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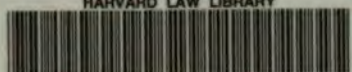
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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

## KENTUCKY COURT OF APPEALS.

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COX, &co. v. ANDERSON'S ADM'R.

(Filed December 8, 1902—Not to be reported.)

Grant E. Lilly for appellants.

W. B. Smith and J. A. Sullivan for appellee.

Appeal from Madison Circuit Court.

Judge DuRelle delivered the following response to petition for rehearing:

The unusually able and earnest petition for rehearing filed for appellant in this case merits, and has had, our careful attention.

It is admitted in the argument in the petition that the language employed in the Gibbs will bestowed upon the widow a fee-simple title to all the testator's estate. But, it is said, this is true only because of section 2842, Kentucky Statutes, which is as follows: "Unless a different purpose appears by express words or necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple, or such other estate as the grantor or testator had power to dispose of."

Appellant then argues that as the widow took a fee-simple title to the testator's property, it was under a statute containing a proviso, which must be first satisfied; that in this case it does appear by necessary inference and express words that the widow should not take the fee-simple title to the testator's lands.

The section quoted, as well as section 2846, Kentucky Statutes, viz., "a contingent remainder shall, in no case, fail for want of a particular estate to support it," are both found in the chapter on "Lands," and necessarily are applicable alone to that subject. But as part of testator's estate devised was land, it is proper to consider these sections with respect at least to such portion.

We adopt, from among the excellent and approved maxims cited by appellant, the one that "in the construction of devises the intention of the testator is the pole star by which the courts steer," with the qualification that such in-

tention must be gathered from the instrument alone; must be reasonably certain, and must not be contrary to law. As observed by Mr. Justice Miller, it is probably true that no two wills were ever written exactly alike in every particular and under precisely the same circumstances. Yet rules for the construction of language substantially similar have necessarily been evolved. Among them is the one that the law favors that construction of doubtful terms which creates a vested rather than an uncertain estate. With these in mind, we observe that it was the natural, as it was the evident, purpose of the testator in this case to provide, not incidentally or provisionally, but to the fullest extent for his widow. The whole will shows that this was not only the testator's first, but his controlling thought. He gave her the whole of his estate. No intention was manifested to restrict her in its use, or even abuse. She might have consumed the whole of it without accountability. She could have sold it and passed a perfect title. It was hers. There does not appear the slightest indication of a purpose to deny her the fullest use and enjoyment of it, of which it was capable, without let or hindrance from any source. These are the attributes of a fee-simple title (in the case of real estate) under the law of this Commonwealth. So much of the intention of the testator is clear, unambiguous, unmistakable.

The clause under which the appellant claims is the following: "When she, Sally Ann Gibbs, is done with it, I give to Mt. Zion Church as an endowment \$1,000, the proceeds of which are to go towards paying the expenses of the church."

It is to be observed that testator describes his estate as consisting of "cash, notes and lands, bank stock and other stock, live stock, growing crops and household and kitchen furniture." None of this property was devised or bequeathed to the widow for her life only. She took it all alike. None of it was given subject specifically to the payment of the \$1,000, nor is it stated from what particular property the \$1,000 was to be raised, nor is it stated clearly when the \$1,000 was to be paid. "When she was done with it," might mean at her death, or before. It might have reference to testator's cash notes, or his bank stock, other stock, live stock or growing crops. He evidently wanted the church eventually to get \$1,000. It is equally clear that he did not intend though that his wife's interest, already carved out in his estate, should be diminished to provide the sum. He intended something by the use of the words quoted. He meant, we think clearly enough, that if anything was left by his wife, at her death, to dispose of it for her according to his notion to the extent of \$1,000, leaving her to dispose of the remainder according to her notion. In other words, he attempted to control the statute of distribution, or the law giving the absolute owner of property, of testamentary capacity, the right to dispose of it by will. Of the two things attempted, one he could do, viz., vest his widow with a complete and fee-simple title to the estate; the other, to affect the law governing her power of disposing of what remained at her death, he could not do.

The wishes of the dead respecting their property, as expressed by their wills should be respected, when legal, but the interest of the living should not be disregarded. If the \$1,000 mentioned was imposed as a remainder on any part of the testator's estate, it was upon all alike. It would have prevented the sale, maybe the full and necessary enjoyment by the widow of what he had given to her. This would have been to make a clause, at best,

of doubtful meaning, and of secondary importance in the testator's desire, to override another, the testator's dominant purpose and plain attempt.

It is said in Schouler, Wills, section 476: "In construing a will the predominant idea of the testator's mind, if apparent, is heeded, as against all doubtful and conflicting provisions which might of themselves defeat it. The general intent and particular intent being inconsistent, the latter must be sacrificed to the former."

Ibid, section 477: "The courts have discarded words as surplusage which were senseless as they stood expressed in the instrument. They have rejected or modified expressions in the will which were inconsistent with the main intention, or which indicated an intention which the law would not permit to take effect."

This will does not create a precatory trust, and does not contain a devise over. The authorities cited on these points need not, therefore, be discussed. The argument that the will creates a precatory trust is not based upon anything said in the will, but is built upon the expression in the original opinion that the testator had merely "expressed a desire that when his wife was done with it, that is, when she desired to part with that sum, that she give to this congregation \$1,00 out of the amount he gave her." This illustration seems to have misled counsel, and might, if left alone, confuse others. It is consequently changed in form so as to express the thought thus: "The testator's effort was to give to this congregation \$1,000 of his wife's property, if she had that much when she died."

The petition is overruled.

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SHANNON'S ADM'R V. LOUISVILLE & NASHVILLE R. R. CO.

(Filed December 4, 1902—Not to be reported.)

Railroads—Contributory negligence of yardmaster—S. was night yardmaster in the employ of appellee in its yards at Paris, and while engaged in coupling cars received injuries resulting in his death, to recover damages for which this action was instituted. The lower court gave an instruction equivalent to a peremptory instruction to find for appellee. The question involved on this appeal is whether the court should have peremptorily instructed the jury to find for appellee. The proof showed that the engine was pushing some freight cars toward a caboose standing on the track for the purpose of coupling. Appellant stepped in front of the engine, moving along with the train with his face or side to the train, loosening a wedge in the coupler, when his foot caught in the frog, causing him to fall, when the car ran over and mashed his leg, resulting in his death. S. knew the danger of getting before a moving train. Held—That S. was guilty of such contributory negligence as to preclude a recovery of damages. The law is well settled that the servant can not recover if his injury was proximately due to his own fault in taking unnecessary risks, as by needlessly going or remaining in a dangerous place, needlessly coupling cars in motion, or needlessly trying to step on a moving railroad train.

J. M. Benton and Beckner & Jouett for appellant.

Breckinridge & Shelby and Edward W. Hines for appellee.

Appeal from Clark Circuit Court.



Opinion of the court by Judge Hobson.

Edward Shannon, appellant's intestate, was night yardmaster in the service of appellee in its yards at Paris, Ky. While engaged with a crew of men in switching a train at night he was run over and killed, and this action was filed to recover for the loss of his life. The jury to whom the case was submitted found a verdict for the defendant. The only question that we deem it necessary to determine on the appeal is whether the court should have peremptorily instructed the jury to find for appellee.

The proof introduced by the plaintiff tended to show these facts: They had thrown the caboose of the train in on the main track, and had then pulled the train southward and thrown some cars in on another track. They were then proceeding to back the engine, which had five or six cars attached to it, northward to couple onto the caboose, which was about two-car lengths north of the frog. The switchman threw the switch and was then ordered by Shannon, who was standing near by, to go down to the caboose and bring him a link. The train was backing on down, moving slowly, and the switchman started to get the link. Just before he reached the caboose he heard Shannon holloa behind him, and went back immediately and found that he had been run over, his leg being so crushed that he died soon afterwards. There was a janny coupler on the rear car of the backing train, and as the switchman walked on down he heard a knocking on this coupler, just before he heard Shannon holloa. The train was in continuous motion from the time it started back, after the switchman threw the switch, until Shannon holloaed, when it was stopped; and he was found lying on the opposite side of the track from that on which he was standing when he ordered the switchman to go for the link. There is a wedge in the janny coupler to keep the pin from falling back and this sometimes gets tight, and must be knocked loose. The engineer and another witness saw Shannon's light on the side of the train as he started back, but the light went out of sight shortly before he holloaed. When they got to Shannon he said that he hung his foot in the frog. There was proof that the frog was out of order, and there were marks on one of his shoes, from which it might be inferred that he had hung his foot in the frog and thus been caught and run over by the train. No one connected with the train knew where he was until he was heard to holloa. As Shannon was standing on the side of the track when the switchman left, and there was no one else near the end of the train, the only reasonable inference from the evidence is that, as the train came along, he got in front of it, and was attempting to knock the wedge out of the coupler, and while walking along on the track doing this, got his foot hung in the frog, which was on the inside of the rail. As the train was backing, in order to face the coupler and knock on it, he would have to be with his side or face to the train and to walk sideways or backwards as it came up to him. As yardmaster he had often warned his subordinates not to go in front of moving trains, on the ground that it was dangerous. The case then presented is, can there be a recovery for a defective condition of the frog which caught his foot, and caused him to be run over, when he placed himself voluntarily in front of this moving train and undertook to hammer out the wedge as it was backing along?

It was in the night time. In order to hammer on the coupler he was

necessarily right up against the car. Although it was moving slowly, perhaps about three miles an hour, still he could but know that if for any reason he missed his footing he would be in imminent peril, and to undertake to walk in front of the train, with his side or face to it, was to place himself in a most perilous position, from which no care on the part of those controlling the train could extricate him if a mishap occurred. He was the superior officer in charge; the train was several car lengths from the caboose, and he knew it would not stop until about the time it reached the caboose, unless signaled. He knew the train was in motion, and with this knowledge deliberately went in front of it to hammer on the wedge before it had passed the switch, for his foot was caught in the frog and the caboose was two car lengths away.

The rule is elementary that the servant who voluntarily places himself in a perilous position can not recover of the master, where there is no necessity for his so doing, although he may be injured by reason of some neglect of the master, which would otherwise be actionable. The rule is thus well stated in 20 Am. & Eng. Ency. of Law, 145: "Where a servant voluntarily and needlessly assumes a position of peril and is injured, he can not recover therefor, although at the time of the injury the master was negligent in the discharge of the duties which he owed to the servant."

In 1 Shearman & Redfield on Negligence, section 207, the rule is thus stated: "The servant can not recover if his injury was proximately due to his own fault in taking unnecessary risks, as by needlessly going or remaining in a dangerous place, \* \* \* needlessly coupling cars in motion, or needlessly trying to step on a moving railroad train." \* \* \*

In *Whitmore v. Boston, &c., R. R. Co.*, 150 Mass., 477, a crew was loading cars from a vessel, and kicking them out when loaded. There was a space between some of the cars which had been loaded and kicked out, and the plaintiff went in between them to work. While he was working there another car was kicked out, which jammed the cars together and injured him. It was held he could not recover on the ground that he voluntarily placed himself in a position of danger, although no signal was given of the kicking out of the last car. This is a much stronger case than that, for here the deceased went in front of the actually moving train and undertook the perilous task of moving along with it over the switch, a danger which he fully understood.

So in *Lord v. Pueblo, &c., R. R. Co.*, 12 Colo., 890, the deceased attempted to pass between two cars about two feet apart, and was caught and killed by a sudden movement of the train. It was held that he could not recover, on the ground that it was a perilous undertaking which he attempted voluntarily. So, also, where the servant undertook to cross the track in front of a moving train. (*Elliott v. Chicago, &c., R. R. Co.*, 5 Dak., 523, 8 L. R. A., 863; *Loring v. Kansas City, &c., R. R. Co.*, 128 Mo., 349; *Cooney v. Great Northern R. R. Co.*, 9 Wash., 292.)

Even if it be inferred that the deceased was not caught while he was hammering on the coupler, but after he had left it and was trying to cross the track in front of the moving train in an effort to get to the other side of the track, still the result is the same; for he had needlessly placed himself in a position of manifest peril, and if in extricating himself from this position, and in attempting to get across the track just in front of the moving train,

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he voluntarily took a risk which he should not have assumed, he must at least stand in no better light than other persons undertaking to cross a railroad track just in front of a moving train. It is urged for the appellant that instruction No. 2, given by the court, was equivalent to a peremptory instruction, and that there were errors in the other instructions, but it is unnecessary for us to consider any of the instructions under the view of the law we have indicated.

Judgment affirmed.

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NEW YORK LIFE INSURANCE CO. v. WEAVER'S ADM'R, &c.

(Filed December 4, 1902.)

Insurance—Fraud—Appellant issued a policy of life insurance on the life of W. for \$10,000. After her death suit was brought on the policy by the beneficiaries, and after the service of the summons appellant paid the amount of the policy. Afterwards appellant instituted this action against the beneficiaries to recover the amount paid, charging that the examining physician and the insured entered into a fraudulent and corrupt collusion to defraud the company; that with this intent the insured made many false and fraudulent statements as to the condition of her health, and that the physician made false and fraudulent statements in his medical report as to the physical condition of the insured upon the faith of which the policy was issued. Appellant does not allege that it did not know of the fraud before the payment of the money. Held—That appellant is not entitled to the relief sought. A party who has been induced to enter into a contract by fraud may exercise the right of rescission within a reasonable time after the discovery. If the policy was obtained by fraud a court of chancery would have cancelled it, notwithstanding the incontestible clause therein, if the suit for a rescission had been brought within a reasonable time after its issue during the lifetime of the insured upon the tender back of the premiums received by the company. But in this case appellant not only failed to take any steps looking to a repudiation of the contract during the lifetime of the insured, but when sued upon the contract, after her death, confessed liability by the payment of the principal, interest and cost.

A. E. Cole & Son for appellant.

E. L. Worthington and Thos. R. Phister for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Burnam.

This case comes up on appeal from a judgment of the Mason Circuit Court. A general demurrer was sustained to the plaintiff's petition. It alleges in substance that appellant issued a policy of insurance on the life of Mary L. Weaver for \$10,000, payable at her death, one half to her estate and the other half to her children; that the policy was issued upon the faith of representations made by Mary L. Weaver in her application therefor, and upon the report of the medical examiner as to her physical condition at the time; that the insured, Mary L. Weaver, made many false and fraudulent statements as to the condition of her health in this application, and that W. H. Hoard, their examining surgeon, entered into a fraudulent and corrupt conspiracy with the insured to procure the issue of said policy, and made divers false and fraudulent statements in his medical report as to the physical

condition of the insured; that after the death of the insured appellee, L. C. Harrison, as administrator of Mary L. Weaver, and the statutory guardian of her children, brought suit upon the policy, which was by its terms incontestable; that after being summoned to answer, they paid the amount of the policy, with interest and costs, and a judgment was entered dismissing the suit; and charge that by reason of the fraudulent conspiracy entered into by Mary L. Weaver and W. H. Hoard, and the false representations made by them, that they had been cheated out of \$10,000 paid, and subjected to other expenses; and pray a judgment for \$15,000 in damages for the deceit practiced upon them by Mary L. Weaver and Dr. Hoard. They do not allege that they did not know of the fraud before the payment of the money.

The law is well settled that when a party has been induced by fraud to enter into a contract, he may have same rescinded, provided he has not acted upon it or recognized it as binding after the discovery of the fraud, but he must exercise the right of rescission within a reasonable time after the discovery. But if he delays instituting his suit for an unreasonable time, he will be held to have confirmed the contract. If, as alleged, the policy was obtained by fraud, we think there can be no doubt that, notwithstanding the incontestable clause therein, a court of chancery would have cancelled it in a suit for a rescission brought within a reasonable time after its issue and during the lifetime of the insured, upon the tender back of the premiums received by the company. But in this case appellant not only failed to take any steps looking to a repudiation of the contract during the lifetime of the insured, but when sued upon the contract after her death confessed liability by the payment of the principal, interest and cost.

It is an axiom of the law that a litigant is entitled to his day in court, but that he is not entitled to two days, and a judgment in an action necessarily determines not only every question which is presented, but every one which ought to have been presented, or such as are essentially with the subject-matter of the litigation, especially as to matters of claim and defense. (*Freeman on Judgments*, 2d edition, section 249). Having failed to institute a suit for a rescission within a reasonable time, or to make defense when sued upon the policy, appellant can not be permitted to relitigate questions which were necessarily concluded by the judgment. Besides, if an appellant seems to concede the incontestable clause in the policy precluded them from resisting its payment on the ground of fraud, it logically follows that it is equally efficacious to defeat any action brought against the estate of the decedent for damages by reason thereof.

For reasons indicated the judgment is affirmed.

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CITY OF LOUISVILLE v. KENTUCKY AND INDIANA BRIDGE CO.  
SAME v. MUTUAL LIFE INSURANCE CO., &c.

(Filed December 4, 1902—Not to be reported.)

**Street improvements—Liability of city for increase of bid beyond first contract—Statute of limitation—**In an action between the city of Louisville and other parties, property holders in said city, plaintiff alleged that a contractor had executed a bond for the completion of street improvements with sufficient

surety, and that the council had released the contractor from contracts that he had entered into and executed bond for, and that on a reletting of the contract the lowest bidder was given the contract at from 25 to 33 per cent. higher than the former contract, and that having paid the difference between the bids the property owners sued the city for the difference, and the courts decided that the city was liable for said sums. Appellees, who were property owners on the same street, filed their suits to recover on their claims against the city. The city relied on the five year statute of limitation as a defense. Held—That said defense was insufficient, as appellee's cause of action did not accrue until they had paid the amount due the contractors, and appellees were entitled to recover.

H. L. Stone for appellant.

W. W. Thum and Stanley E. Sloss for appellees.

Appeals from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Hobson.

These appeals grow out of the case of Barfield v. Gleason, 23 Ky. Law Rep., 128. In that case, among other things, we said: "It appears that at the first letting this work was awarded to one McNaghton, who entered into a contract with good security; that after performing certain work in the same neighborhood, under like contracts, he became insolvent (it is claimed, by reason of the improper rejection of materials purchased by him to carry on the work), made application for release from his remaining contracts, and that, although his surety was ample and sufficient, the board of public works recommended his release, and the council adopted a resolution rescinding the contract. There was a subsequent advertisement of the improvement, and the appellee, Gleason, was the lowest bidder. His bid was from 25 to 33 per cent. higher than the McNaghton contract. No award was made at that time, but at a subsequent letting the contract was awarded to Gleason on substantially the same bid that he had made at the time of the second advertisement. A judgment over against the city is asked by the appellants for the difference between the McNaghton contract and the bid upon which the contract was awarded to Gleason. Does this state of facts constitute a cause of action against the city?"

Upon this question the members of the court are not in accord, but the majority are of opinion that it does so, for the following reasons: The city of Louisville in determining that Catalpa street should be improved performed a legislative function. In advertising for bids under the ordinance, making the award, executing the contract with the bidder, and requiring the performance of the work, it was, through its officers, executing a statutory power of attorney from the property holders. The contract was made with concededly good and sufficient security. The council, on the recommendation of the board of public works, undertook by resolution to release the contractor and his surety from its fulfillment. There was here no exercise, or attempt to exercise, legislative discretion a second time upon the question which had previously, in the exercise of legislative discretion, been determined, viz., whether the improvement was necessary and should be made. The extent of the council's powers in that behalf and the proper mode of their exercise need not be considered here, nor need we consider the powers of the council in a case where the contract is unenforceable either

because of irregularity or because of insolvency of the contractor and his surety. The contract here is conceded to have been valid and enforceable. It was one which the city council had no power by resolution to cancel, and subsequent events showed that it was a highly advantageous contract. By the city's unauthorized action it cast upon the property holders the burden of the difference in cost between the work as provided for under the McNaghton contract and under the less advantageous Gleason contract. For this difference the property holders are entitled to a right of action, not against Gleason, who was required only to look to the validity of the ordinance which provided for the improvement, but against the city by whose unauthorized action the burden was cast upon them.

On the return of the case to the circuit court, after this appeal, judgments were entered in favor of the property owners who had asserted claims against the city for the amount of the additional burden placed on their property by the act of the city in releasing McNaghton. These judgments were paid. Appellees, who were property owners on the street, but had not then asserted their claims against the city, afterwards filed their petitions thereon. The city pleaded the five years' statute of limitation; the court sustained a demurrer to this plea and the city failing to plead further, gave judgment against it.

It is insisted for appellant that the cause of action of the property owner accrued when McNaghton was released, and that this court in effect so determined in the case above quoted, for there the property owners had paid nothing when their petitions were filed. On the other hand, it is insisted for the appellee that the property owners had no cause of action against the city until they had paid their assessments, or at least until it had been finally determined that they must pay them, which was within five years before the suits were filed.

The question whether the property owners had a cause of action against the city before they paid their assessments was not made in the other case. The only question made there was as to the liability of the city for the difference between the two bids. A surety may maintain an action in equity against his principal before paying the debt to compel the principal to discharge it. So the purchaser of property may maintain a like action against one who is primarily liable for a debt which is a lien on the property to compel him to pay the debt and relieve the property of the incumbrance, although he has not been compelled to pay anything. The former action was in equity, and was in the nature of an application to the chancellor by the property owners to compel the city to relieve their property of the burden which the city had placed upon it. It was so treated by the court, and it was not determined in that suit what form of judgment should be entered. Until the property owner paid he had no right to sue the city to recover from it a personal judgment in his favor, for if the rule were otherwise he might recover the money from the city, although by some means he might never be compelled to pay out anything. The cause of actions here was for money paid. The sum of the case is that the city in its proceedings to charge appellees' property with the improvement of the street had by its unauthorized acts placed upon the property a greater lien than was warranted, and that this additional sum appellees have been compelled to pay. As was said in the former opinion, the city was in this proceeding acting as the

statutory attorney in fact of the property holders; and it is responsible for its unauthorized acts as such, but its liability was not fixed until the loss fell on appellees. There was no right to a personal judgment against the city until the money was paid, and the property owners might sue to recover the amount so paid within five years of the time of the payment.

Judgment affirmed.

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PRESTON v. PRICE.

(Filed December 5, 1903—Not to be reported.)

Contested elections—Bleeding—At the November election, 1901, appellant was the Republican nominee for clerk of the Johnson County Court and appellee was the Democratic nominee. The board of canvassers certified appellee's election by twenty eight majority. Appellant filed this action contesting the election, charging bribery and corruption of voters and failure of election officers to certify the result in one precinct. Appellee filed an answer, denying the allegations of the answer and making countercharges. Appellant filed a reply, but it was stricken from the record because same was not filed in the time required by law. Held—That the reply was properly stricken from the record. Under the law providing for contest of elections, time of filing pleadings is mandatory. Objection is made to the answer because it is not styled a counterclaim; also because no notice was given of filing the answer. Held—That the statute does not require that the answer should be styled a counterclaim, but permits counter grounds of contest to be set up in the answer. After the court struck out the reply and parts of the answer, the contestee moved the court to render judgment in his favor on the face of the pleadings, to which contestant objected, and offered to read the evidence taken in support of the grounds of contest set out in the petition. The court refused to hear said evidence, but sustained the motion to render judgment in favor of contestee on face of the pleadings, and dismissed the petition. Held—That this was error. Although the affirmative matter of the answer was taken for confessed, the contestant might still have recovered if he proved the averments of his petition.

C. B. Wheeler and Warren Meek for appellant.

John P. Wells and Vaughn, Howes & Howes for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge DuRelle.

At the November election, 1901, appellant Preston was the Republican nominee for clerk of the Johnson County Court, and appellee Price was the Democratic nominee. The board of canvassers certified Price's election by twenty-eight votes. Preston thereupon instituted a contest for the office, alleging that he received a majority of the legal votes cast, but that the board counted for Price votes that had been cast for Preston, and votes that were not cast in the race for county court clerk; that a large number of the votes which were cast and counted for Price were procured by bribery, by the use of money and whisky on the day of the election; that in Big Gap precinct 118 votes were counted for Price, though the officers of election failed to certify any votes cast for him at that precinct, and that at various named precincts specified numbers of voters were bribed to cast their votes for Price by paying them money and giving them whisky, and that in order

to see that the voters so bribed actually voted for Price they were caused to vote "on the table," in the presence of all the officers of election, without first declaring under oath their inability to mark their own ballots. The number of votes alleged to have been illegally counted for Price aggregates something over 200.

It is objected to this petition, though no demurrer was filed, that it does not state facts showing Preston to have been eligible for election as county court clerk. We do not think it necessary to consider this question, under the circumstances, inasmuch as the answer shows him to have been the incumbent of the office, and, therefore, presumably eligible.

The petition was filed on November 20, 1901. The answer was filed December 9, 1901, and contains a specific denial of practically every averment of the petition, and also sets up grounds of contest against the contestant, the counter grounds being charges of improprieties, irregularities and illegal votes in favor of contestant similar to those alleged by contestant against contestee. The illegal votes specified in the answer aggregate between forty and fifty.

Objection is made to the answer on the ground that it is not styled a counterclaim. We do not think this objection is well taken. The statute (Act of —, 1900, section —) provides that "within twenty days after the service of summons upon him, the contestee shall file his answer, which may consist of a denial of the averments of the petition, and may also set up grounds of contest against the contestant," etc. The statute does not require that the answer should be styled a counterclaim, but permits counter grounds of contest to be set up in the answer. A reply to the answer was filed on December 19. On motion of contestee the reply was stricken from the record as not filed in time. Certain affidavits were filed and read on the hearing of the motion, but they show only that the filing of the reply was postponed to other business. The affidavit of one of the counsel shows that he does not know the date at which he received the reply from counsel at Catlettsburg, but that he prepared a typewritten copy thereof and filed the same "as soon as he could conveniently or reasonably do so, considering other matters on hand, and in which this affiant was engaged, which demanded affiant's special attention at the time." We are not called upon to decide whether for good cause shown, or for unavoidable casualty or misfortune, the time prescribed by the statute for filing a reply in an election case might be extended, for no such state of cause is shown. The whole statute, so far as it relates to contested election cases, shows the legislative intent to be that such contests should be railroaded through the courts, to the end that if the contestant should succeed in his contest he might do so in time for his success to be of benefit to himself, and possibly to the public. We are of opinion, therefore, that the time specified within which a reply may be filed is mandatory, to the extent of requiring it to be filed within the time named, unless good cause be shown. It is unnecessary to decide anything further in the present case. We do not think the use of the word "may," in reference to a reply, the reply "may be filed within ten days after the answer," etc., requires the application of a different rule from the use of the word "shall" with respect to an answer. A reply is unnecessary, if the answer makes up the issue. Therefore, the word "may" was used in regard to the reply.



1092 TOWN OF CENTRAL GOVINGTON V. BELLONBY.

On behalf of contestant it is objected that no notice was given of the filing of the answer. No notice is required by the statute. The rules applicable to the filing of pleadings in the clerk's office in vacation, in ordinary cases, do not apply in contested election cases. The time fixed for filing pleadings in these cases is short, and we think the clear intent of the statute is that the parties must take notice of such filing. But after the court struck out the reply, and on motion struck out certain parts of the answer, the contestee moved the court to render judgment in his favor on the face of the pleadings, "to which contestant objected, and offered to read the evidence taken in support of the grounds of contest set out in the petition. The court refused to hear said evidence, but sustained the motion to render judgment in favor of contestee on face of pleadings," and dismissed the petition, with costs. This was error. It seems to have been done upon the supposition that the affirmative matter of the answer being taken pro confesso, a judgment necessarily went in favor of contestee. This, however, does not appear to be correct. Even if the affirmative averments of the answer be taken as confessed, the contestant might still recover if he proved the averments of the petition. In other words, the certified majority for contestee, together with the averments of the answer, are not sufficient to offset the averments of the petition. The averment of the answer, in substance that contestee received a majority of the votes cast, is only an affirmative denial of a similar averment by contestant in the petition.

For the reasons given the judgment is reversed and cause remanded, with directions to consider the testimony and render judgment in accordance therewith.

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TOWN OF CENTRAL GOVINGTON v. BELLONBY.

(Filed December 5, 1902—Not to be reported.)

1. Municipal government—Damages—Negligence—Appellee brought this action, alleging that C. and L. so obstructed a sidewalk with brick and sand as to make it dangerous to pedestrians, and that they failed to place any light upon said obstructions, and that by reason of same and the negligence of defendants, plaintiff, while traveling along the sidewalk, was permanently and seriously injured, for which she asked \$5,000 damages. Appellant was made a defendant. Appellant, in its answer, specially pleaded that it had not authorized the obstructions, if any there were, to be placed upon the sidewalk, and that it had no notice thereof nor reasonable opportunity to discover same, and also pleaded contributory negligence on the part of the plaintiff, which negligence was denied in the reply. The jury, upon peremptory instruction, found for the defendants, C. and L., and upon final hearing the jury found a verdict in favor of appellee for \$2,500 against appellant. One of the principal objections relied upon by appellant for a reversal is that the court erred in directing a finding in favor of C. and L. Held—That appellant has no grounds for complaint against appellee.

2. Verdict not excessive—The verdict is not excessive and was rendered under proper instructions to the jury.

Simrall & Arthur and Orlando P. Schmidt for appellant.

James P. Tarvin and B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Guffy.

The petition and amended petitions filed herein by plaintiff charge that appellant, A. J. Craig, and Richard Lambert so obstructed a certain sidewalk in the town of Central Covington with brick and sand as to make it dangerous to pedestrians, and that said parties failed to place any light upon said obstructions, and that by reason of same, and of the negligence of the said defendants, the plaintiff in travelling along said sidewalk was permanently and seriously injured and caused to incur great expense in treatment, to her damage in the sum of \$5,000, for which she prayed judgment. The answers of the several defendants may be considered a traverse of all the averments of the petitions which tended to show a right to recover. The appellant also specially pleaded that it had not authorized the obstructions, if any there were, to be placed upon the sidewalk, and that it had no notice thereof, nor reasonable opportunity to discover same, and also pleaded contributory negligence on the part of the plaintiff, which negligence was denied in the reply. The demurrers to the petition, as finally amended, were properly overruled.

The jury upon peremptory instructions found for the defendant, Craig, and upon final hearing the jury returned the following verdict: "We, the jury, find a verdict in favor of the plaintiff for \$2,500 as against the city of Central Covington. We find for the defendants, Richard Lambert and A. J. Craig."

The appellant's motion for a new trial having been overruled, it prosecutes this appeal. The grounds relied upon for a new trial are in substance as follows:

- 1st. Because the verdict is not sustained by sufficient evidence.
- 2d. Because the verdict was contrary to law.
- 3d. Because the court erred in refusing to instruct the jury at the close of plaintiff's testimony to find for the defendant, Town of Central Covington.
- 4th. Because the jury failed to find any verdict against the defendant, Lambert, for any sum.
- 5th. Because the evidence showed, and the defendant, Lambert, admitted, that he was responsible for the obstruction on the sidewalk, and the verdict of the jury in exempting the said Lambert from all damages is contrary to both the law and evidence.
- 6th. Because Lambert's own testimony showed that he purchased the brick, had them placed on the said sidewalk, allowed them to be retained there for a period of days and knew their condition, all without the knowledge or consent of the town of Central Covington, and by so doing became the proximate and direct cause of plaintiff's injury, and the verdict of the jury is palpably against the law and the evidence.
- 7th. Because by Lambert's own testimony he is the cause of the injury, by being a trespasser on the street without permission, and by the first instruction given the jury the town's undoubted right of recovery against Lambert may be lost or jeopardized.
- 8th. Because no sufficient knowledge was shown upon the part of the town of Central Covington as would indicate negligence on the part of said town in failing to remove the obstruction.
- 9th. Because the evidence failed to show that either the town marshal or

the police judge has power under the charter of Central Covington or its ordinances to remove obstructions from the streets of said town, or to place lights on the same.

10th. Because the knowledge of the town marshal or police judge, unless it is made the duty of those officers to report all obstructions on the streets, is in no sense the knowledge of the town, and the jury erred in finding against the town of Central Covington.

11th. Because by the weight of the evidence it was shown that the accident occurred in the daylight and could thus have been easily avoided, and that plaintiff was guilty of such contributory negligence as should have entitled the defendant town to a verdict at the hands of the jury.

12th. Because the court erred in refusing the instructions asked for by the defendant town.

13th. Because the verdict of the jury was excessive and out of all proportion to the injury received.

It may be conceded that the testimony is conflicting as to the character of the obstruction in the street, and as to whether it was a reasonable obstruction; also as to the extent and severity of plaintiff's injuries, as well as the fact of notice to the town of the existence of the obstruction for such a length of time as to show that the town did or could, by the exercise of reasonable diligence, have discovered in time to have removed the same, and the same may be said as to whether plaintiff was guilty of contributory negligence; but the jury heard all the testimony and had the witnesses before them, and we are not authorized to say that the verdict is not sustained by sufficient evidence.

It seems that a special judge, the Hon. Harvey Myers, was finally agreed upon or selected without exception of defendants, hence the second ground in the motion for new trial is not available. From what we have already said, it is clear that the peremptory instruction should not have been given. As to the fourth ground for a new trial, which is in substance repeated in several other paragraphs, in respect to the failure of the jury to find any verdict against the defendant, Lambert, it seems to us that the appellant has no grounds for complaint against the plaintiff on that account. This record seems to show that the plaintiff in good faith earnestly sought to obtain a verdict against Lambert, as well as the appellant, and we are unable to see any reason for reversing the judgment obtained by her simply for the reason that she did not obtain judgment against as many of the defendants as she desired. As to whether the jury should have found against Lambert or not is a question that we are not called upon to discuss or decide, for the reason that appellee is not now complaining of the judgment, and the appellant not having sought any judgment over against Lambert in the court below, and he is not even made a party to this appeal. We fail to perceive wherein the appellant has any right to complain of the verdict in favor of Lambert, nor do we think it proper to express any opinion as to whether or not the appellant could, under any stated case, recover from Lambert the damages adjudged to be against the appellant in this suit.

We have carefully considered the instructions offered and refused, also those given, and we think the court did not err in any respect in regard to refusing or giving instructions. The instructions seem to have been care-

fully, clearly and properly drawn, and the appellant has no ground for complaint in respect thereto.

It is very earnestly insisted that the verdict of the jury is excessive, and out of all proportion to the injuries received. We can not concur in the contention of appellant in this respect. If the testimony given by the plaintiff, her doctor and others, was believed by the jury, the verdict is not excessive. It is true that some evidence was introduced tending or attempting to show that her injury was not as severe as claimed to be by her, but it is the peculiar province of the jury which hears the evidence to hear and determine the facts, and award such a verdict as the law and facts authorize. It may be that if we were the sole judges of the facts we might not render judgment for so large an amount as the plaintiff recovered in this case, but under the well-settled rules of this court and under the law governing such trials, we do not feel authorized to disturb the verdict of the jury. After a careful consideration of this entire case we fail to perceive any error prejudicial to the substantial rights of the appellant.

Judgment affirmed.

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GUSSIE KREIGER v. GOSNELL, &c.

(Filed December 5, 1902—Not to be reported.)

**Street improvements—Liens**—This was a suit to enforce a lien for an apportionment warrant for the improvement of Hill street, which embraced the construction of a subway under the tracks of the L. & N. R. R. Co. The chancellor gave a judgment enforcing the lien for the entire cost of the subway; also gave judgment against the city for 10 per cent. embraced in the contract to guaranty the repair of the street for five years. The city has not appealed, but the correctness of the judgment enforcing the lien for the cost of the subway is questioned on appeal prosecuted by appellant, a property holder. Held—That the case be reversed, with directions to ascertain what proportion of the cost of construction was occasioned by making the street a subway, with which the property of appellant should not be charged.

C. B. Seymour and P. A. Gaertner for appellant.

Lane & Harrison for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge DuRelle.

This was a suit to enforce a lien for an apportionment warrant for the improvement of Hill street, in Louisville. Separate suits were brought on each warrant, but the pleadings in this case were, by consent, adopted as the pleadings in seven other similar cases, and the evidence taken in the case of Gosnell v. Louisville Steam Forge Co. was read in all the cases growing out of that improvement. The transcript used on the appeal in that case was, by consent, made a part of this record. As will appear by reference to the opinion in the case last-mentioned (Louisville Steam Forge Co. v. Mehler, &c., 28 Ky. Law Rep., 1837), the territory contiguous to the improvement was naturally of a level surface; the right of way of the Louisville & Nashville Railroad Co. crosses the street improved between the points designated for the improvement, and the work consisted in part of trans-

forming the street at that point into a subway under a bridge, about fifteen feet deeper than the surrounding level, with an incline in the approaches of the subway of about 8 per cent., extending on either side of the bridge for a distance of some 500 feet. The making of the subway was in pursuance of a contract between the railroad company and the city, by which it was agreed that the street should be constructed under the company's tracks.

The chancellor held in all the cases that the abutting property was liable for the entire cost of the improvement, including the cost of making the street a subway. He also held, in supposed compliance with the decision in *Gleason v. City*, 90 Ky., 523, that 10 per cent. of the contract price of the work was not for original construction at all, but for repairs to be made under the five-year guaranty contained in the contract, and, therefore, as cost of reconstruction, chargeable against the city and not against the property holders. He accordingly rendered judgment in favor of the contractors against the property holders for 90 per cent. of the contract price, and against the city for 10 per cent. of that price.

On the appeal in *Louisville Steam Forge Co. v. Mehler*, this court held that the cost of the improvement, to the extent it was occasioned by the subway crossing, was not street construction which was chargeable against the property holder, and the judgment was reversed, with directions to ascertain what proportion of the cost of construction was occasioned by making the street a subway, and to relieve the abutting property from such proportion of the cost. This court also held that the guaranty clause in the contract there involved was in substance the same as that considered in *City of Louisville v. Mehler*, 23 Ky. Law Rep., 62; that it was a mere guaranty of the work and materials, and imposed no liability upon the city for that proportion of the cost. The case was, therefore, reversed also upon the cross appeal of the city.

The judgment appealed from in the case at bar is exactly like the judgment considered in *Louisville Steam Forge Co. v. Mehler*. It is erroneous in adjudging that portion of the cost of the improvement occasioned by making the street a subway a charge against appellant's property. This error is the ground for the appeal by the property holder. The chancellor was also in error, in that he gave judgment against the city for 10 per cent. of the contract price, instead of against the property holder. The city has not appealed, and the contractor has no cross appeal.

It is insisted on behalf of the contractors (appellees) that there were two errors committed by the trial court, one against the property holder, viz., charging her with the cost of making the street into a subway, and the other in her favor, viz., failing to charge her with 10 per cent. of the cost of the improvement, and that it does not appear from anything in the record that if the court had fixed the correct amount for which appellant was liable it would have been any less than the amount for which judgment was actually rendered, and, therefore, the judgment appealed from ought to be affirmed. Appellees insist that it is well settled that a judgment enforcing an erroneous apportionment for the cost of improving a public way will not be reversed at the instance of the property holder unless it appear that the burden would be reduced by a correct apportionment. In support of this *McHenry v. Selvage*, 99 Ky., 282, is relied on. In that case it was held im-

material that the apportionment was made on the assumption that the contiguous property was not divided into squares by principal streets, appellant's contention being that it was in fact so divided, because it did not appear that under the method of apportionment by squares he would be required to pay less than under the method adopted. *Barret v. Falls City Artificial Stone Co.*, 21 Ky. Law Rep., 669, and *Chawk v. Beville*, 21 Ky. Law Rep., 1769, are to the same effect. In the latter case the court said: "The rule is well settled that in order to entitle the party complaining of an apportionment to relief in cases of this character he must show that under the proper method of apportionment he would be required to pay less than under the method adopted."

These cases have no application to the case at bar. The record does show that the apportionment against appellant would have been less if it had been made on the basis which this court held proper in the *Louisville Steam Forge Co.* case, for there would have been a deduction made from it. The other error was not an error in the apportionment of the cost of the improvement by square feet in the quarter squares abutting, or by square feet to a designated distance from the improvement, or by the number of front feet. It is not an error in the mode of apportionment; it is an error in the person against whom the judgment was rendered, and it is an error in appellee's favor as much as in favor of appellant; and appellee is now attempting to offset an erroneous judgment in his favor against the city, no doubt already collected, against an error embraced in another judgment, also in his favor, rendered against appellant.

Our attention is also called to paragraph 7 of the amended answer, pleading an unnecessary multiplication of actions, in bringing a separate suit upon each apportionment warrant and seeking to make appellees liable for the costs thereby occasioned, under section 687 of the Code. This is a matter in which the trial court should be accorded a large discretion, and we leave it for such action as the chancellor deems proper in the premises.

For the reasons given the judgment is reversed, with directions upon return of the case to ascertain what proportion of the cost of construction was occasioned by making the street a subway, with which the property of the appellant should not be charged, and for further proceedings consistent herewith.

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HENRIETTA SONNE v. GOSNELL, &c.

(Filed December 5, 1902—Not to be reported.)

C. B. Seymour and P. A. Gaertner for appellant.

Lane & Harrison for appellees.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge DuRelle.

This case presents the exact questions presented in the case of *Gussie Kreiger v. Geo. W. Gosnell, &c.*, ante., 1095, this day decided.

The judgment is, therefore, reversed for further proceedings in accordance with the opinion in that case.

JOSEPH KREIGER v. GOSNELL, &amp;c.

(Filed December 5, 1902—Not to be reported.)

C. B. Seymour and P. A. Gaertner for appellant.

Lane &amp; Harrison for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge DuRelle.

This case presents the exact questions presented in the case of Gussie Kreiger v. Geo. W. Gosnell, &c., ante, 1095, this day decided.

The judgment is, therefore, reversed for further proceedings in accordance with the opinion in that case.

QUAST v. GOSNELL, &amp;c.

(Filed December 5, 1902—Not to be reported.)

C. B. Seymour and P. A. Gaertner for appellant.

Lane &amp; Harrison for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge DuRelle.

This case presents the exact questions presented in the case of Gussie Kreiger v. Geo. W. Gosnell, &c., ante, 1095, this day decided.

The judgment is, therefore, reversed for further proceedings in accordance with the opinion in that case.

JOSEPH SONNE v. GOSNELL, &amp;c.

(Filed December 5, 1902—Not to be reported.)

C. B. Seymour and P. A. Gaertner for appellant.

Lane &amp; Harrison for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge DuRelle.

This case presents the exact questions presented in the case of Gussie Kreiger v. Geo. W. Gosnell, &c., ante, 1095, this day decided.

The judgment is, therefore, reversed for further proceedings in accordance with the opinion in that case.

JACOBS v. GOSNELL, &amp;c.

(Filed December 5, 1902—Not to be reported.)

C. B. Seymour and P. A. Gaertner for appellant.

Lane &amp; Harrison for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge DuRelle.

This case presents the exact questions presented in the case of *Gussie Kreiger v. Geo. W. Gosnell, &c.*, ante, 1095, this day decided.

The judgment is, therefore, reversed for further proceedings in accordance with the opinion in that case.

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## IDA KREIGER v. GOSNELL, &amp;c.

(Filed December 5, 1902—Not to be reported.)

C. B. Seymour and P. A. Gaertner for appellant.

Lane & Harrison for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge DuRelle.

This case presents the exact questions presented in the case of *Gussie Kreiger v. Geo. W. Gosnell, &c.*, ante, 1095, this day decided.

The judgment is, therefore, reversed for further proceedings in accordance with the opinion in that case.

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## LOUIS KREIGER, &amp;c. v. GOSNELL, &amp;c.

(Filed December 5, 1902—Not to be reported.)

C. B. Seymour and P. A. Gaertner for appellants.

Lane & Harrison for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge DuRelle.

This case presents the exact questions presented in the case of *Gussie Kreiger v. Geo. W. Gosnell, &c.*, ante, 1095, this day decided.

The judgment is, therefore, reversed for further proceedings in accordance with the opinion in that case.

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## EDWARDS v. LOGAN.

(Filed December 9, 1902.)

1. Contested elections—Ballots as evidence—Misconduct of commissioners appointed to count ballots—At the November election, 1901, appellant was the Republican candidate for county attorney of Edmonson county, and appellee was the Democratic candidate for the same position. On the face of the returns appellant had a majority of nineteen votes. Appellee filed this action, contesting said election, alleging that the officers of the election had fraudulently or mistakenly counted votes for appellant which, in fact, were cast for appellee, and that illegal voters had been allowed to vote in certain precincts and had voted for appellant, and that when the errors or frauds were corrected, and the returns purged of illegal votes, appellee would have a majority of the legal vote cast. The answer contained countercharges of a similar nature. At a succeeding term of the circuit court the court on its own motion appointed two commissioners, one of each political party, to count the ballots, which were then preserved in the county court clerk's office, and gave them the keys and they proceeded to make a count. They



declined to permit either of the parties to be present at the count, and refused admission to all others. After finishing their labors they made a report to the court, and the court set aside their report. The court thereupon ordered the ballots to be brought into court, and the judge, in the presence of counsel and the parties, counted the ballots. Objection is made that the ballots were not in evidence, and the production of same to the commissioners and the court could not be considered, as they were produced after the time for taking evidence had expired. Held—That it was the purpose of the legislature, in enacting the law providing for the preservation of ballots, and providing that they should be locked in boxes with separate locks, so that the keys to one should be in the hands of the officers of the precinct of one of the political parties and the keys to the other lock in the hands of the officers of the other political party, and that in the event of a contest the keys were to be delivered by such officers to the judge of the circuit court, to make such ballots evidence of the first importance in a contested election. When such a contest is filed the ballots become evidence by that fact for all purposes by the trial court. It was proper to consider the ballots on the determination of the questions in issue in this case. The ballots cast in an election are the primary and best evidence of the voters' will as expressed therein, and that in case of a contest, as between the certificates of the officers of election and the ballots, the ballots are the best evidence, but this is conditioned strictly upon the fact that the integrity of the ballots is clearly established. Otherwise, the certificate of the officers of election should prevail. That when the ballots are produced from the custody of the officer whose duty it is to preserve them, and are shown to have been preserved from intermeddling from unauthorized persons and are apparently unchanged, they will be received as evidence of what they may show upon their face, but where they may have apparently been tampered with, or where opportunities have been afforded to unauthorized persons, or to persons interested, to tamper with them, then the burden is upon the party producing and relying upon such ballots to establish their integrity clearly and satisfactorily by evidence. In this case the court erred in receiving the ballots as conclusive under the circumstances, and as better evidence than the certificates of the officers of election. Conceding that the court had the authority to appoint commissioners to count the ballots, it was not proper for the commissioners to have excluded the parties and their counsel from the proceedings when they were opening and canvassing the returns, nor was it regular or proper for them to have held a secret meeting for that purpose, however pure may have been their intentions. The parties to the litigation in person or by counsel, or both, were entitled to witness not merely the opening of the ballot boxes and the envelopes containing the ballots, but also to inspect their condition and verify the actions of the commissioners. Such an arbitrary rule should not be vested anywhere with respect to the returns of an election.

2. Pleadings—Amended answer—After the ballots had been counted by the commissioners, and before they were counted by the circuit judge, appellant offered to file an amended answer, in which he charged that the ballots had been altered or changed; that unauthorized persons and interested persons had access to them and opportunities for changing them, and that, therefore, they were not the same ballots that had been counted and certified by the officers of election. The court erred in refusing to permit this amended answer to be filed, as it was not a ground of either contest or of counter contest, but is a matter affecting the evidence offered. The rules of pleading regarding the time of filing grounds of contest and countercharge, do not apply in this case.

3. Certifying questioned ballots—A ballot endorsed "not counted," and signed by the clerk, which was placed in an envelope and the envelope sealed with wax, across which the election officers signed their names, could not be counted, as the provision of the election law prescribing the manner of certifying questioned ballots is mandatory, and must be strictly complied with.

4. Qualification of voters—Evidence—Idiots—Lunatics—Appellant charges that the court erred in deducting from his vote the votes of a person who is charged with being an idiot; also of one who is charged with being a lunatic. Held—That although the evidence establishes with a reasonable degree of certainty that one of said persons is an idiot, and the other a lunatic, there is not sufficient evidence to show that they voted for appellant, and the court erred in deducting said votes from appellant. The statements made by them after voting, as to how they voted, were incompetent as hearsay. The only evidence as to how either of them voted is that their party affiliation had been with the Republican party, and this was insufficient.

5. Residence of voters—The lower court improperly deducted the vote of W. from appellant, as he was a resident of the State and precinct, and had been for a sufficient time to entitle him to vote. The lower court properly deducted the vote of M. from appellant, also the vote of T. from appellee, as they lacked residence for a sufficient length of time, and should have deducted the vote of B. from appellee for the same reason.

6. Minors—Evidence—School census—The lower court improperly deducted from appellant the votes of C. and S., alleged to be minors. The only evidence before the court to show that they were minors was the testimony of the county court clerk that a school census, on file in his office, showed that each of the voters were born within twenty-one years before the date of the election. Held—That the school census is not evidence of the date of the birth of these people for any other purpose than school purposes.

7. Marking ballots—The lower court rejected a ballot which was marked with a pencil within the circle under the Republican device, then cross marks with a stencil in the squares after several of the candidates, but none after the name of any candidate for county attorney on the opposite ticket. Held—That the court erred in the rejection of this ballot. The proof shows that appellant received a majority of the legal votes cast for the office of county attorney.

W. B. Gaines, John E. DuBose and Edward W. Hines for appellant.

Wm. Cromwell, Wilkins & Lay, D. W. Wright and M. Hazelip for appellee.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge O'Rear.

This contest involves the election to the office of county attorney of Edmonson county. The election was held in November, 1901. On the face of the returns, as certified to by the officers of election, appellant had a majority of nineteen votes. Within the time allowed by statute appellee filed a petition in the Edmonson Circuit Court, in which the validity of the certificate awarded by the election commissioners to appellant was attacked upon two general grounds. One was that the officers of election of each of the precincts in the county had fraudulently or mistakenly counted votes for appellant which, in fact, had been cast for appellee. The other was that illegal voters had been allowed to vote in certain precincts and had voted for appellant, and that when the errors or frauds first mentioned were corrected, and the returns were purged of the illegal votes last mentioned, the

result would have been that appellee would have received a majority, and, therefore, did receive a majority, of the legal votes cast at that election for the office of county attorney. Appellant, within the time prescribed, also by the statute, filed an answer, containing countercharges of a somewhat similar nature. The charges were not as specific, probably in either instance, as they should have been, but the parties seem to have joined an issue, and to have developed the case by proof upon the averments as made. After the time allotted by statute for the introduction of proof by the respective parties had expired, and at a succeeding term of the circuit court, the judge of the court, upon his own motion, appointed two commissioners, one selected, it is said, from each of the political parties represented by the claimants to the office in dispute, whom he directed to begin upon a day certain named in the order to then count the ballots, which were preserved in the county court clerk's office, and which had not been filed in the circuit court up to that time, so far as the record discloses. Exceptions were saved to each party by the order of the court. The commissioners so appointed having procured the keys to the ballot box from the circuit judge, met upon a day subsequent to that first fixed in the order, and proceeded to count the ballots. They declined to permit either of the parties to be present at the count, and refused admission to all others. They reported to the court the result of their labors, in which they stated that they found that the ballots in the ballot boxes showed that appellee had received 950 votes, and appellant had received 948. This did not take into account any of the ballots returned by the election officers as questioned. The officers of election had certified by certificates, regularly and duly entered on the night of the election at the close of the polls, that appellee had received 935 votes and appellant 954 for the office in question. How the discrepancy occurred is not explained.

Exception to the report of the commissioners was sustained upon a ground not now material. Thereupon the court, a special judge presiding, the regular judge having declined to sit in the case, ordered the ballots brought into court, and then proceeded, in the presence of counsel, and the parties, to count the ballots. The result of that count was that each of the litigants was found to have received 949 of the unquestioned ballots.

The first question presented by this appeal is whether, in the first place, the ballots were properly before the court as evidence, and, in the second place, whether the court's action concerning the custody, inspection and counting of the ballots was authorized by law. For appellant it is insisted that the ballots not having been produced and proved within the time provided by the statute for the taking of proof in the case, could not be subsequently introduced, because to so allow would be to permit the introduction of evidence for the party so using them after the time allotted by the statute for that purpose. The court is of opinion that it was the purpose of the legislature in enacting the law providing for the preservation of ballots, and providing that they should be locked in boxes with separate locks, so that the keys to one should be in the hands of the officers of the precinct of one of the political parties, and the keys to the other lock in the hands of the officers of the other political party, and that in the event of a contest the keys were to be delivered by such officers to the judge of the circuit court of

the circuit having jurisdiction of the case, to make such ballots evidence of the first importance in a contested election. When such a contest is filed, the ballots become evidence by that fact for all proper purposes before the trial court, to be introduced and considered upon such issues as may be legally joined under the provisions of the act. We, therefore, decide that it was proper to consider the ballots on the determination of the questions in issue in this case in so far as they shed light thereon, and subject to the rule announced below.

Whether the court should have appointed commissioners to aid it in tabulating and counting the ballots is a matter not entirely free from doubt. It may well be argued that the duty of canvassing returns of an election can only be exercised by those officials specifically charged with it, who are in the first place the officers of election of the several precincts, then the commissioners of election of the county, and then in the case of contest, the circuit court upon whom jurisdiction is conferred by the statute. The expression in that act, that "the action shall proceed as an equity action," would seem to have reference more especially to the manner of the production of evidence which is by deposition exclusively under the Civil Code in equitable cases, and dispensing with the jury, for in no other particular do the actions appear to be tried as equitable actions. In fact in many particulars, noticeable in the terms of the statute, they are quite dissimilar from equitable actions. From the expression above referred to it has been thought that the court found its power to appoint commissioners. But whether this is true or not, it was not proper for the commissioners to have excluded the parties and their counsel from the proceedings when they were opening and canvassing the returns in litigation, nor was it regular or proper for them to have held a secret meeting for that purpose, however pure may have been their intentions. Certainly the parties to the litigation in person or by counsel, or both, were entitled to witness, not merely the opening of the ballot boxes and the envelopes containing the ballots, but also to inspect their condition and verify the actions of the commissioners. Such an arbitrary right should not be, and we hold is not vested anywhere with respect to the returns of an election. The rule may be stated to be that where the ballots are preserved so that their identity is assured, they can be counted during a contest, and they are undoubtedly better evidence of the vote cast than the returns, and should prevail where there is a difference. (*Hughes v. Holman*, 28 Oregon, 481; *Owens v. State*, 64 Tex., 500; *People v. Holden*, 28 Cal., 128.) But before a recount of the ballots should be allowed to rebut the presumption of the correctness of the official returns it should be proved satisfactorily that the ballots had not been tampered with since the election, and that those offered in evidence are the identical ones cast. On this point it was said in the case of *People v. Holden*, 28 Cal., 128: "We must presume that the officers of election honestly performed their duty in the premises; that they did not mutilate any of the ballots, but, on the contrary, strung them in the condition in which they were found in the ballot box on a thread, and sent them in that condition to the clerk's office. The same presumption exists in relation to their custody by the clerk. \* \* \* The legislature could have had no other design in thus providing for the preservation of the ballots than to make them evidence of their own contents and a test of the

correctness of the returns made up from them by the officers of the election. They are in fact made a part of the returns, for it is expressly provided that they shall be sealed up with the poll list and tally paper, with the certificates of the officers attached, and endorsed 'election returns.' "

That presumption of integrity of the ballots can not attach, however, until it is first shown that they came from the officer whose duty it is by law to have and preserve them, and that they are apparently in the condition of preservation prescribed by the statute. When that much is shown, the legal presumption as to their integrity attaches. On the contrary, however, if it be shown either that they have been tampered with, or that access has been afforded to them to persons unauthorized by law, then the burden shifts, and it thereupon becomes the duty of the person offering and relying upon such ballots to prove affirmatively not only that they are the identical ballots cast in the election, but they have not been mutilated, changed nor tampered with.

In *People v. Livingston*, 79 N. Y., 288, it was said: "The statute requires the ballot boxes to be preserved undisturbed and inviolate, and it is incumbent upon the party offering the evidence to show that they had been so kept, not beyond a mere possibility of interference, but that they were intact, to the satisfaction of the jury. The burden was upon the relator to satisfy the jury that the boxes had remained inviolate. The returns are the primary evidence of the result of an election. They are made immediately upon canvassing the votes, and the votes are canvassed at the close of the polls in public, and presumably in the presence of the friends of both parties. \* \* \* After the election it is known just how many votes are required to change the result, the ballots themselves can not be identified; they have no earmark. Everything depends upon keeping the ballot boxes secure, and the difficulty of doing this for several months, in the face of temptation and opportunity, requires that the utmost scrutiny and care should be exercised in receiving the evidence. Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine. It is not sufficient that the mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty. If the boxes have been rigorously preserved, the ballots are the best and highest evidence; but if not, they are not only the weakest, but the most dangerous, evidence."

Judge Cooley, in his work on Constitutional Limitation, 625, announces substantially the same rule. (*People v. Sackett*, 14 Mich., 320; *People v. Cloott*, 16 Mich., 283, 97 Am. Dec., 141.)

The authorities are abundant that where ballots have been so exposed as to have offered opportunity to be tampered with, and have not been guarded with that zealous care which will contravene all suspicion of substitution or change, they lose their presumptive purity, and are no longer to be relied on as evidence in a contest or judicial inquiry as to the result of an election. (*McCrary on Elections*, 475, etc.; *Powell v. Holman*, 50 Ark., 94; *Hudson v. Solomon*, 19 Kan., 177, opinion by Brewer, J.; *Hartman v. Young*, 17 Oregon, 150.)

Another fact in this case is that at the same general election in Edmonson county, out of which this contest grows, the office of the clerk of the county court was also in contest, that is, the incumbent who had received the cer-

tificate and who continued in office having the custody of the ballots in question, was interested in the result and condition of these ballots, because his office was also then being contested. The ballot boxes, though locked, it is suggested, were wooden boxes so constructed that they could have been entered by the use of a screw driver, taking off the hinges, which were exposed.

In *Albert v. Twobig*, 85 Neb., 568, it was said that although "the ballots cast constitute the primary evidence to determine the rights of the respective parties, it must appear, however, that they have been preserved substantially in the manner and by the officers prescribed by the statute. If they have been placed in a position to be tampered with by interested parties, the burden of proof is on the party offering them in evidence to show that they are in the same condition as when sealed by the several election boards. And in the absence of such proof it was held that the ballots were properly rejected as evidence."

In this case, after it had become apparent that the court was going to count the ballots which had been in the hands of the commissioners, appellant offered to file an amended answer, in which he charged that the ballots had been altered or changed; that unauthorized persons and interested persons had access to them and opportunities for changing them, and that, therefore, they were not the same ballots that had been counted and certified by the officers of election. This amendment was rejected by the court, doubtless upon the theory that the statute governing the pleadings in this particular class of cases requires that the grounds of contest shall be stated in the petition, and those of counter contest shall be stated in the answer, and that none other shall be considered by the court. In its strict sense this is not a ground either of contest or of counter contest, but is a matter affecting the evidence offered on the grounds already set out. The court is of opinion that the pleading should have been allowed, and the facts stated therein should have been permitted to be proved, even without the pleading.

From these authorities this court holds that the ballots cast in an election are the primary and best evidence of the voters' will, as expressed therein, and that in case of a contest, as between the certificates of the officers of election and the ballots, the ballots are the best evidence, but that this is conditioned strictly upon the fact that the integrity of the ballots is clearly established. Otherwise, the certificate of the officers of election should prevail. (*Bailey v. Hurst*, 24 Ky. Law Rep., 504.) That when the ballots are produced from the custody of the officer, whose duty it is to preserve them, are shown to have been preserved from intermeddling from unauthorized persons, and are apparently unchanged, they will be received as evidence of what they may show upon their face; but where they may have apparently been tampered with, or where opportunities have been afforded to unauthorized persons, or to persons interested, to tamper with them, then the burden is upon the party producing and relying upon such ballots to establish their integrity clearly and satisfactorily by the evidence. In this case the court erred in receiving the ballots as conclusive under the circumstances recited, and as better evidence than the certificates of the officers of election. However, in view of the conclusion to which we have arrived upon other points, the case will not be remanded for a new trial because of this

fact, for the reason that to do so would be only to afford an opportunity to the successful party to increase his majority already established.

There were a number of so-called "questioned" ballots returned by the officers of the election, there being some from every precinct in the county, excepting perhaps one. The certificate required by the statute to be attached to these questioned ballots was not attached in any instance. The statute on this point reads as follows (Act to further Regulate Elections, Acts General Assembly, 1900, section 10): "That if there are any ballots cast and counted, or left uncounted, concerning the legality or regularity of which there is any doubt or difference of opinion in the minds of the judges of the election, said ballots shall be placed in the large linen envelope furnished by the county clerk for that purpose, and sealed up, and across the seal thereof the officers of the election shall plainly write their names, and at the point of the seal indicated for that purpose the judges of the election shall, in the presence of the clerk and sheriff, place the county election seal in hot wax, as above described, so that it can be plainly read, and the same shall be returned to the clerk of the county court with the returns of the election, for such judicial or other investigation as may be necessary, with a true statement as to whether they have or have not been counted; and if counted, what part and for whom."

The learned trial judge rejected all of these contested ballots except two, because the statement required by the closing clause of the section of the statute above quoted was not made. As to the two excepted, and which he counted for appellee, the only statement as to how they were voted was this, written on the back of each ballot: "Not counted. Questioned. W. H. Hack." Hack was the clerk of the election at that precinct. These ballots were enclosed in an envelope, and the envelope was endorsed as required by the statute, that is, the officers signed their names across the seal on the envelope which had been sealed with wax, and stamped; but there was no other statement as to how these ballots were voted save the one of the clerk above quoted. Now, was the statute complied with as to the certificate required by the statute showing how they were counted, or whether at all counted by the officers of the election? In *Struss v. Johnson*, 100 Ky., 319, this identical question of certificate was under consideration. The court held that this provision of the statute was mandatory, and that "to render doubtful or questioned ballots admissible as evidence in a judicial or other investigation we are of opinion that they must be sealed and returned with the statement of the officers of election as required by the statute." This was followed in *Banks v. Sergeant*, 104 Ky., 849, and *Anderson v. Likens*, 104 Ky., 699. We are of opinion, therefore, that the court erred in counting the two ballots in question.

Among the illegal votes cast at this election was one cast by Lewis Hill, who is conclusively shown to have been an idiot. Copies of inquests finding him such were produced in evidence. Under the Constitution and statutes of this State idiots and lunatics are not permitted to vote, and this person should have been excluded from the polls. The trial court upon the evidence, which we will notice, deducted his vote from appellant. That evidence was that this person claimed to belong to the same political party of which appellant was the nominee, and that afterwards the idiot had stated

that he had voted the straight ticket of that party. On the other hand, appellant proved by another witness, that while the idiot had told him that he had voted the straight ticket of the party, yet when describing how he voted that ticket, he showed that he voted it by placing the stencil mark under the emblem of the opposite party. Manifestly the statements of this idiot should not have been received, or if received at all, the result is that each cancels the other. What a voter may say after the election, and after he has voted, as to how he voted, is at best but hearsay. An idiot, of course, is one who is destitute of mind, and has been since his birth. Such a person would not be competent as a witness. Certainly his statement out of court could have no more legal force than his statement made in court under oath. We are of opinion that the court erred in deducting this vote from appellant.

George Parsley is shown to have voted at this election. It was claimed that at the time he was a lunatic. Two questions in his case are, therefore, presented: First, was he disqualified; and, second, how did he vote? The evidence is conflicting as to the state of his mind on the day of the election. One witness gave it as his opinion that he had not mind sufficient to know the nature of a vote or to transact business. Another, on the other side, gave it as his opinion that he was competent and qualified. Another gave his opinion that he was disqualified, and he judged that fact from what the voter said, and detailed what the voter said. The matter detailed does not of itself show him mentally deranged. The evidence is substantially the same as to the mental capacity of this witness as was shown in regard to that of his father and a brother, all of whom had at times been afflicted with this unfortunate malady, and all of whom had at times been confined in asylums for the insane. All of them, however, had previous to this election been discharged. On the day following the election this voter was by a verdict of a jury in a trial then had, and that day begun, found to be of unsound mind, and was directed to be confined in an asylum. When his malady reappeared so as to justify this action does not appear, independent of the testimony above referred to.

The question whether he is a competent voter is not entirely free from doubt. The political affiliation of this voter, so far as he had always claimed to have one, was proved. Other than this there is no evidence in the record as to how he voted. This court held in *Tunks v. Vincent*, 21 Ky. Law Rep., 475, that the declarations of a voter made after the election as to how he voted were incompetent as hearsay. In that case, however, it was held that if the voter was placed upon the witness stand as a witness, and was willing to state how he voted, but the opposite party interposed an objection, and told him that he need not answer unless he wanted to, and that thereupon the witness refused to answer, these facts, coupled with the further proof of his party affiliation, that he had been an active and strenuous partisan, were sufficient circumstances to justify the finding that the witness had voted for that party with whom he had affiliated, and whom he had accommodated by refusing to answer a question which he had previously expressed a willingness to answer. In this case, however, a number of these elements are lacking. The only fact that would indicate how this voter voted is the one of his previous party affiliation. Now if he was insane, and so insane as to be classed as a lunatic, that is, did not have mind sufficient to know or to com-



prehend his act, or will power to control it, it is as probable that he voted against as for his party affiliation; at least there is no reasonable probability that could be ascribed to his secret conduct when in such deranged condition because of his judgment and opinions entertained when in a rational and sane state of mind. We know as a matter of fact that lunatics frequently, if not generally, do exactly the contrary while insane to what they would have done when of sound mind. It is the opinion of the court that the trial court improperly deducted this ballot from appellant.

Virgil S. Wolf voted for appellant. His vote was deducted by the trial court because it found that he was an illegal voter. The facts appear to be that he was an unmarried man, and had previously lived in Edmonson county in the precinct in which he voted, but had sometime during that year gone to Evansville, Ind., to work. He remained there a few months, returned to Edmonson county, and was living there when this election occurred. The voter testified that when he left Kentucky he left with the intention of returning; that he then claimed, and has always since claimed, Edmonson county as his home, and that while in Indiana he did not vote there, and did not claim his residence there; that his absence was but temporary. His brother testified that the voter had previously made his home with him, and had returned to his place, and was making his home there before and at the time of the election, and that before he left for Indiana he expressed an intention to retain his residence in Edmonson county. Section 1478 of Kentucky Statutes, regulates this question of residence. The first subsection is: "That shall be deemed his (the voter's) residence where his habitation is, and to which when absent he has the intention of returning. He shall not lose his residence by absence for temporary purposes merely."

The court is of the opinion that this witness was a legal voter at this precinct.

Stanley S. Minton is shown to have voted for appellant. Previous to the election he had removed to Indiana with his family; expressed his intention to remain there permanently. Afterwards he evidently changed his intention and returned to Edmonson county, but within a year before the election. His vote was deducted from that given to appellant, and we think rightfully.

James Cook and Andrew W. Skaggs voted evidently for appellant. Their votes were deducted upon the theory that they were minors at the time of the election. The only evidence before the court that they were minors was the testimony of the county court clerk that a school census on file in his office showed that each of these voters were born within twenty-one years before the date of the election. The court is of the opinion that this school census is not evidence of the date of the birth of these people for any other purpose than school purposes. Who gave it to the school assessor or trustee, and who reported it, was not shown, nor indeed was the report or the census itself offered in evidence. It was merely the clerk's statement of what he had found the state of the record to disclose. The court is of opinion that these two votes were improperly rejected.

Marcellus Bailey is shown to have voted for appellee. Within sixty days before the election he removed from the precinct in which he had been living for some months into another precinct in which he had not lived, and voted

in the latter precinct. He is the only witness on the subject. He testifies that he did not move until the 12th day of September, 1901 (the election occurred on the 5th of November); that on the 12th of September he sold his property and removed his home. This vote was not excluded from appellee, but should have been.

Rufus Tarter is shown to have voted for appellee, and the court deducted the vote upon the ground that he was an illegal voter. No complaint is made that this action was not proper. The record is pretty clear that he was an illegal voter. The facts in the case of this voter are substantially the same as Stanley S. Minton's, above discussed.

There was one ballot rejected that had been marked thus: The cross mark was made with a pencil within the circle under the device under which appellant was a candidate, then cross marks were made with the stencil in the squares after several of the candidates, but none after the name of any candidate for county attorney on the opposite ticket. This court has held in the cases of *Houston v. Steel*, 98 Ky., 596, and *Graham v. Graham*, 24 Ky. Law Rep., 548, that a mark with a pencil at the point where the stencil should have been made is equivalent to a mark with the stencil. It would, therefore, appear that this mark was sufficient in law to have voted the ballot for all of the candidates, including county attorney under the ticket under the emblem of which the pencil mark was made, except as to those candidates where the stencil mark had been made opposite the names of the candidates of the other ticket. One ballot was counted for appellee which had been marked under both of the party devices or emblems, and also opposite the name of appellee. By marking his ballot so indicated an intention, as shown, in our opinion, to not vote either party ticket, but to vote for the person alone opposite whose name he had marked. The ballot was properly counted.

There are other questions presented in the record, but which do not appear to affect the result, and which are not argued in briefs. We refrain, therefore, from discussing them. The result is that appellant received a majority of the legal votes cast for the office of county attorney, and the judgment should be rendered accordingly.

The judgment is reversed and the cause remanded for proceedings consistent herewith.

The whole court sitting.

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TICHENOR v. WOOD, &c.

(Filed December 9, 1902—Not to be reported.)

1. Decedents' estates—Judicial sales—An action was brought to enforce a purchase-money lien on land sold in 1878. The vendee having died the suit was brought against his widow and heirs and a decree rendered and sale made. A child, who was an infant, seeks to set aside the decree and sale for various errors.

2. Affidavit purging claim—It is urged that the affidavit filed with the petition purging the claim was defective. Held—That the failure of the personal representative to raise this objection was a waiver of it.

3. Description of land—Description of the land in the petition, and the judgment which follows the description in the deed to the grantee, is sufficient.

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4. Appraisement—Failure to appraise the land before sale did not avoid the sale for the debt created in 1873. The act of 1878 requiring appraisement of real property before making a judicial sale for debt does not apply to a debt created in 1873.

H. P. Taylor for appellant.

M. L. Ward for appellees.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge O'Rear.

This suit was brought to enforce a purchase-money note, alien to secure which was retained on land sold in 1873. The vendee having died before suit, his administrator, widow and heirs at law were made defendants. This appeal is by one of the heirs, who was an infant at the time of the proceedings. The following questions are presented:

1st. the affidavit of the plaintiff (creditor) filed with the petition, purging the demand sued on, did not say, in the words of the statute, that there was no set-off to the demand.

The proper practice is for the personal representative to file an affidavit showing that no demand has been made of him before suit brought, accompanied by the affidavit required by the statute, and thereupon a rule would have been awarded against the plaintiff to show cause why his petition should not be dismissed. (*Thomas v. Thomas*, 15 Ben Mon., 178; *Nuttall v. Brannin*, 5 Bush, 11; *Rogers v. Mitchell*, 1 Met., 22.) By not making that question before submission the defendants waive the omission to make demand. (*Usher v. Flood*, 12 Ky. Law Rep., 721.)

2d. It is argued that the description of the premises in the petition and judgment are insufficient. The language in which the land is described in the petition and judgment seems to have been adopted from the deed conveying this land to appellant's ancestor. It is as follows: "Two undivided two-eighths two tracts or parcels of land lying and being in Ohio county, Kentucky, on Green river, just below Hogs Falls, and known as the Daniel Tichenor land, on which he died. The land is supposed to contain 150 acres."

We are of opinion that the description is sufficiently definite. "That is certain which may be made certain."

3d. The commissioner executing the judgment of sale did not have the land appraised as required by the statute of 1878. (*General Statutes*, 885, edition 1887.)

The debt for which this land was sold was created in 1873, at which time no appraisement was provided for in such sales. It has been held by this court that the act of 1878 did not apply to debts created before the act took effect; that as to such debts the act was unconstitutional. (*Sullivan v. Berry*, 88 Ky., 198; *Collins v. Collins*, 79 Ky., 88.)

These being the only objections urged against the judgment, we are of opinion that it should be affirmed.

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DEPPEN, &c. v. GERMAN-AMERICAN TITLE CO., &c.

(Filed December 9, 1902—Not to be reported.)

Fraud—Mortgages—Estoppel—In 1895 appellant subscribed for 400 shares in appellee company of the par value of \$25 per share, agreeing to pay there-

for \$10,000; but it was known and understood at the time that appellant did not have the money to pay for the stock, and it was agreed that he should execute his twenty promissory notes for \$500 each, payable five years after date to appellee company, secured by mortgage on real estate. The notes and mortgages were thus executed. As a further part of this agreement and stock subscription it was agreed that appellant was to be employed in some capacity at a salary of \$150 per month. He continued in this employment for about a year, until appellee company made a deed of assignment for the benefit of its creditors. After the assignment appellant D. instituted this action, seeking a rescission of his contract of stock subscription and a cancellation of his notes and mortgage on the ground that they were obtained by fraud, covin and deceit practiced upon him by the president of the company. Appellees, in defense, pleaded that they were innocent purchasers of the notes without notice of any infirmities in same, and sought to collect the notes by an enforcement of the mortgage lien and plead an estoppel by appellant by his knowledge and acts from securing a cancellation of his stock subscription and notes and mortgage. Held—That the notes were not placed on the footing of foreign bills of exchange, and defenses may be set up against same. Appellant is entitled to a cancellation of his stock subscription, notes and mortgage on account of the fraud practiced upon him. The scheme to employ appellant at \$150 per month to render services worth \$50 per month was a part of the fraud practiced. Appellant was not estopped by his acts from seeking a rescission of his contracts, as he knew nothing of the condition of the appellee company or the value of the stock, but he should be required to pay \$1,000, the excess for value of his services; also the amount of a loan made to him, but he should not be charged with \$300 premiums credited to him as interest.

S. J. Boldrick and J. W. S. Clements for appellants.

H. M. Lane for appellee Hess.

Barnett & Barnett for appellee Louisville Banking Co.

Ernest Macpherson, Arthur Peter and Geo. A. Brent for appellees In.

D. I. Heyman for appellee Western Bank.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge White.

In May, 1895, appellant, R. O. Deppen, subscribed for 400 shares of stock in the German-American Title Co., of the par value of \$25 per share, agreeing to pay therefor \$10,000. But it was known and understood at the time of this subscription that Deppen did not have the money to pay for the stock, and so it was agreed that he should execute his twenty promissory notes of \$500 each, payable five years after date to the German-American Title Co., or bearer, in payment of said stock subscription. These twenty notes were to be secured by a mortgage on real estate executed to the German-American Title Co., as trustee for the holder of these notes. As a further part of this agreement and stock subscription it was agreed that Deppen was to be employed in some capacity by the title company.

This agreement was finally closed, the notes and mortgage executed June 15, 1895, and Deppen began to work for the title company on that date as clerk in the office, his salary being \$150 per month. Deppen continued to work for the title company until it made an assignment in May, 1896, and

for some time before the assignment he was a director. He was elected a director probably in January, 1896, the exact date not appearing. The employment of Deppen required that he should keep a book showing the location of bonds, notes and mortgages executed to the title company. However, it appears that the notes executed by himself were never put on his book. While Deppen was employed in the office of the title company some of the notes were sold to purchasers and the remainder were pledged to banks to secure loans thereon. A part of Deppen's business was to assist in making sales of notes and mortgages executed to the title company and payable to it or bearer, similar to his own notes. It appears from the proof that he offered to sell his own notes to persons, who did not purchase.

After the assignment in May, 1896, appellant Deppen instituted this action in equity against all parties in interest, seeking a rescission of his contract of stock subscription and a cancellation of his notes and the mortgage, on the ground that they were obtained by fraud, covin and deceit practiced upon him by the president of the German-American Title Co., by falsely and fraudulently representing to appellant that the stock of the German-American Title Co. was worth par (the price agreed to be paid), when in fact and truth the stock was not worth anything.

Appellees, by answer, pleaded that they were purchasers for value before maturity of these notes, and that they had no notice of any infirmity in the notes or of any defense appellant had thereto, and, therefore, contended that there could be no defense presented to them. Appellees also denied the allegations of fraud and deceit that induced appellant to execute the notes, and pleaded that appellant by his conduct in executing the notes and mortgage, knowing they were to be negotiated, and his subsequent conduct in remaining silent for nearly eleven months after their execution and delivery to the title company, with full opportunity to learn the true condition of the affairs of the title company and the value of his 400 shares of stock therein, and from the further fact of his proposing to sell these notes for the title company, and of having been credited with dividends of 8 per cent. semi-annually in January, 1896, was estopped from a cancellation of the notes and mortgage as to them, and pleaded further that, having delayed filing his action for rescission until after the known insolvency and assignment of the corporation, and even after an action to settle the affairs of the corporation had been brought by the assignee, he was not entitled to a rescission.

Appellees then sought by cross petition to obtain judgment and decree of foreclosure of the mortgage. Appellant denied the plea of estoppel. Upon these issues the proof was taken and upon trial the court dismissed appellant's petition, and rendered judgment on the cross petitions, decreeing foreclosure of the mortgage. To reverse that judgment this appeal is prosecuted.

The duties of the appellant when employed by the title company were not such as would give him information of the general affairs of that company, of its condition financially, nor of the actual value of the shares of stock. It is not pretended that he had actual knowledge of the affairs of the company, nor of the value of the stock he purchased until the day the deed of assignment was executed. In fact appellant testifies without contradiction that he had no idea that the stock was worth less than par at any time up till the deed of assignment was made. It is insisted that as to appellees,

purchasers for value, appellant must have exercised diligence to ascertain the condition of the corporation, and to have demanded a rescission or gave notice of his defense to the notes as soon as he learned he had been defrauded; that for his negligent failure so to do he is estopped to plead the fraud practiced on him, as he was silent when he should have spoken.

In answer to that it is urged that it is shown that it was difficult to learn after an examination of the books of the corporation its exact financial condition. We have examined all these questions presented with much care, and after much difficulty and with some hesitancy we have concluded that the question of rescission is immaterial, as the same relief can be granted to appellant as a defense to the cross actions seeking to foreclose the mortgage liens, if appellant be entitled to relief at all. We are also of opinion that these notes never became bills of exchange, and that, therefore, appellant may present such defenses thereto as he could were they owned and held by the German-American Title Co., unless by some act he has estopped himself to make such defense subsequent to the original execution and delivery thereof to the title company. (Louisville Ins. Co. v. Hoffman, 20 Ky. Law Rep., 2016; Schnable v. German-American Title Co., 21 Ky. Law Rep., 1068; Ritchie v. Cralle, 22 Ky. Law Rep., 160; Waggoner v. German-American Title Co., 22 Ky. Law Rep., 215; Levy v. Rudolph, 22 Ky. Law Rep., 258. In these cases bonds and notes like these in controversy were held not to be placed on the footing of bills of exchange.)

Although the action is begun by appellant Deppen seeking a rescission of the stock subscription and a cancellation of his notes and the mortgage, effect of that action is to force appellants to seek collection of the notes. The stock subscription can not be rescinded, the corporation is defunct, passed into insolvency before appellant sought relief, and he can not now be restored to his petition. (Olsen v. Bank, 67 Minn., 267; Turner v. Ins. Co., 65 Ga., 649; Howard v. Turner, 155 Pa., 358; Bissell v. Heath, 98 Mich., 472; Chuff v. Upton, 91 U. S., 665.)

The action is then to be treated as one to enforce the mortgage lien, with appellant presenting his plea of fraud and failure of consideration as a defense, with appellees pleading estoppel. We are of opinion clearly that appellant was defrauded when he purchased the stock. The shares were represented to him as being really worth above par, when in truth the corporation was then insolvent, and the stock worth nothing. It was pledging the notes received for stock to make good its overdrafts. It never had the stock that it was represented to have, and some stock that had been issued were given away, and of the true condition appellant knew absolutely nothing, and from an examination of the books of the company, if he had made such, he would have been unable to learn the true condition. The chief bookkeeper, and also the assignee, testified in this case, and neither could give the real condition of the company at any date. As an inducement to him to take this amount of stock and to lend color to the representations of the business and condition of the company, appellant was offered and given a position in the office at a salary of \$150 per month, for services shown to have been worth not exceeding, at a liberal estimate, \$50 per month.

This was a part of the scheme. So then, from the plain, undisputed facts shown herein, we conclude that the notes and mortgage were obtained by

fraud and deceit, and if they were owned by the title company and suit was instituted by that company this plea would be a defense to their collection.

We conclude also that appellant is not estopped for pleading this fraud as a defense to the notes, from the mere fact that he was an employe in the office of the title company, and was for a time director therein, nor from the fact that he may have at some time offered these notes for sale to persons, others than these appellees, and who did not purchase such notes. There is no proof that appellant sold or recommended any of these notes to any of the holders thereof. However, appellant in presenting his defense seeks equity, and to obtain it must do equity.

As a part of the fraudulent transaction by which the notes and mortgage were obtained appellant was to be, and was, paid a salary in excess of the real value of his services, and was also to receive, and did obtain, a loan from the company with his stock deposited as collateral, and was afterwards credited with dividends of \$300 as payment of interest, we are of opinion that appellant should be required to pay the salary received in excess of the value of his services, which excess we find to be \$1,000; and also to pay the amount due on his loan of \$600, which was nominally secured by pledge of shares of stock, but really secured by the notes and mortgage here in controversy. To this extent we are of opinion appellant has received consideration and benefit for the notes and mortgage. These sums should be adjudged to be due appellees pro rata on the amount of notes held by each, and to secure payment judgment of foreclosure may be had. The \$300 credit as interest paid by dividend should be eliminated from the calculation as nothing was in fact paid.

For the reasons given the judgment appealed from is reversed and cause remanded for judgment consistent herewith.

Whole court sitting.

Judges Burnam and O'Rear dissenting.

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#### BAILEY v. COMMONWEALTH.

(Filed December 9, 1902—Not to be reported.)

1. Criminal law—Malicious cutting and wounding—Instructions—Appellant escaped from the Danville workhouse, where he had been confined for some time for some misdemeanor. C., who was deputy keeper of the workhouse, found him in Lexington, and attempted to arrest him without a warrant. Appellant drew a knife and attempted to cut C., but C. seized the hand in which appellant had the knife, and in this way his little finger was cut. At the same time appellant seized the hand in which C. had a pistol. Appellant was indicted, tried and convicted of the offense of malicious cutting and wounding (but from which cutting and wounding C. did not die) under section 1166, Kentucky Statutes. The jury fixed his punishment at two years' confinement in the penitentiary, from which this appeal is prosecuted. Errors in instructions are relied on for a reversal. Held—That the court erred in giving the fifth instruction, by not requiring the jury to believe the cutting and wounding was done with intent to kill before they could convict.

2. Arresting without warrant—Self-defense—The instruction on self-defense should have been amended by adding to it the statement that C.,

who was a peace officer of Boyle county, was not authorized to arrest appellant in Fayette county, who had committed only a misdemeanor, and that if he attempted to do so it was the privilege of appellant to resist such attempted arrest by the use of such force as was necessary, or reasonably appeared to appellant to be necessary, to preserve his liberty and no more, and to that end had the right to use force to repel force so far as same was necessary, or to the appellant in the exercise of a reasonable discretion appeared to be necessary, for his protection.

George Denny for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was tried and convicted under the charge of cutting and wounding Thomas Connelly with a knife with intent to kill him, and from which cutting he did not die. The jury fixed his punishment at two years' confinement in the penitentiary. In view of the conclusions at which we have arrived we will set forth all the evidence in the case, it being the testimony of three witnesses introduced by the Commonwealth, as follows: "Thomas Connelly: I live at Danville, Boyle county, and I am deputy workhouse keeper of Danville, Ky. On the — day of June I was in Lexington, Ky., and was looking for the defendant, Robert Bailey, who had escaped from the workhouse, in which he was confined, some months before. As I was going to the depot, at a grocery store, and when I looked at him and recognized him, he started away, and I followed him, and he went behind a meat block in the store and picked up a knife from the meat block, and tried to cut me, cutting a slit in my coat on the side; he then drew the knife back to cut me again, when I seized his hand with my left hand, and my little finger was cut by the knife, and at the same time, I had a pistol in my right hand and the defendant caught my right hand and was holding that; he tried to get his hand in which he had the knife loose from me, and I was trying to get my right hand in which I had my pistol loose from him, and that his left little finger was stiff from the cut and he exhibited the finger to the jury; that he had no warrant for defendant's arrest, and that his hand was not cut until he caught the hand of the defendant which held the knife."

"George St. Clair: He was present when the man, whose name was said to be Connelly, came, and when Connelly came in the defendant went rapidly to that part of the grocery where the meat was cut, and Connelly followed, and the defendant picked up the knife and Connelly seized the hand which held the knife, and it seemed to me that was how his hand was cut; that in catching the hand with the knife in it Connelly's hand was cut by his hand coming against the blade of the knife. Connelly had a pistol in his right hand, and the defendant was holding Connelly's right hand in which he held the pistol, and Connelly was holding defendant's right hand in which he held the knife; that it looked to him that Connelly's hand was cut by his hand going against the knife blade when he caught the defendant's hand."

"Chas. Leach: Went to Connelly when he was holding the defendant by the hand which held the knife and that part of Connelly's hand was against the blade of the knife, and that he took hold of the defendant, and that he tried



to out him (the witness), and that he and Connelly held the defendant until a policeman came and arrested him; that the defendant kept moving his hand in which he held the knife, as if he was trying to get it loose; that Connelly had a pistol in his right hand which the defendant was holding."

Upon this evidence the court instructed the jury first as to the felonious cutting, and then as to the cutting in sudden affray. The court gave to the jury the following instruction as to self-defense: "If the defendant did out and wound Thomas Connelly with a knife, but at the time he did so the defendant believed, and had reasonable grounds to believe, that he was then and there in danger of death or of suffering some serious bodily harm at the hands of said Connelly, and it was necessary, or to the defendant reasonably appeared to be necessary, to cut said Connelly to avert the danger, or what reasonably appeared to the defendant to be such danger, this was a cutting and wounding in self-defense. And if the defendant did out and wound Thomas Connelly, yet the jury should find him not guilty unless they believe from the evidence, beyond a reasonable doubt, that said cutting and wounding was not done in self defense."

The fifth instruction given to the jury is as follows: "By cutting and wounding with a knife is meant the intentional infliction of a wound by one person upon another by cutting the person of such other with a knife. The defendant has not been proved guilty, even if a wound was inflicted upon the person of Thomas Connelly by defendant with a knife, unless such wound was so inflicted in the execution of a purpose on the part of the defendant to wound said Connelly by cutting his person with a knife."

We are of opinion that the fifth instruction should have followed the language of the statute, section 1166, Kentucky Statutes, in which it is provided: "If any person shall willfully and maliciously cut, strike or stab another with a knife, \* \* \* with intention to kill, if the person so cut, stabbed or bruised die not thereby," etc.

The words "with intention to kill" are omitted from the instruction in this case, although that idea is contained in the first instruction given. But the court, in this instruction, is defining to the jury what constitutes the technical offense of cutting and wounding with a knife as covered by the law of this case, and the jury might have inferred, and doubtless did, that the intentional infliction of a wound by one person upon another, by cutting the person of such other with a knife, is all that was required to justify a conviction in this case.

In *Head v. Commonwealth*, 4 Ky. Law Rep., 824, it was held that it was not a felony to willfully and maliciously cut and wound another unless with intent to kill, and that omitting the words "with intent to kill" was reversible error.

The instructions of the court in all other respects are a clear and accurate exposition of the law, but we think the court should have added to the self-defense instruction given, under the circumstances of this case, the statement that Connelly was not authorized to arrest appellant, a mere misdemeanor, in Fayette county, Connelly being a peace officer of Boyle county only, and that if he attempted to do so, it was the privilege of appellant to resist such attempted arrest by the use of such force as was necessary, or reasonably appeared to appellant to be necessary, to preserve his liberty, and

no more, and to that end had the right to use force to repel force so far as same was necessary, or to the appellant in the exercise of reasonable discretion appeared to be necessary, for his protection.

One making an assault with a knife with the intent to kill may be guilty under the statute in question of cutting and wounding such person assaulted with the intent to kill him, if the person so assaulted is wounded alone by grasping the weapon with which he is assaulted, and in attempting to defend himself from the assault, but where the one doing the cutting is assaulted with a deadly weapon undisputably, without warrant of law, and there is no conflict in the evidence as to the circumstances attending it, and in repelling such assault he uses a knife or other similar instrument, and his assailant is wounded by grasping such knife, the one doing the cutting under such circumstances is not necessarily, and does not appear in deed and in fact to be, guilty of this offense. It would rather appear, so far as he is concerned, to be an accidental cutting, or at least a justifiable one.

Judgment is reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

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SMITH v. RICHMOND, &c.

(Filed December 9, 1902.)

Illegal contracts—Conspiracy to violate law—R., who was operating a lottery in Cincinnati, O., as agent of S., came to appellant, who was operating another lottery in said city, and represented to appellant that in order to obtain immunity from the laws of Ohio it would be necessary for them to pay a large sum monthly to C., and that he agreed to pay to R. for this purpose \$150 per month, and under said agreement he paid said monthly sums, which amounted in the aggregate to \$16,075, no part of which R. paid to C., as agreed. Appellant instituted this action to recover said sum from R. The lower court sustained a demurrer to the petition and dismissed the petition, from which appellant prosecutes this appeal. Held—That the court properly dismissed the petition. Both parties clearly entered into a conspiracy or partnership for the purpose of enabling them to violate the laws of the State of Ohio, and to corrupt or bribe the officers of the law. The transaction set up in the petition must be treated as the formation of a partnership for an illegal purpose, greatly to be condemned from any standpoint. A corruption of the authorities of a great State or city should not be tolerated. The payment of money to defeat the enforcement of the criminal laws is one of the most heinous of crimes, and no court should afford any relief to the parties engaged in such a nefarious business. The operation of lotteries is, by common consent, regarded as contrary to public policy and highly immoral, and plaintiff has added to that unholy business a still greater crime of bribing public officers, and paying money to prevent the enforcement of the criminal laws of a sister State. Both parties, according to the petition, are guilty of a great crime, and the courts should not hear the complaints of either in respect to the illegal business conducted by them.

H. P. Whitaker and M. M. Durrett for appellant.

Harvey Myers for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Guffy.

This is an appeal from a judgment of the Kenton Circuit Court in the suit of the appellant against the appellees. The court having sustained a demurrer to the petition as amended, and appellant failing to plead further, his action was dismissed. The sole question presented for decision is whether the petition, as amended, stated a cause of action, or, in other words, whether upon appellant's own showing he was entitled to relief from a court of equity. So much of the petition as is material to plaintiff's cause of action reads as follows:

"2d. Now comes W. B. Smith, the plaintiff, and for his amended petition herein states: That on and before the — day of May, 1890, the defendant, M. J. Richmond, represented to this plaintiff that he, the said Richmond, was the employe and agent of S. T. Dickinson & Co., and their associates, who then were operating and carrying on a lottery business in the city of Cincinnati, O., under the charters of what were known and designated as the Kentucky State Lotteries; that one Louis Davis, since deceased, was at said time and thereafter operating and carrying on a lottery business in said city by permission of the said S. T. Dickinson & Co., and their associates, and of this plaintiff; that this plaintiff was at said time and thereafter operating and carrying on a lottery business in said city as the sole owner of the Colorado State Lottery, for which he had obtained a charter from the State of Colorado; that at said time the said defendant, M. J. Richmond, approached this plaintiff and represented to him that it would be necessary for plaintiff and the said lottery companies represented by said defendant to pay one George B. Cox, a citizen and resident of said city, certain sums of money in order to procure immunity from arrest and prosecution by the State and municipal authorities of the State of Ohio and said city, for operating and carrying on said lottery business aforesaid; that shortly after said representations so made as aforesaid by Richmond to this plaintiff, to wit, on or about the — day of May, 1890, a meeting was held in the city of Cincinnati at which plaintiff, said Richmond, acting in his capacity of employe and agent as aforesaid, and Louis Davis were present; and it was then and there agreed that plaintiff should pay \$150 per month, the companies represented by said Richmond should pay \$150 per month, and said Davis should pay \$50 per month to said Cox for the purpose aforesaid; and it was further agreed by and between the parties at said meeting that the several sums above mentioned should be delivered to said Richmond, to be paid by him to said Cox for the said purposes, and this the said Richmond agreed to do. Plaintiff further states that pursuant to said agreement he did deliver to said Richmond in each and every month from May, 1890, to April, 1892, both inclusive, the sum of \$150, and that pursuant to said agreement, and on the representation to this plaintiff by said Richmond that it was necessary for plaintiff to pay to said Cox for the purpose aforesaid a further sum of \$75 per month, plaintiff did deliver to said Richmond in each and every month from May, 1892, to April, 1895, both inclusive, the sum of \$225; and that pursuant to said agreement this plaintiff did deliver to said Richmond in each and every month from May, 1895, to May, 1897, both inclusive, the sum of \$175, making a total sum of money so delivered to said Richmond to be paid to said Cox for the purpose aforesaid of \$16,075. Plaintiff further states that said defendant, M. J. Richmond, failed to pay said

sum of money, or any part thereof, to said Cox, and fraudulently converted the same, and all of it, to his own use, and refuses to return said money, or any part thereof, to this plaintiff although plaintiff has demanded same. Plaintiff reiterates herein each and every allegation of his original and first amended petition, and makes same part hereof."

We copy the opinion of the court below as one of the means of making a clear statement of the contentions of the parties hereto: "The cause is submitted on demurrer to petition as amended. There are some depositions taken on behalf of plaintiff in the record, but they are not read or considered on this motion. There is no ascertainment of the facts, and the allegations of the petition as amended are taken as true only for the purpose of this demurrer. The facts so taken as true are as follows: On the year 1890, or prior thereto, the plaintiff, Smith, was engaged in the business of conducting a lottery in the city of Cincinnati, O. S. T. Dickinson & Co. were at the same time engaged in the same business in the same city. M. J. Richmond, defendant hereto, was the employe and agent of said Dickinson & Co. One Lewis Davis was also conducting the same business at same time and place. The plaintiff, Smith, and said Davis and said Richmond representing said Dickinson & Co., held a meeting, at which it was agreed that the several parties engaged in said business should each month pay to said Richmond a certain sum of money to be applied by said Richmond in bribing and corrupting the authorities of the State of Ohio and of the city of Cincinnati, to thereby procure immunity for those engaged in said business. The said Smith, pursuant to said agreement, paid to said Richmond from May, 1890, to May, 1897, the sum of \$16,075, but the said Richmond, instead of using said money in the bribery of Ohio officials (assuming for the purposes of this demurrer that such a thing were possible), retained the money and converted it to his own use.

"This action is instituted by Smith to recover of Richmond said sum of \$16,075, and on demurrer to the petition as amended the question arises as to whether the law and the courts will furnish relief to one occupying the position held by the plaintiff, Smith. This action is in equity. It is contended by the defendant on this demurrer that where the consideration of a contract is an agreement to hinder, impede or defeat the administration of the criminal or penal laws, the contract is against public policy, is void and that no party thereto can enforce it by process of law.

"The plaintiff, on this demurrer, admits the existence of this principle contended for by defendant, but says it applies only as between the parties to such a contract, and does not apply as between one of the parties, and his agent, or the agent of all the parties, acting as go between in carrying out the vicious provisions of the contract. The plaintiff quotes and relies upon the opinion of the Kentucky Court of Appeals in case of *Martin v. Richardson*, 94 Ky., 183. Martin was the agent of a lottery company. He sold to Richardson some tickets in his lottery, one of which drew a prize, and while Richardson was ignorant of this fact Martin induced him to exchange the tickets he held for other tickets, and Martin collected the prize from the lottery company. Richardson sued Martin for the money and the Court of Appeals held that he could recover; that even assuming the purchase and sale of the lottery tickets to have been an illegal

transaction, Richardson could not avail himself of that fact as a defense. It seems to me that it would have been strange had the Court of Appeals held otherwise. The purchase and sale of the lottery tickets constituted a transaction that was at most illegal. The act of Martin in procuring an exchange of the tickets was a crime. The Court of Appeals simply refused to permit the commission of an act, at most illegal, by one 'to be plead as a defense to the commission of a crime by another.' It refused to permit the commission of a lesser wrong by one to be used as a defense to the commission of a greater crime by another. This opinion in that case is not applicable to the case at bar.

"The plaintiff quotes and relies upon Wharton on Agency, and the opinion of several State courts, from which it may be assumed to be the rule that an agent who has in his hands money belonging to his principal on a closed account can not set up as a defense in an action by the principal for money had and received the illegality of whole or a part of the transaction. In all the extracts from these authorities quoted in brief for plaintiff the word 'illegal' is used in speaking of the contract. Plaintiff's counsel has not provided this court with the facts of any of the cases he has referred to. The only reference made in any of the extracts set out in plaintiff's brief is to 'illegal' contracts. It appears certain that if Smith had furnished this money to Richmond as his agent for the purpose of conducting a lottery, and that Richmond retained and converted the money, Smith could recover of him, even in a State where the conducting of a lottery was unlawful. But in the case at bar the plaintiff was, for seven years, continuously engaged, not only in conducting an unlawful business, but in attempting, and as he believes successfully attempting, to bribe and corrupt the authorities of Ohio and Cincinnati, and to that end he delivered to Richmond over \$16,000. For the seven years this plaintiff was engaged in the commission of an act that this court may fairly assume to be a crime in the State of Ohio, the place of its commission, counsel for plaintiff has not furnished this court a single instance in which any court has given relief to one in such a position as against a defaulting agent. I believe there is a broad distinction between contracts illegal and contracts criminal, even when considered in reference only to the relations and respective rights of one of the parties thereto and his agent. This plaintiff is asking the law and the courts of Kentucky to aid him in recovering back money that he paid out for seven years, believing it was being used in the bribery of the authorities of a sister State. This does not seem to be the purpose for which the courts of this State are created or are existing. It is but rarely that such an unblushing confession is seen as in the plaintiff's pleadings in this case. It may be observed that Richmond in putting this money in his pocket and keeping it there, although in so doing he defaulted, was guilty of an offense much less than that he would have been guilty of had he carried out the purposes of his principal. In this connection the fact is emphasized that as to Richmond there is no evidence that these things are true, and that they are assumed to be true solely for the purpose of this demurrer. It appears by his own pleading that the hands of Smith are so unclean that he is not entitled to ask any relief in any court, and the demurrer to the petition as amended is sustained. The plaintiff declines to plead further, the petition herein is

dismissed, and it is adjudged that the defendant recover of the plaintiff his costs herein, to which plaintiff excepts, and prays an appeal to the Court of Appeals, which is granted."

It is evident from the pleadings of the appellant that he, the appellee, Richmond, and Davis were engaged in operating lotteries in the city of Cincinnati, which was a violation of the criminal laws of the State; that in order to procure immunity from arrest and punishment, or, in other words, to corrupt the officers and to defeat justice, they made the agreement set out in the petition, and Richmond was to receive and pay over the money to procure the desired immunity from arrest and prosecution; and that the business was so conducted for about seven years, during which time the sum, aggregating \$16,075, was paid over to Richmond. It may be inferred from the petition that the desired protection was secured, as it is nowhere claimed that the object of the agreement was defeated.

Appellant refers to a number of decisions of this and other courts in his two able briefs, which, he claims, sustain his contention in this case. Upon examination of the various cases it will be found that they cover what may be called three classes of cases. One is where a party simply employs a man as agent to go and pay money to a third party for an illegal purpose; another class is where a party may be engaged in an illegal business, and have realized considerable pecuniary profit, in the shape of money or other property, which is in possession of the other party to the crime, in which case some courts hold that such party has in his hands money or property which justly belongs to the other parties; and although it is the fruit of illegal business, yet he will not be allowed to have the same simply because the business which procured the property is illegal. The other class is where employees, who are simply the servants employed to carry on and conduct an illegal business, will not be permitted to withhold from the owner property which was placed in their hands by him for the purpose of conducting or carrying on such illegal business.

The case at bar does not fall within the rule announced in any of the cases referred to. In this case these parties clearly entered into a conspiracy or partnership for the purpose of enabling them to violate the laws of the State of Ohio, and to corrupt or bribe the officers of the law. These parties were in reality partners in the venture or undertaking specified, and in the general course of business, be it legal or illegal, one of the parties only would handle the money or pay out at a time. In other words, all the parties would not be expected to go together and pay out or receive money together, but the act of one is the act of all. We conclude, therefore, that the transaction set up in the petition must be treated as the formation of a partnership for an illegal purpose greatly to be condemned from any standpoint. A corruption of the authorities of a great State or city should not be tolerated. The payment of money to defeat the enforcement of the criminal laws is one of the most heinous of crimes, and no court should afford any relief to the parties engaged in such a nefarious business. The operation of lotteries is by common consent regarded as contrary to public policy, and highly immoral, and this plaintiff has added to that unboly business a still greater crime of bribing public officers and paying money to prevent the enforcement of the criminal laws of a sister State. Both parties, according

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to the petition, are guilty of a great crime, and the court should not bear the complaints of either in respect to the illegal business conducted by them. To allow such would in effect be to wink at, if not to sanction, the most corrupt of practices. We think the opinion of the court below is in accord with nearly all, if not quite all, the authorities respecting such transactions, and in accord with the principles announced in the recent case of Central Trust and Deposit Co. v. Respass, 28 Ky. Law Rep., 1905.

To allow the appellant to recover in this case would in effect be saying to all parties that you can go on with reasonable safety, furnish money to a person for illegal and criminal purposes, and after you have derived the benefit therefrom, sue the so-called agent and recover back the money, unless he, perchance, was able to prove to the satisfaction of the court that he in like manner had paid over the money for the said unlawful purposes. As before stated, we do not think that Richmond was the agent of plaintiff in the legal sense of agency, but was simply one of the partners in crime; and we know of no court that has ever sustained a suit of one partner for an accounting the money invested in an unlawful purpose, especially if such purpose was to violate the criminal laws of a State and shield offenders from punishment, or corrupt public officers.

Judgment affirmed.

Whole court considered this case.

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MORTON'S EX'OR V. TRUSTEES OF THE CHURCH HOME FOR  
FEMALES AND INFIRMARY FOR THE SICK.

(Filed December 9, 1902—Not to be reported.)

Wills—Legacies—Interest—A testator left to appellee a legacy of \$60,000 upon the death of his wife, to whom he had devised the income of his estate for her life. The widow renounced the provisions of the will and thus precipitated the payment of the legacy to appellee, and the court decided that same become due October 15, 1892, and the question involved on this appeal is the method of computing interest on said legacy from the date it was due. Held—That under section 2065, Kentucky Statutes, a legacy shall carry interest after it is due, and the proper method is to calculate the interest as on other debts, applying payments first to the satisfaction of the interest due.

Barnett & Barnett for appellant.

Helm, Bruce & Helm for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge O'Rear.

John P. Morton devised the net income of his estate to his wife for her life. Upon her death, and in certain contingencies named and not necessary to be here enumerated, he gave to appellee the sum of \$60,000. Mrs. Morton renounced the will. Appellee claimed its bequest was then due. On a former appeal (99 Ky., 819) it was held that the effect of the widow's renunciation of the will was to precipitate the maturity of legacies that were by the will postponed till her death. In that opinion it was held that the bequest to appellee was due October 15, 1892.

The executors paid appellees in installments from time to time, finally

extinguishing the claim in December, 1897. The trial court held that these partial payments should be applied first to the payment of interest accrued on the principal sum, and then to the principal. Appellants insist that the legacy was not a debt, and consequently the statute, section 2219, subsection 3, as follows: "Partial payments on a debt bearing interest should be first applied to the deduction of the interest then due," does not apply; but that the \$60,000 should be counted at 6 per cent. per annum interest from October 15, 1892, till December 1, 1897, aggregating \$78,890; that the partial payments made by the executors to appellee should be counted at the same rate of interest from the date they were respectively made, to December 1, 1897, by which it is claimed for appellants they paid \$1,891.88 in excess of the \$78,890.

The theory is advanced that the trustees "borrowed" from the estate of Morton the sums represented by these partial payments till the time when the whole legacy became satisfied. It is not claimed that any such arrangement was in fact entered into between these litigants, or contemplated by them. The fiction is adopted to effect the avoidance of the usual customary application of the rule declared by the statute, supra, concerning the application of partial payments to an interest-bearing demand.

Although the statute uses the word "debt," in our opinion it was intended to include every interest-bearing obligation or demand. When this bequest became due, that is collectible by appellees from appellants, so far as its interest-bearing quality was concerned it was a debt. The estate had and enjoyed for those years a large sum of money which this court has held was due to appellees. It is right in law and conscience, therefore, that the estate should pay for the use of money which it properly should have paid to appellees October 15, 1892. Besides, Kentucky Statutes, section 2065, provides that specific legacies shall carry interest after due. There is no good reason presented, or to us apparent, why the ordinary rule, the one stated in the statute, and applied by the circuit court, is not applicable to this case.

Judgment affirmed.

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LOUISVILLE & NASHVILLE R. R. CO. v. HART, JR., BY, &C.

(Filed December 9, 1902—Not to be reported.)

Railroads—Negligence—Instructions—A section boss on appellant's road, with a crew of hands and a train of cars, were engaged in ditching in a cut, and in order to prevent a train dashing into his train, placed on the track a torpedo to give warning of its approach. The torpedo was placed on the track at a point which was not used as a walk-way, and was not frequented by persons not employed by appellant. While the hands were engaged at work appellee and another boy climbed onto the track and found the torpedo, and appellee loosened it from the rail and carried it home, where he exploded it and a piece of gravel flew into his eye, injuring it so that the eye had to be removed. This action for damages was brought, and a recovery of \$1,000 was awarded to appellee. Held—That the court should have given a peremptory instruction to find for appellant. It was not negligence to place the torpedo on the track as it was placed. The use was a proper one. The torpedo was properly in use at the time of its removal from the track. No greater safeguards could have been adopted than were adopted.



John S. Kelley and Edward W. Hines for appellant.

Nat W. Halstead and Morgan Yewell for appellees.

Appeal from Nelson Circuit Court

Opinion of the court by Judge DuRelle.

The road of appellant railroad company, a short distance from the station at Bardstown, passes over what is, in that neighborhood, called the "little trestle," which is about 180 feet long and 20 feet high at the highest point. Some distance further away from the station what is known as the "big trestle" passes over the Bloomfield pike, being about 71 feet high at the highest point and nearly 600 feet long. Still further away from the station the road passes through a long cut and makes a sharp curve. The ground along this part of the road is very rough and uneven. The right of way is fenced in and protected by barbed-wire fences, and cattle gaps and sign boards are placed conspicuously, warning trespassers. There is no highway except the highway of the railroad, and, while the greater part of this part of the railroad right of way is within the corporate limits of Bardstown, there is no showing that it is used as a passway from one part of the town to another. Everything that could reasonably be expected seems to have been done to prevent people going upon this unusually dangerous part of the right of way. Nevertheless it appears that, possibly from the very fact that the surface of the ground is broken and irregular, and that there are warnings against trespassing thereon, young people did go there from time to time and use the right of way as a walk for pleasure. There is no evidence to show that the railroad company consented in any way to this use. On the contrary, all the testimony indicates that the company endeavored to prevent it.

In October, 1899, the section boss having occasion to do some ditching in the cut before mentioned, placed a torpedo on the track between the trestles and a signal flag. The torpedo was flattened metallic shell, from an inch and a half to two inches in diameter, charged with explosive, and having flexible metallic arms, to be bent around the top of the T-rail so as to hold it in position until it should be exploded by the impact of the wheels. The object of thus placing the torpedo was to give warning to the engineer of the expected train, in the event the signal flag should fail to attract his attention. These torpedoes, when exploded, make a loud report, like the report of a gun, the great object of their construction being to make a noise when exploded. When the section boss and his gang quit work for dinner they took up the flag and torpedo, replacing them when they returned to work.

On the afternoon of that day two little boys, about eight years of age, went down the bluff to the Bloomfield pike, went out the pike to the big trestle, climbed the hill and went upon the track, along which they walked to and across the little trestle, when they turned and retraced their steps. On the way back one of them saw the torpedo, detached it from the rail and gave it to his companion. They then went back by the same way over which they came, until they were nearly at home, when they separated. The boy who had the torpedo went out the pike again, and some unknown fool whom he met on the pike seems to have told him that if he would hit the torpedo

with a hammer a gold dollar would fly out of it. He then went to his own home, procured a hatchet from the kitchen, and in company with his brother and the appellee, who was a child under six years of age, pounded the torpedo until it exploded. A piece of gravel was thrown into the appellee's eye, destroying the sight and necessitating the removal of the eye.

Suit was thereupon brought against the appellant railroad company and a trial had, resulting in a judgment and verdict for \$1,000, from which this appeal is taken. It is unnecessary to follow counsel through the various questions which have been elaborately argued in this case. It is perfectly evident from the testimony that if there is any place on the road where it is proper to use such a contrivance, it was proper at the point at which it was used. The place was out of the way of ordinary travel, was in itself a dangerous place, and was protected and safe-guarded to as great an extent as could possibly be done. There is no question that if the use of such a contrivance was proper at this point, it was proper to use it for the purpose for which it was used on this occasion, to wit, to warn the engineer of the expected train that there were workmen upon the track who might be injured unless the train was stopped. We think, therefore, that it was not negligence to place the torpedo as it is shown by the record in this case to have been placed. The use was a proper one. The torpedo was properly in use at the time of its removal from the track. No greater safeguards could have been adopted than were adopted. It is, therefore, readily distinguishable from those cases where explosives were carelessly stored when not in use, and from the turn-table cases, where the injury took place when the appliance was left carelessly unsecured when not in use.

It is unnecessary, therefore, to consider the argument upon the question whether there was an intervening cause for the accident.

The peremptory instruction should have been given, and the judgment is reversed and cause remanded, with directions to award appellant a new trial and for further proceedings consistent herewith.

Whole court sitting.

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DAVIS' ADM'R v. CHESAPEAKE & OHIO RY. CO., &c.

(Filed December 9, 1902.)

Corporations of other States becoming corporations of this State—Constitutional law—Removal of actions to Federal courts—This action was brought against appellee to recover damages for injuries resulting in the death of appellant's intestate, alleged to have been caused by the negligence of appellee, its agents and servants, in the operation of its train of cars in Lewis county. The petition alleges that pursuant to section 211 of Constitution and section 841, Kentucky Statutes, the appellee became a corporation, citizen and resident of this State, by filing in the office of the secretary of state and in the office of the railroad commission copies of the charters or articles of incorporation of the Chesapeake & Ohio Ry. Co., organized under the laws of Virginia and West Virginia, authenticated by its seal and by the attestation of its president and secretary, by virtue whereof said company at once became, and is now, a corporation, citizen and resident of this State, and that thereupon a certificate of said incorporation was issued to appellee by the secretary of state. At the succeeding term of the court appellee filed its petition and

bond for the removal of the action to the United Circuit Court for the Eastern District of Kentucky, upon the allegation that it was and always had been a foreign corporation, organized under the laws of Virginia. The lower court ordered a removal of the action, from which order this appeal is prosecuted. The sole question presented on this appeal is whether or not appellee, having complied with the requirements of the Constitution and statutes above referred to, has become a resident corporation, which would prevent a removal of the action to the Federal court. Held—That by compliance with the provisions of section 841, Kentucky Statutes, there was created and organized a railroad corporation, the appellee herein; that corporation so created and organized is a citizen and resident of this State, and as this domestic corporation was made defendant in the original petition, there existed no grounds to authorize a removal to the United States Circuit Court. Both the plaintiff and defendant were citizens and residents of this State. The authority acquired by the appellee was not a mere license to carry on its business in this State. The whole question is one of legislative intent, and there can be no question as to the intention to create a corporation when section 841 is complied with.

A. E. Cole & Son for appellant.

W. H. Wadsworth and E. L. Worthington for appellees.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge White.

This is an action for damages for the death of Henrietta Davis, alleged to have been caused by the negligence of appellee, its agents and servants, in the operation of a train of cars in Lewis county.

The petition was filed September 18, 1901, and summons was served September 19, 1901. The January term, 1902, was the appearance term, at which the defendant was required to answer. On October 5, 1901, an amended petition was filed, making Wm. Lewis, the engineer, Bracken, conductor, and Henry Inskip, brakeman, all alleged to have been in charge of the train that killed Henrietta Davis, parties defendant. In due time, at the January term, 1902, the appellee, Chesapeake & Ohio Ry. Co., filed its petition and bond for removal of the action to the United States Circuit for the Eastern District of Kentucky, upon the allegation that it was, and had always been, a foreign corporation, organized under the laws of the State of Virginia, and upon the allegation that no such person as Lewis, Bracken and Inskip, or either of them, were on the train, or in charge of the train, that killed Henrietta Davis, and the amendment making such persons parties defendants was done for the fraudulent purpose, if possible, to defeat a removal to the United States Court.

The appellant offered to file a second amendment making the Maysville & Big Sandy R. R. Co. a party defendant, which the court refused to permit. The cause was then, on appellee's motion, ordered removed to the United States Circuit Court, and from that order this appeal is prosecuted.

The original petition filed herein describes appellee, Chesapeake & Ohio Ry. Co., as a corporation of this State, and pleads in these words: "Plaintiff states that on the — day of December, 1898, pursuant to section 211 of the Constitution of Kentucky, and section 841, Kentucky Statutes, the defendant, Chesapeake & Ohio Ry. Co., became a corporation, citizen and resident of this State by filing in the office of the secretary of state,

and in the office of the railroad commission, copies of the charters or articles of incorporation of the Chesapeake & Ohio Ry. Co., organized under the laws of Virginia and West Virginia, authenticated by its seal and by the attestation of its president and secretary, by virtue whereof said company at once became, and is now, a corporation, citizen and resident of this State, and that thereupon a certificate of said incorporation was issued to defendant by the secretary of state."

In the petition for removal the allegation is made that the defendant was, at the time of the filing of this suit, a corporation created, organized and existing under and by virtue of the laws of the State of Virginia, and of no other State. The facts pleaded by plaintiff as to compliance with section 841, Kentucky Statutes, by filing copies of the charter, etc., are not denied or in any way put in issue. The legal question presented on the petition for removal then is whether a compliance with the provisions of section 841 of Kentucky Statutes and section 211 of the Constitution created a corporation in this State, so that it was then a citizen and resident herein.

Section 211 of the Constitution provides: "No railroad corporation organized under the laws of any other State, or of the United States, and doing business, or proposing to do business, in this State, shall be entitled to the benefit of the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses until it shall have become a body-corporate pursuant to and in accordance with the laws of this Commonwealth."

Section 841 of Kentucky Statutes provides: "No company, association or corporation created by or organized under the laws or authority of any State or country other than this State shall possess, control, maintain, or operate any railway, or part thereof, in this State until, by incorporation under the laws of this State, the same shall have become a corporation, citizen and resident of this State. Any such company, association or corporation may, for the purpose of possession, controlling, maintaining, or operating a railway, or part thereof, in this State, become a corporation, citizen and resident of this State by being incorporated in the manner following, namely: By filing in the office of the secretary of state, and in the office of the railroad commission, a copy of the charter or articles of incorporation of such company, association or corporation, authenticated by its seal and by the attestation of its president and secretary, and thereupon, by virtue thereof, such company, association or corporation shall at once become, and be, a corporation, citizen and resident of this State. The secretary of state shall issue to such corporation a certificate of such incorporation."

The allegations of the original petition of appellant are that all these provisions of the law were complied with, and that a certificate of incorporation was issued by the secretary of state, and the defendant is sued as a Kentucky corporation. It is quite clear from the statute quoted that the legislature intended that the foreign railroad company should become a corporation of this State, and then an easy and convenient means of so doing was provided. Having complied with the provisions of that law and become, so far as that law can or does create, a corporation, citizen and resident of this State, the question is presented, has the original or first corporation the right to remove suits brought against the alleged Kentucky corporation upon the

allegation of diverse citizenship? If in this case there are two corporations, although of the same name, it is clear that the foreign corporation can not remove, for it is not made a party, but if there be only one corporation, and that a Virginia corporation, the right of removal would not be defeated by an allegation that defendant was a corporation, citizen and resident of this State.

This is a question of law that was properly presented by the original petition and the petition for removal, and upon hearing the lower court necessarily held that there was but one corporation, and that one was created by and organized under and by virtue of the laws of Virginia. This question is one of great importance to the State and the public as well as the parties hereto, and it seems has never been decided by this court. In some form or other this question has been presented to the United States Supreme Court and to the Federal Circuit Court of Appeals, and to the circuit courts under various statutes of the different States, and has been decided.

In the Supreme Court, in the case of *Gerling v. Railroad Co.*, 151 U. S., 673, Mr. Justice Gray classified the different states of case on which removal depended thus: "A railroad corporation created by the laws of one State may carry on business in another by virtue of being created a corporation by the laws of the latter State; also, as in *Railway Co. v. Vance*, 93 U. S., 450; *Memphis & C. R. Co. v. Alabama*, 107 U. S., 581; *Clark v. Barnard*, 108 U. S., 436; *Stone v. Trust Co.*, 116 U. S., 307, and *Graham v. Railroad Co.*, 118 U. S., 161, or by virtue of a license, permission or authority granted by the laws of the latter State to act in that State under its charter from the former State. (*Railroad Co. v. Harris*, 12 Wall., 65; *Railroad Co. v. Koontz*, 104 U. S., 5; *Pennsylvania R. Co. v. St. L. & T. H. R. Co.*, 118 U. S., 290; *Mare v. Railroad Co.*, 127 U. S., 117.) In the first alternative it can not remove into the circuit court of the United States a suit brought against it in a court of the latter State by a citizen of that State, because it is a citizen of the same State with him. (*Memphis & C. R. Co. v. Alabama*, above cited.) In the second alternative, it can remove a suit because it is a citizen of a different State from the plaintiff." (*Railroad Co. v. Koontz*, above cited.)

To which of these two classes does this case belong? Was the foreign railroad corporation licensed, permitted and authorized to do business in this State under its foreign charter? Or was a new corporation created by the law (section 841) and compliance therewith by the appellee? It is clear from the section of the Constitution, and the wording of the act itself, that the legislative intent was to create a new corporation, that would be a citizen and a resident of this State, and be in fact a Kentucky corporation. We say there can be no doubt that such was the intention of the act, but the inquiry arises, does the law accomplish what the legislators had in mind to do?

In 1889 the legislature of Georgia passed an act providing for a releasing of the Western & Atlantic Railroad and for its operation by the lessee. That act, passed November 12, 1889, provided, among other things, as follows: \* \* \* "The persons, associations or corporations accepted as lessees under this act, if not already a corporation created under the laws of Georgia, shall from the time of such acceptance, and until after the final adjustment of all matters springing out of this lease contract, become a

body-politic and corporate under the laws of this State, under the name and style of the Western & Atlantic Railroad Co., which body-corporate shall be operated only from the time of their taking possession of said road as lessees; and it shall have the power to sue and be sued," etc.

The Nashville & Chattanooga Railroad Co., a Tennessee corporation, became the lessees under the act and the question coming before the Supreme Court of Georgia (16 S. E. Rep., 347), that court held that the act of 1889 created a new corporation in the State of Georgia, known as Western & Atlantic Railroad Co., and that for an injury in Georgia, an action would not lie against the Nashville, Chattanooga & St. Louis Railroad Co., but should be against the home corporation, viz., Western & Atlantic Railroad Co. The same question as to whether the act of 1889 of Georgia created a new corporation, came before the United States Circuit Court of Appeals, Sixth Circuit, before J. J. Taft, Lurton and Barr, district judge in the case of Western & Atlantic Railroad Co. v. Roberson, 61 Fed., 592. It was there held that the act of Georgia created a corporation, and an action might be maintained in the United States Court in Tennessee by a citizen of Tennessee for an injury done in that State, because there was diverse citizenship shown.

In Railroad Co. v. Vance, 96 U. S., 450, the facts appear to be that the Indianapolis & St. Louis Railroad Co. was an Indiana corporation, and leased the St. Louis, Alton & Terre Haute Railroad, which was an Illinois corporation.

The legislature of Illinois passed an act confirming and ratifying the lease. The act provides: "The said lessees, their associates, successors and assigns, shall be a railroad corporation in this State, under the said style of 'The Indianapolis & St. Louis Railroad Co.,' and shall possess the same, or as large, powers as are possessed by said lessor corporation, and such other powers as are usual to railroad corporations."

The Supreme Court, by Mr. Justice Harlan, said: "The Indianapolis & St. Louis Railroad Co., as lessee of the St. Louis, Alton & Terre Haute Railroad Co., was thus created by apt words, a corporation in Illinois. The fact that it bears the same name as that given to the company incorporated by Indiana can not change the fact that it is a distinct corporation, having a separate existence, derived from the legislation of another State."

In an action between these two railroad corporations, styled St. Louis, Alton & Terre Haute Railroad Co. v. The Indianapolis & St. Louis Railroad Co., before the circuit court, 9 Bissel, 144, and styled Pennsylvania R. Co. v. St. Louis, Alton & Terre Haute Railroad Co., in the Supreme Court, 118 U. S., 290, a question of jurisdiction was presented depending on whether the St. Louis, Alton & Terre Haute Railroad Co. was a corporation of Indiana.

The Supreme Court, by Mr. Justice Miller, said: "It does not seem to admit of question that a corporation of one State, owning the property and doing business in another State by permission of the latter, does not thereby become a citizen of this State also. And so a corporation of Illinois, authorized by its laws to build a railroad across the State from the Mississippi river to its Eastern boundary, may by the permission of the State of Indiana ex-

tend its road a few miles within the limits of the latter, or, indeed, through the entire State, and may use and operate the line as one road by permission of the State, without thereby becoming a corporation or a citizen of the State of Indiana. Nor does it seem to us that an act of the legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the State of Indiana as have been conferred on it by the State which created it, constitutes it a corporation of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence under the laws of another State to exercise its functions in the State where it is so received. The latter class of laws are common in authorizing insurance companies, banking companies and others to do business in other States than those which have chartered them. To make such a company a corporation of another State, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the State, or by the legislature, and such allegiance as a State corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the State conferring such powers.

In a case where the corporation already exists, even if adopted by the law of another State and invested with full corporate powers, it does not thereby become such new corporation of another State until it does some act which signifies its acceptance of this legislation and its purpose to be governed by it." We think what has occurred between the State of Indiana and the Illinois corporation falls short of that."

The same court, but a few days later, decided the case of *Graham v. Railroad Co.*, 118 U. S., 161, and by Mr. Justice Blatchford said, page 167: "This act (of New York) professes in its title to be an act to consolidate the three companies. It authorizes the sale to the Boston, Hartford & Erie Co. of the franchises and property of the other two corporations (which were New York corporations), and provide that such sale shall pass the title to such franchises and property, and that such purchasing company shall thereby 'become possessed of the rights of charter and property sold,' and thereafter have, hold and use the same in its 'own name and right.' As a purchaser of what this act authorized to be sold to it, the company purchasing became a New York corporation, by its then existing name."

Following the doctrine announced in these cases, and they have not been overruled, we are of opinion that by compliance with the provisions of section 841, Kentucky Statutes, there was created and organized a railroad corporation, the appellee herein. That corporation, so created and organized, is a citizen and resident of this State, and as this domestic corporation was made defendant in the original petition there existed no grounds to authorize a removal to the United States Circuit Court. Both the plaintiff and the defendant were citizens and residents of this State. We recognize the distinction between license and authority granted to a foreign corporation to do business here and an incorporation as provided in section 841.

In the case of the *Commonwealth v. M. & O. Railroad Co.*, 23 Ky. Law

Rep., 784, there were presented facts showing a license to that corporation to do business in this State under its foreign charter, by act of the legislature of this State in February, 1848. That company was indicted in the Carlisle Circuit Court under section 842 for a failure to comply with the provisions of section 841, and for operating a railroad without such compliance. The court held that under the act of 1848 there was a grant of license or authority to the railroad company to do business and acquire property in this State as a foreign corporation, and, therefore, it could not be compelled to incorporate here or to do anything additional than had been required under the act of 1848.

The court said, per O'Rear, J.: "If section 841 is applied to appellee, it will be required, in order to continue the use and enjoyment of the privileges granted to it in 1848, to do something in addition to that required by terms of the grant. It will be compelled to take up the burdens of a citizenship which it has not hitherto had to bear, and deprive itself of privileges deemed by many, or all similarly situated, to be of considerable pecuniary value."

The court had in that opinion previously said: "One of the advantages now thought to pertain to its nonresidency is the privilege of claiming the jurisdiction of the Federal courts in certain actions."

It will thus be seen that the difference between a grant of license and authority to a foreign railroad company to do business in this State and an incorporation under section 841 of Kentucky Statutes has been recognized by this court.

In the argument of that case learned counsel for the railroad company conceded that the effect of a compliance with section 841 was to create a corporation by and under authority of the laws of this State. The opinion so holds, and that holding was necessary to reach the conclusion therein expressed. If a compliance with section 841 was merely formal, a police regulation, and affected no change in status, or of substantial right, the railroad corporation might have been required to comply therewith, and for a failure to do so been subjected to the penalties of section 842. But as the court held that a compliance with section 841 made a material change in the position of the railroad and required it to surrender a valuable right, that of claiming the jurisdiction of the Federal courts in certain cases, the court held it could not be required to comply with section 841 because of its contract created by the acceptance of the grant of 1848. But it is said by learned counsel for appellee that the cases of *Railroad v. James*, 161 U. S., 545, and *Louisville, & Co., R. R. Co. v. Louisville Trust Co.*, 174 U. S., 552, hold that by compliance with section 841 the company so complying does not become a domestic corporation of this State.

In our opinion neither of the cases go to the extent claimed by counsel. The case of *Railroad v. James* was an action by a citizen of the State of Missouri against the railroad for an injury done in the State of Missouri and brought in the Federal court. The allegation of the petition was that the railroad corporation was a corporation of the State of Arkansas. By answer it was denied that the defendant was a corporation of Arkansas, and the allegation was made that it was a corporation of Missouri. This plea presented a question of jurisdiction in the United States Circuit Court.

We confess there are utterances in that opinion that would go to the extent



of holding that a corporation already in existence can not be reincorporated by another State, but that persons must always be named as corporators. Yet we find in the opinion the following: "It is competent for a railroad corporation organized under the laws of one State, when authorized to do so by consent of the State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State. \* \* \* Such corporations may be treated by each of the States whose legislative grant they accept as domestic corporations."

Again, at page 565, the court said: "But whatever may be the effect of such legislation in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we can not concede that it availed to create an Arkansas corporation out of a foreign corporation in such a sense as to make it a citizen of Arkansas within the meaning of the Federal Constitution, so as to subject it as such to a suit by a citizen of the State of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that Constitution, as construed by the decisions of this court, it would be necessary to create it out of natural persons, whose citizenship of the State creating it could be imputed to the corporation itself."

By this we understand the court to mean that the legislature by the laws of one State can not, out of a corporation already in existence in some foreign State, make a corporation, but that to create this artificial body there must be used in its creation some natural persons. Most assuredly that is true. The legislature of this State can not, by any sort of enactment, remove an artificial body, created solely by reason of the law of some other State, out of the State of its creation into this State, and likewise, if the corporation has been created once by the law of any State, that corporation can not be created by our law. It can not be recreated, because it has an existence. It can not migrate because the laws of the State which created it can not have force beyond the territorial boundary of such State. But that opinion does not deny the right of any State to create a corporation having the same name and powers and composed of the same stockholders of a corporation existing in another State. Indeed it is expressly said this may be done if persons are used to form the corporation. So far as we are advised it is always necessary to use natural persons to organize a corporation. Such we understand to be the meaning of section 841. The stockholders and persons composing the foreign railroad corporation, company or association shall organize into a domestic corporation before they can own, control or operate a railroad.

This corporation so organized and created is a citizen and resident of this State. For convenience in organization and to save expense these stockholders and persons are permitted, instead of complying with our general statute as to the organization of railroad companies, to file the copies of their articles of incorporation or charter granted them, properly identified as such by the certificate of the president and secretary of the company. When this is done, by the very words of the statute, a corporation, resident and citizen of this State, is created and organized. The statute uses the

words company, association or corporation. These words necessarily mean an association of natural persons into one common undertaking. Whether it be a partnership, spoken of as company, a joint stock association or a regularly chartered corporation that composes the foreign railway company, when it comes into this State it must be, and becomes, a domestic corporation, a citizen and resident of this State, which can only be done by being created and organized under our law into a corporation. These persons might organize regularly under the provisions of the general corporation statute into a corporation if they choose, but being already engaged in the business of owning, controlling and maintaining or operating railroads, it is presumed their articles already signed are sufficient, and our statute accepts such articles in lieu of new ones. There is nothing in the case of *Louisville, & Co. v. R. Co. v. Louisville Trust Co.*, 174 U. S., 552, contrary to this view.

That opinion was written by Mr. Justice Gray, who had written *Gerling v. Railroad Co.*, 151 U. S., 673, and also the opinion in *Memphis & C. R. Co. v. Alabama*, 107 U. S., 581, and instead of overruling either case, or in any way offering a criticism as to their correctness, he makes extracts from these opinions, and also cites 96 U. S., 450, *Railroad Co. v. Vance*; 108, U. S., 436, *Clark v. Barnard*; 118 U. S., 161, *Graham v. Railroad Co.*, and that line of cases to support his position. The real question determined in the *Louisville R. Co. v. Louisville Trust Co.* case was the right of an Indiana corporation to sue in the Federal court in Kentucky a corporation of Kentucky, when the same stockholders and persons composing the Indiana corporation had also been incorporated in Kentucky under the same name and for the same purposes. The right was upheld and jurisdiction was sustained. So here the Virginia corporation might have been sued, in which case a right of removal would have existed. This was not done, however. The corporation was sued that was organized and created by the filing in the offices of the secretary of state and railroad commission copies of the articles of incorporation of the Chesapeake & Ohio Railway Co., as provided by section 841, and which corporation being thus created and organized, was a corporation, citizen and resident of this State; and while its powers, duties, objects and stockholders were the same as in the Virginia corporation of the same name, this was a separate and distinct corporation because created by a different sovereignty.

So far as we have examined the adjudicated cases and the text-writers on the subject, it seems to be universally conceded that the question of whether a corporation has been created is never one of power in the State so to do, but always one of legislative intent.

In the case of *Railroad v. Harris*, 12 Wallace, —, where the Supreme Court differs from the Court of Appeals of Virginia, and of West Virginia, as to whether by an act of the Virginia Legislature the Baltimore & Ohio Railway Co. became also a Virginia corporation, it was fully conceded that such might have been done if the legislature had so intended. The Virginia courts had concluded that the intention was manifested in the act, but the Supreme Court thought otherwise. The legislation of this State furnishes ample illustration of the difference between a license to a foreign railroad company to do business in this State and an act reincorporating a railroad

corporation of another State. Let us take an example. By an act of March, 1872, entitled "An act to authorize the Mississippi Central Railroad Co. to extend their road into and through the State of Kentucky," the corporation was declared a body-politic and corporate and authorized to construct and operate its road through Kentucky to the Ohio river. This, under the rule of the Supreme Court, was a mere license to a foreign corporation to do business in this State. The Mississippi Central Railroad Co. at that time existed under the laws of Mississippi, of Tennessee and of Louisiana.

In 1877 these corporations were consolidated by enabling acts of the three States in one company, called Chicago, St. Louis & New Orleans Railway Co., and in March, 1878, the legislature of this State ratified the former act, and the consolidation of the three corporations into one, and granted a charter to the consolidated company. In an action brought in this State by a citizen, a removal was taken to the United States Circuit Court upon a petition alleging that the defendant, Chicago, St. Louis & New Orleans Railroad Co., was a foreign corporation, its habitat being Louisiana.

Upon motion to remand Hammond, District Judge, 5 Fed. Rep., 545, held it was a corporation of this State, and remanded the case, because that court had no jurisdiction.

Subsequently, in 188-, the legislature of this State passed an act authorizing the Illinois Central Railroad Co., an Illinois corporation, to acquire and operate, by lease or purchase, the line of the Chicago, St. Louis & New Orleans Railway Co., and it is a matter of common knowledge that in compliance with that legislative permission a lease for a long term of years was executed to the Illinois Central Railroad Co., and that company now operates the line of road. This latter act authorizing the acquisition by the Illinois Central Railroad Co. was a mere license to the foreign railroad corporation to do business in this State. Since the passage of that act section 841 has been passed, and suppose now that the Illinois Central Railroad Co. desires to build a line of road for itself in this State, and in order to place itself within the constitutional provision so as to exercise the power of eminent domain its stockholders comply with section 841, Kentucky Statutes.

In such case no court would be justified in holding that that act by the company's stockholders did no more than was done by the act of the legislature authorizing the lease. This history of one line of railroad, and the different acts of the legislature of this State in relation thereto, show clearly the distinction and difference between the intent to license and to create a corporation. It has been repeatedly said by all the text-writers and authorities that no particular form of words is necessary to create a corporation or to grant corporate powers. If the act shows that it was the intention to create a corporation, such has always been held to be the effect.

In the case of Grangers Life and Health Ins. Co. v. Kamper, in 78 Ala., 325, the question arose as to whether the insurance company was a corporation of the State of Mississippi as well as the State of Alabama, where the first charter was granted. The court concluded that it was a corporation in Mississippi and said, page 344: "This act (of Mississippi) authorized the company to establish in that State one or more departments. But no department could be established until citizens of the State had subscribed for

and paid or secured, to the satisfaction of the president and general board of directors, a capital stock of \$100,000; and the directors of each department were required to be citizens of the State. Upon the establishment of a department it was declared the corporation was to be regarded as a home company, and should be entitled to have and enjoy all the rights, privileges, immunities and exemptions of life insurance companies incorporated by the laws of Mississippi. Under this act a department was organized, and it may perhaps be inferred from the averments of the bill that it was for stock of the department, and not for the capital stock of the company in this State, the appellees were subscribers. The effect of this act was not merely to license or to enable the corporation formed in this State to transact business and exercise its powers in Mississippi. It is of far wider operation, and creates a corporation having the same name, and like franchises, as the corporation formed in this State, whenever there was an organization in pursuance of its provisions, a domestic corporation, in the words of the act, a home company. \* \* \* When there was an organization in pursuance of its provisions a corporation existed, having its own capital, its own members, its own domicile, its own governing body; and its corporate powers were derived not from a foreign power, or by reference to the powers a foreign power may have conferred on a corporation of its creation, but were the rights, privileges, immunities and exemptions of life insurance companies incorporated under the laws of Mississippi. The act, when accepted, when there was an organization under its provisions, became a contract between the State and the corporators."

In the case of *McGregor, qui tam. v. Erie Railway Co.*, 35 N. J. Law, 115, the Supreme Court of New Jersey held that the Erie Railway Co. was a domestic corporation by reason of certain acts of the legislature. The court said: "The title of the act of 1862 declares that it is an act not only to confirm the sale under the foreclosure of the property, rights and franchises of the New York & Erie Railroad Co., but to complete the organization of the Erie Railway Co., and the powers and provisions of that act, with the preliminary act of 1860, are such as necessarily to give the Erie Railway Co. the character of a corporation of this State, although it is not so expressly declared. (10 Wall., 567.) There is not a mere incidental power conferred or confirmed, but the intrinsic nature of the franchises and privileges the Erie company is authorized to possess and enjoy in its corporate name, as well as the liabilities imposed by the act of 1862, were such as, ipso facto, to make it a domestic corporation."

In the case of *Debnam v. Southern Bell Tel. Co.*, decided by the Supreme Court of North Carolina June 7, 1900, 38 S. E. Rep., 269, the court, after a careful review of all the Federal authorities, held that the Southern Bell Tel. Co. was not entitled to a removal because it had been created a corporation by the laws of North Carolina. The court, by Douglas, J., after quoting from the case of *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S., 562, as follows: "This court has often recognized that a corporation of one State may be made a corporation of another State by the legislature of that State, in regard to property and acts within its territorial jurisdiction (citing 1 Black, 286; 12 Wall., 65; 13 Wall., 270; 96 U. S., 450; 107 U. S., 581; 103 U. S., 433; 116 U. S., 307; 118 U. S., 161; 151 U. S., 673,

and again on the same page), but this court has repeatedly said that in order to make a corporation already in existence under the laws of one State a corporation of another State, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the State or by the legislature, and such allegiance as a State corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation without more does not do this, said: 'This clear and concise statement of the law would meet our unqualified approval, even if it had come from a different source. Applying this rule in its strictest form, we are clearly of opinion that the act now under consideration does not pretend to be a mere grant of privileges or powers, but is, in legal intent and effect, a creation or adoption in such form as to confer the power usually exercised over corporations by the State or legislature, and such allegiance as a State corporation owes its creator. The act says in express terms that every telephone \* \* \* company incorporated, created and organized under and by virtue of the laws of any State or government other than that of North Carolina, desiring to own property or to carry on business or to exercise any corporate franchise whatsoever in this State, shall become a domestic corporation of the State of North Carolina by filing, etc.; that when any such corporation shall have complied with the provisions of this act above set out, it shall thereupon immediately become a corporation of this State, and shall enjoy the rights and privileges, and be subject to the liability of corporations of this State, the same as if such corporation had been originally created by the laws of this State. \* \* \* We are of opinion that as the defendant has become a domestic corporation of the State of North Carolina, and in contemplation of law a citizen thereof, and as the plaintiff has sued the defendant as a North Carolina corporation upon a cause of action which discloses no Federal question whatever, the case can not be removed into the circuit court of the United States.'

The cases might be multiplied to sustain this view that section 841, Kentucky Statutes, is not a mere license to a foreign corporation, but was in itself a creative statute, providing when certain formalities are complied with a corporation is created in this State. The whole question is one of legislative intent, and as we said above, there can here be no question as to the intention to create a corporation when section 841 is complied with.

Appellee, Chesapeake & Ohio Railway Co., having complied with that section, became a corporation of this State, a citizen and resident herein, and being such and sued on a cause of action presenting no Federal question, was not entitled to a removal to the United States Circuit Court.

We are aware that Judge Barr, in the case of Talyor v. Illinois Central R. Co., 89 Fed. Rep., 119, took a different view from the one here expressed, and while we greatly admire and respect his ability as a judge, we can not agree with him as to the purpose, meaning and effect of our statutes. It is suggested that section 841, Kentucky Statutes, is unconstitutional because in conflict with the commerce clause of the Federal Constitution. We are of the opinion that there is no conflict, and if there be the same conflict would exist between section 211 of our Constitution and the commerce clause of the Federal Constitution. There is nothing in section 211 of the Constitution, or section 841, Kentucky Statutes, that in any way interferes with

interstate commerce. So far as section 841 provides, the appellee, Chesapeake & Ohio Railway Co., may carry all articles of commerce that it may receive outside the State to any point it pleases, in or out of the State, but it can not do an intra State business without a compliance with this section.

This is like our statute providing for separate coaches for the white and colored passengers. That law is valid, and has been upheld as to all passengers from points in this State to other points in the State, but would not apply to passengers taken outside of the State. Does not apply to interstate business. The question as to the validity of this statute was directly before this court in the Mobile & Ohio Railroad case, *supra*, and it was therein expressly held not to violate the Constitution. The foreign railroad corporation may, under a license or by mere acquiescence, engage in interstate commerce through this State; but it could exercise no power of eminent domain for any purpose whatever. Nor could the legislature grant to such foreign corporation the power of eminent domain because of section 211 of the Constitution. If the power and right of eminent domain is to be exercised, it is necessary that the railroad corporation that exercises it be a corporation of this State.

The Virginia corporation could not exercise the power of eminent domain, and by incorporating in this State under the provisions of section 841, Kentucky Statutes, this valuable right and great power is conferred on the incorporators. By compliance with this provision there was a right conferred, and power given, that could only be given to a domestic corporation, and we hold that at the same time, and in order to acquire this right of eminent domain, a corporation was created. It is to be presumed that the corporators, stockholders and directors who voluntarily complied with section 841 desired to possess the right of eminent domain, and as that could only be obtained in this State by a domestic corporation, voluntarily sought to be, and was, created and organized into a corporation by compliance with section 841.

We conclude, therefore, that appellee is a corporation of this State, and as such was sued, and its petition for removal to the Federal court was insufficient, as there was no showing of diverse citizenship.

The order and judgment of removal was, therefore, erroneous, and is reversed and cause remanded for further proceedings consistent herewith.

Whole court sitting.

Judges DuRelle, Burnam and O'Rear dissenting.

Judge O'Rear delivered the following dissenting opinion:

This is an action brought originally against appellee, Chesapeake & Ohio Ry. Co., by appellant for the death of appellant's intestate, alleged to have been caused by the negligent act of appellee in the operation of its railroad train in Lewis county. Subsequent to the filing of the original petition the persons alleged to have been in charge of the train as engineer, fireman and brakeman were made defendants, but they have not been served with process and are not before the court, and in the petition for a removal it is alleged that they were not upon or in charge of the train at the time of the accident. Later the Maysville & Big Sandy R. R. Co. was joined as defendant, it being the owner and lessor of the track and right of way over which appellee is operating its road, but it has not been brought before the court.

The sole defendant at the time of the removal proceedings was the appellee, Chesapeake & Ohio Ry. Co.

The majority opinion assumes the proposition in this case to be, and I think correctly, alone whether appellee's compliance with section 841 of the Kentucky Statutes constitutes it a domestic corporation. If it does, appellant being also a citizen of Kentucky, the cause is not removable to the Federal court. This question might be divided for consideration into these two heads:

1st. Is it competent for the legislature to deny a continuance of the privilege to a foreign corporation already within its borders and engaged in the business of carrying on interstate commerce, unless such foreign corporation shall, under such onerous penalties as to practically amount to confiscation of its property, become a citizen of this State?

2d. If such foreign corporation should accept the terms so prescribed by the legislature, would it thereby become a citizen of the State of Kentucky in the sense employed in the Federal statutes, so that a suit against it by a citizen of this State would not be removable into the United States Courts?

The complex nature of our government has first and last been the source of much discussion and occasional conflict of jurisdiction between the State and Federal authorities. Without attempting to enter upon an analysis or a discussion of this question, I hold to the opinion that in those matters where the Federal Constitution reserved to the Federal government exclusive jurisdiction, the rights of the States over such may not be extended beyond legitimate and proper taxation and the exercise of its police power. In other respects, the Federal control of the question is, and from the very nature of the case must be, ample, complete and exclusive, and may be exercised as if State lines did not exist. Among these subjects is that of interstate commerce. It is not pretended in this case that section 841 of the statute under discussion was intended to be, or is, an exercise of either the taxing power or that it is a police regulation by the State government. The record in this case discloses the fact to be that prior to the enactment of section 841 there existed in this State a railroad corporation created by the laws of this State, known as the Maysville & Big Sandy R. R. Co., which owned a right of way and roadbed extending from Boyd county, Kentucky, to Covington, Kentucky; that appellee, before the enactment of the statute mentioned, acquired from the Maysville & Big Sandy R. R. Co., by lease for a long term of years its roadbed and properties, and has since been, and is now, operating same under that lease; that appellee Chesapeake & Ohio Ry. Co. is a corporation originally created by the State of Virginia, with an enabling act by the State of West Virginia. Thus it would appear, and it is not questioned in this case, that appellee was engaged in carrying interstate traffic between the States of Virginia, West Virginia, Kentucky and Ohio. Appellant's petition alleges the lease above referred to in such terms as to permit us to indulge the presumption in this record that the lease was regularly entered into by the permission of this State. Whether such permission is evidenced by a general enactment, or by special act authorizing it, it will amount at least to a license at the time the contract of lease was made. Allowing these facts to be true, then was it competent for the legislature of this State to prohibit appellees continuing

the enjoyment of the property it had acquired under the provision referred to, and its use in carrying on interstate commerce, without appellee should become incorporated as a citizen of Kentucky, and give up the privileges and rights attaching to its then existence as a citizen solely of another State? I maintain that it could not. If the State could legally require that all persons engaged in interstate traffic within the borders of this State should become first citizens of this State, it would be equivalent to saying that none but citizens of this State could engage therein in such traffic. The penalty of \$1,000 per day denounced by statute against all who refuse or fail to first become citizens of this State before they can operate, or continue to operate, a railroad in or through this State is manifestly prohibitive. By statute none but corporations can acquire in this State the right to operate railroads. If no corporation but one created by this State, in every sense of the word a domestic corporation, can operate a railroad in this State, then it necessarily follows that this State not only could, but would by the operation of the statute quoted, if given the effect ascribed to it by the majority opinion, effectually control all commerce within and through this State. If it be conceded that the State may say who may and who shall not carry on the business of a common carrier within its borders, it must of necessity follow that such State exclusively controls and regulates the matter of all commerce therein. In all other things than that of interstate commerce a State may regulate the entrance, or even deny altogether the admission, of foreign corporations to do business therein. It has been definitely settled, too, that a corporation is not a citizen within the meaning of the provisions of the Federal Constitution, providing that citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.

The precise question of the power of a State to regulate the conduct of interstate commerce by first requiring a license of a common carrier engaged therein, although such carrier was a foreign corporation, was directly presented and determined in the case of *Crutcher v. Kentucky*, 141 U. S., 47. In that case the court said: "If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the province of the State legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities as a matter of convenience in carrying on their business can not have the effect of depriving them of such right, unless congress should see fit to impose some contrary regulation on the subject."

In *Norfolk & Western R. R. Co. v. Pennsylvania*, 136 U. S., 114, the facts were that the State of Pennsylvania undertook by an act of the legislature to require all foreign corporations having an office or offices in that Commonwealth to pay an annual license fee, and providing a penalty for the failure. The Norfolk & Western R. R. Co. was a corporation created by the laws of Virginia and West Virginia, and engaged in the carrying on of interstate traffic through other States, and by traffic arrangements into the State of Pennsylvania. Having failed to take out the license prescribed by



the Pennsylvania act, judgment was rendered against the railroad company for penalties. Upon appeal the Supreme Court of the United States, speaking through Mr. Justice Lamar, held: "It is well settled by numerous decisions of this court that a State can not, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burden upon such commerce within its limits."

It would seem to follow as a consequence that if a State can not regulate or exclude from its jurisdiction a foreign corporation engaged in interstate commerce by the adoption of "the guise of a license tax," it could not do so by any guise.

In *Pickard v. Pullman Southern Car Co.*, 117 U. S., 84, the State of Tennessee sought to impose a license tax upon a Kentucky corporation, which was engaged in furnishing cars for the transportation of passengers between the States. The Tennessee statute was held to be invalid as being an interference with interstate commerce.

Whether a foreign corporation proposing to engage, or being engaged, in carrying interstate commerce would have the right to enter any State without its permission, and to acquire a right of way therein, is a question not presented in this case, and one that has not, so far as I am advised, been expressly determined.

In the case of *St. Louis & San Francisco Ry. Co. v. James*, 161 U. S., 554, opinion by Mr. Justice Shiras, it was intimated that the right existed, at least the question is there clearly shown to be an open one so far as the Federal authorities are concerned. If the States can not require first a license from a foreign corporation or person engaged in interstate commerce before they can enter such States and do business there, it as certainly follows that such State can not require more than taking out a license, that is, it could not require such person or corporation to become a citizen of the objecting State. Although a foreign corporation or person engaging in such traffic has taken out such license, or has conformed to the statute containing the terms set forth in section 841, *supra*, it can not be held to be a voluntary act when done under the coercive influence of the highly penal statute, threatened to be enforced upon a failure to conform to the statute. Kentucky did not create this corporation; can not terminate its existence; could not liquidate its affairs at the instance of a creditor or stockholder, even upon showing otherwise justifying it. Its existence as a corporation is not due in any part to the sovereign or creative power of this Commonwealth. The utmost that this State could have done was to confer upon the existing corporation, resident conclusively in the eye of the law in another State, certain privileges supposed to be necessary, or at least desirable to be so conferred. The fact of the legal residence of a corporation may be a fiction of the law. But it is a necessary one, and one that is well established and understood. But to say that the same corporation may be for identical purposes a resident at the same time of two States seems but a fancy. At any rate, even if the fact could be accomplished, it should not be unless the fact is that the corporation both intends, to and does, obtain legal vitality and existence as a corporation from both sovereigns.

It seems that a corporation, so far as the Federal authorities go, may be created, having power granted to it, and deriving corporate existence and

authority in part from two or more States (Louisville, &c., Ry. Co. v. Louisville Trust Co., 174 U. S., 560), although this court, in an opinion by Chief Justice Hargis, in Covington and Cincinnati Bridge Co. v. Wooley, 78 Ky., 523, seems to have taken an opposite view. Nor does it seem to be an open question that the same incorporators may incorporate under the same name in two or more States; but I do not conceive that either of these propositions is involved here. The majority opinion goes to the extent of holding that by a compliance with section 841 of the statutes a foreign corporation engaged in operating a railway in this State thereby becomes a corporation created by this State. There can be but two reasons for an enactment of the statute in question. One is to confer upon foreign corporations proposing to operate railroads in this State the right as such to do so. The other is to deny any person, except a corporation of this State, to engage in that business. The latter, in my view, under the authorities above referred to, would be an unconstitutional requirement. Therefore, the first must have been the purpose of our legislation. In other words, it is an enabling act to confer upon corporations already created, and existing and deriving their authorities from, and owing allegiance and responsibility to, some other State to operate a railroad in this State.

The case of the St. Louis & San Francisco Ry. Co. v. James seems all but conclusive of this question. In that case the railroad corporation was created by the State of Missouri. It owned and operated a railroad line extending into and through the State of Arkansas, and also partly through the State of Missouri. The legislature of Arkansas enacted a statute permitting foreign corporations to operate railroads in that State, provided that before they should be "permitted to avail itself of the benefits of this act, or any part thereof, such corporation shall file with the secretary of state of this State a certified copy of its articles of incorporation, if incorporated under a general law of such State or Territory, or a certified copy of the statute laws of such State or Territory incorporating such company, where the charter of such railroad corporation was granted by special statute of such State; and upon the filing of such articles of incorporation or such charter, with a map and profile of the proposed line and paying the fees prescribed by law for railroad charters, such railroad company shall, to all intents and purposes, become a railroad corporation of this State, subject to all the laws of the State now in force or hereafter enacted, the same as if formally incorporated in this State." \* \* \*

In a litigation between a citizen of Missouri and the railway company, brought in the United States Court for the Western District of Arkansas, this question was presented, and was certified by the Circuit Court of Appeals of that circuit to the Supreme Court for decision, and there decided: "In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis & San Francisco Railway Co., by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of state of Arkansas, and continuing to operate its railroad through that State, become a citizen of the State of Arkansas, so as to give the circuit court of the United States for the Western District of Arkansas jurisdiction of this action, in which the defendant in error was, and is, a citizen of the State of Missouri?"

In the elaborate opinion, in which all the authorities affecting that ques-

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tion seem to have been reviewed, the court thus stated the effect of the act above referred to: "It is competent for a railroad corporation organized under the laws of one State, when authorized to do so by the consent of the State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of power to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State. Such legislation on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States. Such corporations may be treated by each of the States whose legislative grants they accept as domestic corporations. The presumption that a corporation is composed of the citizens of the State which created it accompanies such corporation when it does business in another State, and it may sue or be sued in the Federal courts in such other State as a citizen of the State of its original creation. We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one State, indisputably taken, for the purpose of Federal jurisdiction, to be composed of citizens of such State, is authorized by the law of another State to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second State, in such a sense as to confer jurisdiction on the Federal courts at the suit of a citizen of the State of its original creation. We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power."

The language of the act in the Arkansas case was no stronger, and the purpose no more manifest, than in the case at bar. The facts as to whether the foreign corporation becomes a citizen of the State whose privileges it accepts are analogous to this case. Whatever may be the views of the members of the court, or of other courts of the States on this subject, we must, and cheerfully should, put ourselves in accord with the declarations of that court of final resort having jurisdiction of this question. For that reason I hold that the learned circuit judge correctly ordered this case to be removed into the United States Court for the Eastern District of Kentucky, and his judgment should have been affirmed.

Judges DuRelle and Burnam concur.

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SWICE'S ADM'R v. MAYSVILLE & BIG SANDY R. R. CO., &c.

(Filed December 9, 1903—Not to be reported.)

A. E. Cole & Son for appellant.

W. H. Wadsworth and E. L. Worthington for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge White.

The question of removal to the United States Circuit Court presented in this case is identical with that presented in the case of Davis' Admr v. Chesapeake & Ohio Railway Co., ante, 1125, this day decided.

For the reasons there given the judgment and order of removal herein is erroneous and is reversed and cause remanded for further proceedings not inconsistent herewith.

## TURNER v. TURNER.

(Filed December 9, 1902—Not to be reported.)

New trial—In this action to quiet the title to a tract of land an answer was filed to the petition, to which no reply was filed. At a subsequent term of the court the answer was taken for confessed and the petition dismissed. A petition for a new trial was afterwards filed, setting up reasons why plaintiff did not appear and file a reply to the answer. The court sustained a demurrer to the petition and dismissed it. Held—That allegations in the petition for a new trial are sufficient, and the court erred in dismissing it.

J. G. Forrester and J. B. Kinnaird for appellant.

W. F. Hall for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Chief Justice Guffy.

In November, 1899, the appellant filed suit against the appellee in the Harlan Circuit Court to quiet title to a certain tract of land. At the November term, 1899, no order seems to have been made. It also seems that no service of summons was had on the appellee, but at the August term, 1900, of said court the appellee filed his answer. No action seems to have been taken at the February term, 1900, and the case stood continued until November, 1900, at which term the cause was submitted, and the answer taken for confessed, and plaintiff's petition dismissed. On the 12th of February, 1901, the appellant filed his petition in the circuit court for the purpose of obtaining a new trial of the action aforesaid, giving reasons why he did not appear and reply to the answer of the appellee, then, as now, the defendant in said suit.

The court below sustained a demurrer to the petition, and appellant failing to plead further, his action was dismissed. To reverse that judgment this appeal is prosecuted. We deem it unnecessary to recite in detail the ground for a new trial relied on in appellant's petition. Suffice to say that after a careful consideration of the same we are of opinion that the facts stated in the petition, which, on demurrer, must be taken as true, entitle the appellant to a new trial.

The judgment sustaining the demurrer and dismissing the petition is, therefore, reversed and cause remanded, with directions to overrule the demurrer and for further proceedings consistent herewith.

## BARNES v. COMMONWEALTH.

(Filed December 4, 1902—Not to be reported.)

1. Criminal law—Excusing juror—After twelve jurors on the trial of appellant for murder had qualified, but before the attorney for the Commonwealth had exercised the right of peremptory challenge, the court did not abuse its discretion in excusing a juror on the motion made by the Commonwealth on the statement of the attorney that the juror would be needed as a witness.

2. Evidence—Statement of the accused made before the killing, that he intended to kill some one, was competent evidence, although the person threatened was not indicated. The accused having admitted that he had a loaded pistol in his cell; he claimed that the pistol belonged to another prisoner.

The Commonwealth introduced the prisoner, who denied that the accused had his pistol. It is objected that the Commonwealth was permitted to contradict the accused on a collateral issue. Held—That said evidence was competent.

3. Evidence of flight of the accused is competent—The character of the accused, who testifies for himself, may be impeached the same as any other witness, and witnesses were properly introduced for this purpose. Counsel for appellant cross-examined them to ascertain the information upon which their opinion was formed. In doing so, certain answers were made in response to questions asked which indicated that the defendant had been accused of certain misdemeanors, moral delinquencies and unneighborly conduct. The defense had the right to expose or develop the ground of their opinions. When the witnesses gave them the defendant had no right to have the answers excluded from the jury.

4. New trial—The lower court refused to grant a new trial on the alleged ground that one or two jurors had expressed their opinion as to the guilt of the accused before they were accepted as jurors. This is objected to on appeal. Held—That the action of the court on this question is not subject to exception, under section 281, Civil Code of Practice.

John S. Kelley for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Paynter.

This is the second appeal of this case (22 Ky. Law Rep., 1802). The appellant was indicted for the murder of W. B. Nicholls. The first trial resulted in a life sentence. On the last trial he was found guilty and sentenced to the penitentiary for five years.

The reasons for which a reversal is sought will appear from the consideration of the questions herein discussed. While the jury was being empaneled, John W. Mahoney, a regular jurymen, was sworn and examined touching his qualifications as a juror. Eleven others were likewise examined, and the twelve were found to be qualified. Before exercising his right to make peremptory challenges, the Commonwealth's attorney announced to the court that he desired Mahoney to be excused, as the Commonwealth wished to introduce him as a witness on the trial of the case. Over the objection of the defendant, the court excused him from the jury. He was not introduced as a witness by the Commonwealth, nor does it appear why he was not introduced. It is insisted that the effect of the action of the court was to give the Commonwealth a peremptory challenge in addition to those allowed by law. This objection is based upon the idea that the Commonwealth wished to get rid of Mahoney without the loss of one of its peremptory challenges, and that he was acting in bad faith. The fact that the Commonwealth's attorney did not introduce the witness does not authorize the inference to be drawn at the time he moved the court to excuse him that he did not intend to do so. It was a matter of sound discretion with the court as to whether he would excuse the juror, and he did not abuse it in relieving the juror from service.

The Commonwealth introduced Jacob Lowe, who testified that he heard the appellant say: "I will kill the God dam son of a bitch before sundown." At the time he made that statement he did not mention the name of the de-

ceased, but it was before and on the same day of the homicide. This expression having been made under the circumstances, showed the purpose of the appellant to injure or kill some one, and the jury was authorized to infer from it that the deceased was the object of his murderous design. (*Brooks v. Commonwealth*, 100 Ky., 191; *Howard v. Commonwealth*, 24 Ky. Law Rep., 612.) On the cross examination of the accused he admitted that he had a loaded pistol in his cell in the county jail, but he claimed that it had been left in pawn by Emmett Hardin, who had been confined in the jail as a prisoner. The purpose of this testimony was to show that the accused had a design to break jail and escape. The Commonwealth introduced Emmett Hardin, who testified that the pistol found in the appellant's cell was not the one which he left. It is insisted that the court allowed the Commonwealth to contradict the defendant on a collateral issue. The defendant sought to break the force of the testimony of the Commonwealth by showing that another prisoner had left the pistol in the jail. The testimony of the Commonwealth tended to show that he probably had two pistols there instead of one, which tended to show a desperate effort was contemplated to break jail and make his escape. It was always competent to prove that one accused of crime fled to avoid prosecution, or that he had attempted to do so. The Commonwealth had the right to impeach the character of the appellant the same as any other witness. (*McDonald v. Commonwealth*, 86 Ky., 13; *Commonwealth v. Harrigan*, 89 Ky., 807.) Witnesses were introduced for that purpose who qualified themselves to do so. Counsel for appellant cross examined them to ascertain the information upon which their opinion was formed. In doing so certain answers were made in response to the questions asked, which indicated that the defendant had been accused of certain misdemeanors, moral delinquencies and unneighborly conduct. The defense had the right to expose or develop the ground of their opinions. When the witnesses gave them the defendant had no right to have the answers excluded from the jury. It was the province of the jury to determine the weight and credibility of the evidence of the witnesses introduced upon the subject of character. It follows that the Commonwealth's attorney's remarks on this evidence were legitimate.

One of the grounds for a new trial was that one or two of the jurors had expressed opinions as to the guilt of the accused before they were accepted as jurors. The action of the court on this question in refusing a new trial is not subject to exception. (*Civil Code of Practice*, section 281; *Howard v. Commonwealth*, 22 Ky. Law Rep., 1855.)

The judgment is affirmed.

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CALLENDER'S ADM'R v. CALLENDER.

(Filed December 10, 1902—Not to be reported.)

Decedent's estate—Pleading—Exceptions to claims—C. died intestate, leaving surviving him his two sons and a tract of land worth about \$4,000 or \$5,000. Appellant, the oldest son, qualified as his administrator, and instituted this suit to settle the estate, and alleged that the appellee claimed that the estate owed him a considerable sum, the exact nature of which plaintiff did not know. In his answer appellee claimed that the estate owed him a

considerable sum, without setting it up, but alleged that it was filed with the commissioner. The commissioner made his report, allowing the claims of appellee, the principal item of which was a note for \$6,000, alleged to have been executed by the intestate. Exceptions to the report of claims were filed and overruled and the claims allowed. On appeal it is insisted that the note should have been set up by pleading, as required by sections 114 and 115, Civil Code of Practice. Held—That the better method would have been to set up the claim in the pleading, but as the issues were tried on the exceptions the informalities will be disregarded. The proof shows that the intestate expressed and carried out his purpose to execute the note to appellee for an amount sufficient to cover his entire estate, but as the defense that the note was executed without consideration was made, and the proof failing to show any consideration the note is rejected.

Geo. B. Winslow, Henry M. Winslow, Winslow & Winslow and Hazelrigg & Chenault for appellant.

John S. Gaunt and Thos. W. Bullitt for appellee.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge Burnam.

Joseph Callender died intestate in August, 1900. Two sons, J. R. Callender and A. L. Callender, survived him, and were his only heirs at law. He owned at his death about 100 acres of land, worth, perhaps, \$4,000 or \$5,000, and a little personal property. The oldest son, J. R. Callender, qualified as administrator of the estate, and instituted suit for a settlement thereof in the Carroll Circuit Court, making his brother, A. L. Callender, a defendant. After reciting the extent and character of the estate, and the debts due by his intestate, he alleged that A. L. Callender "claimed to hold a considerable indebtedness against the estate, the exact nature of which he had not been able to ascertain," and asked that the cause be referred to the master commissioner to ascertain the indebtedness. In the first paragraph of the answer A. L. Callender admits that "he holds a considerable indebtedness against the decedent, which he says he had filed, properly proven, with the master commissioner." In the second paragraph he claims that all the personal property which had been taken possession of by the plaintiff, as the property of decedent, belonged to him. Contemporaneously with the filing of his answer in the clerk's office he filed with the master commissioner a paper, in words and figures as follows:

"September 10, 1889.

"On day after dait i promise to pay to louis Callender the sum of six thousan dallars \* \* \* of him.

"JOSEPH CALLENDER."

On the 25th of January, 1901, the master commissioner made a report, certifying that this claim, amounting in the aggregate to \$10,075, was properly proven and vouched. Plaintiff thereupon filed exceptions to the master's report, in which he denied that the alleged note was either executed or delivered by J. R. Callender to the defendant, A. L. Callender, and also upon the ground that there was no consideration for its execution. At the same time a general demurrer was filed to defendant's answer, which was overruled. He thereupon tendered an amended petition, in which he denied the execution and delivery of the note, and alleged that there was no considera-

tion therefor. The court refused to permit several amended petitions along this line to be filed. The plaintiff thereupon filed a reply, in which he denied all the allegations of the answer and all statements filed with the note in the affidavit. A general demurrer was sustained to the reply upon the ground that all the defenses relied upon by appellant could be considered upon the exceptions.

It would have been better practice to have required the defendant to set out his claim on the note in a plea in conformity with sections 114 and 115 of the Civil Code. (Horner v. Harris' Ex'ors, 10 Bush, 361.) But as the testimony has been fully taken and the issues tried out upon the exceptions, and judgment rendered, we will disregard the informalities in the pleading and consider the case upon its merits. It is shown in the evidence that both appellant and appellee lived with their father, Joseph Callender, until January, 1891, except for a short interval. At that time the plaintiff left his father's home, and until his death led the hard and precarious life of a cropper of other people's land. The younger brother, A. L. Callender, continued to make his home with his father until his death, assisting in the cultivation of the land, under his father's direction, when not engaged in operating a steam thresher. He was living in his house when his father died, and held possession of it and all of his father's papers until the appellant demanded their possession under his appointment as administrator, and for the first time, so far as this record shows, claimed that his father was indebted to him on the obligation in controversy.

Three distinct and separate issues are raised by the exceptions and evidence: First, was the note signed by J. R. Callender; second, was it delivered by him during his lifetime to A. L. Callender; and, third, was it without a good and valuable consideration? All of them are questions of fact which must be determined from the evidence. Upon the question as to the genuineness of the note the appellee introduced J. M. Giltner and J. A. Donelson, who testified in substance that they were familiar with the handwriting of the decedent; and that, in their opinion, the note was in the handwriting of Joseph R. Callender. Whilst, on the other hand, Fielding Vories testifies that he knew the handwriting of decedent, and that he had in his possession a deed signed by him, which he filed; and that, in his opinion, the paper in controversy was not in the handwriting of decedent. Several photographic copies of admitted signatures of decedent are filed by L. R. Baker, an expert photographer, and A. J. Bruce, clerk of the Carroll County Court, the original of which are before us upon this appeal, and we must admit that the testimony as to the genuineness of the document is scanty, and not satisfactory.

The only witness who testified as to the delivery of the note by J. R. Callender in his lifetime to his son, A. L. Callender, is L. T. Callender, a nephew of decedent, who lived in Texas at the time he gave his deposition. He testified that he was present when Joseph Callender delivered the note to his son, A. L. Callender; that J. R. Callender said: "Take this note, Louis, and keep it, and at my death I want you to have this much money."

The time and place of this delivery were not stated by the witness. And his testimony is largely discredited by that of the witnesses, Orr, Abbett, Fox and Stubbins, all of whom testify that L. T. Callender, shortly after



the death of Joseph R. Callender, informed them that he assisted A. L. Callender to look through his father's papers after his death, and that they found this note among them at that time. Whilst Humphrey Smith, who was a tenant of decedent for two years immediately preceding his death, testified that when A. L. and L. T. Callender came back from the funeral of Joseph R. Callender they went up stairs together; and that when they came down A. L. Callender said to him: "Here is a note with my father's name to it; can't you swear to the handwriting;" that he answered: "No," and said to him: "Can't you find no will;" that both of them answered: "No; this is all I can find;" that they said that they had found the note in an envelope; he remarked that it did not look like it had been written long, and that L. T. Callender had a pencil behind his ear at the time, and said that where writing was kept dry it would not fade; that about three or four weeks after A. F. Callender informed him that he had found the note in an old red pocketbook in the bureau drawer. U. S. Ford testified that A. L. Callender told him that he found the note in his father's papers about a couple of months after his death. Whilst George A. Haden testified that he asked the appellee how he got the note, and that he replied that he found it among his father's papers after his death. The only witness, except L. T. Callender, who testifies as to the delivery of the note, is the witness, J. A. Donelson. He says: "Joseph Callender, deceased, came to my office on one occasion, I can't state the exact year, but I recollect that it was late in the summer, and said that he wanted to fix his property so that his son Louis would get all of it at his death; that Louis had been with him and promised to remain with him so long as he lived. I suggested that he wanted a will written. He said no; that they break wills sometimes, and he could beat a will. I said how. And he said by a note. I explained to him the difference between a will and a note; that a will spoke from his death, and a note from delivery, and told him that he could change a will, but could not change a note. He talked also of having a deed written, but I told him that the danger of that was that Louis might become involved, and the property would be taken from him.

"He left after talking a while longer about it, saying that he thought he could fix it up without a lawyer. In a short time thereafter he returned, that is, within a few weeks, and talking with me for a while, he said I have just fixed up my business; I have just written a note, 'One day after date I promise to pay to Louis Callender' (the amount I will not now state, as it has passed from my memory), but it was so many thousand dollars for services. Then the discussion arose as to the amount named in the note. I recollect saying to him that it was more than he was worth; he said he knew it, but that he wanted Louis to have all that he had; and that he did not expect to be worth any more than that. I said to him limitation will bar that note in fifteen years, and it is probable that you will live longer than that; he said he could fix that; he would make a payment on the note, and have it credited on it. I told him he ought to have a witness to the delivery of the note, as he and Louis were living in the same house. He said that he had delivered it to Louis in the presence of a witness, with the understanding that he was to take it and not collect or use it until after his death. On several occasions since then he has spoken to me about the note, but that was all he could remember well."

But even if be conceded that the note in controversy was executed by Joseph R. Callender, the decided weight of the testimony is that it remained in the old man's possession during his life, and was found by appellee in his papers after his death, and was intended by him to take the place of a will. This conclusion is fortified by the testimony of the only person who claims ever to have heard the old man speak of the note. The testimony of the witness, Donelson, quoted supra, would seem to be conclusive on this question. And L. T. Callender says that when the old man delivered the note to A. L. Callender he said to keep it and at my death I want you to have this much money. There was no talk of any consideration for the note, and it was plainly intended, if credence is to be given to the testimony of these witnesses, as a gift to take effect at the death of the old man. And the law is well settled that promissory notes given by the father to his children can not be enforced against the estate after his death, where a plea of no consideration is interposed. (*Richardson v. Richardson*, 26 L. R. A., 305, in the note to which the authorities on this subject are very fully collated.)

After a careful consideration of the testimony in the case we have arrived at the conclusion that the chancellor should have disallowed so much of appellee's claim as was founded upon this note. And we are also of the opinion that appellee's claim to the cow and bull calf should be disallowed.

For reasons indicated the judgment is reversed and cause remanded for proceedings not inconsistent with this opinion.

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KREMER v. LEATHERS, &c.

(Filed December 10, 1903—Not to be reported.)

Streets—Action to enforce apportionment warrants—Practice—Motion to set aside judgment—Appellant brought this action to recover on two apportionment warrants for street improvements, and to enforce a lien on the property of owners abutting on the improvement. but no certified copies of the ordinance, contract or apportionment were filed with the petition. An answer was filed, and on the 17th day of February, 1900, the court rendered a judgment dismissing the petition. On the 26th day of February appellant filed affidavits, alleging that copies of the papers had been prepared, but by an oversight the same were not filed, and made a motion to set aside the judgment and file copies of the necessary papers which accompanied the affidavits. The court did not decide the motion until the 28th day of April following, when it overruled same, from which order this appeal is prosecuted, and it is insisted that as the courts of Jefferson county continue in session sixty days the court had no authority in April to set aside a judgment which had been rendered in February. Held—That the motion to set aside the judgment having been made within the sixty-day term the court retained jurisdiction of the action, and should have permitted the exhibits to be filed as they were in their nature formal, but necessary, as their substance had been alleged in the petition.

Carroll & Carroll and M. S. Tyler for appellant.

Lane & Harrison and H. L. Stone for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Burnam.

This action was brought by appellant, Henry L. Kremer, as assignee of Valentine Humploh, to enforce liens for two apportionment warrants issued by the city of Louisville for the construction of a sidewalk on both sides of Broadway, between First and Second streets, in the city of Louisville under an ordinance approved April 23, 1898. One of the warrants was against the property of the defendant, John S. Branin, and the other against the property of the defendant, the Second Presbyterian Church. The substance of the ordinance, contract and apportionment under which the work was done, and warrants issued, are fully set out in appellant's petition, but no certified copies of the ordinance, contract or apportionment were filed with the petition. The city of Louisville was made a party with a view of taking a judgment against it in case no recovery could be had against its co-obligees for the several amounts apportioned against their property. The property holders filed a joint answer to the petition, in the first paragraph of which they in substance deny all of the material allegations of plaintiff's petition. The second and third paragraphs were demurred to by appellant, and the demurrer to the second paragraph sustained on the 6th of January, 1900, to which defendants excepted, and on their motion were allowed two weeks' time in which to amend. No action appears to have been taken by the trial court on the demurrer to the third paragraph. On the 10th of January, 1900, defendants declined to amend their answer, and moved a submission of the case upon its merits. On the 17th of February, 1900, the court rendered judgment dismissing plaintiff's petition on the ground that the first paragraph of the defendant's answer put in issue the averments of the petition, and the exhibits necessary to make out a prima facie case under section 2838 of the Kentucky Statutes were not in the record. On the 26th day of February, 1900, plaintiff moved that the order of submission and judgment dismissing their petition be set aside, and in support thereof filed the affidavits of A. J. Carroll and J. Bruce Kremer. Both affidavits state that certified copies of the ordinance, contract and apportionment had been ordered for the purpose of filing as exhibits; and that they believed that they had actually been filed before submission, and with the affidavit of Kremer there was tendered certified copies of the missing paper. On the 28th of April, 1900, plaintiff's motion was overruled and their petition dismissed, and from that judgment this appeal is prosecuted.

It is insisted by appellees that the circuit court had no jurisdiction on the 28th of April, 1900, to set aside the judgment rendered on the 17th of February, as more than sixty days had elapsed from its rendition. This contention is based upon the fact that the Jefferson Circuit Court is a court of continuous session; and that after the expiration of sixty days it lost all power over judgments previously entered. This proceeding was in equity, and the effect of the motion made by appellant on the 26th of February, 1900, to set aside the judgment was to suspend the judgment until it was overruled.

"Any other construction of the law would deprive the parties of the right to appeal in all cases where a court, for prudential reasons or otherwise, saw proper to continue the motion from one time to another, a right that the court can exercise and over which neither counsel nor client have any con-

trol." (Louisville Chemical Co. v. Commonwealth, 71 Ky., 182; Trapp v. Aldrich, Receiver, 28 Ky. Law Rep., 2432.)

We are, therefore, of the opinion that the court did not lose jurisdiction over its judgment of February 17 by the mere fact that it was not acted upon until the 28th day of April; and that the chancellor erred in not sustaining plaintiff's motion to set aside the order of submission, and judgment for the purpose of allowing certified copies of the ordinance, contract and apportionment to be filed. Thompson on Trials, section 848, says: "Where the plaintiff has inadvertently omitted to introduce a formal, though necessary, document until after the close of its evidence, it will be an abuse of discretion to refuse his application to be allowed to introduce it."

The affidavits of both counsel filed in the case state that certified copies of the omitted papers have been ordered to be filed in the record; and that both believed that they had actually been so filed. They were perhaps to some extent misled in this matter by the request on the part of appellees for time to amend the paragraph of their answer to which a demurrer had been sustained, and the sudden abandonment of this purpose, accompanied by a motion to submit the case upon its merits on the 20th. It seems to us that there has been a miscarriage of justice in this case, attributable to the belief of counsel that certified copies of the ordinance, contract and apportionment were in the record. The filing of these papers were largely formal, as their substance had been fully recited in the petition; and that the ends of justice require that plaintiffs should be given an opportunity to have the case tried upon its merits.

For reasons indicated the judgment is reversed and cause remanded, with instructions to set aside the order of submission and to allow plaintiffs to file the tendered records, and for other proceedings consistent with this opinion.

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MT. STERLING IMPROVEMENT CO. v. COCKRELL, &c.

(Filed December 10, 1902—Not to be reported.)

**Surety—Release—**Appellees were sureties on a supersedeas bond executed by O. on appeal from a judgment against him, and the judgment was affirmed. An execution was issued on this judgment and the sheriff levied on land belonging to O. sufficient in value to satisfy the debt. The sheriff indorsed on the execution that it was held up by order of plaintiff. O. in the meantime sold the land to H. This suit was afterwards instituted on the bond, and the defense set up was that as the sheriff held up the execution by order of plaintiff and the debt was lost thereby, that they are released from liability on the bond. Issue was joined on this defense, and the jury found for the defendant. On appeal, Held—That the verdict will not be disturbed as the proof is conflicting. The law is well settled that when a plaintiff issues an execution against the defendant, which is levied upon property sufficient to satisfy it, a lien on the defendant's property enures to the benefit of the security, and if that lien is discharged or lost through the negligence or misconduct of either the plaintiff or the sheriff the execution is considered paid in so far as the surety is concerned.

H. C. McKee and Tyler & Apperson for appellant.

Hazelrigg & Chenault and H. R. Prewitt for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Burnam.

In 1895 the Mt. Sterling Improvement Co. recovered a judgment against J. H. Oldham for \$250, from which he prosecuted an appeal to this court and executed a supersedeas bond, with the appellees, M. O. Cockrell and H. K. Green, as his securities. The judgment of the lower court was affirmed, and the improvement company filed the mandate issued thereon in the lower court, and on the 25th of June, 1898, had an execution issued upon the judgment, which was levied by the sheriff of Montgomery county on the 29th of June, 1898, on a tract of land belonging to J. H. Oldham of sufficient value to have satisfied it. On the 23d of July, 1898, after the levy of the execution, Oldham sold the land for a cash consideration to one Hall, and on the 1st day of August, 1898, the improvement company by its attorney endorsed on the execution these words:

"The sheriff is directed to hold this execution until further orders. August 1, 1898.

"MT. STERLING IMPROVEMENT CO."

And in January, 1899, this action was brought against the appellees on the supersedeas bond. The defendants, Cockrell and Green, answered, admitting that they signed the supersedeas bond, and set out in detail the facts recited above, with the further allegation that neither the plaintiff nor the sheriff had complied with the requirements of subsection 2 of section 2358a of the Kentucky Statutes, which provides that "no attachment or execution hereafter issued, nor any levy or sale under either, shall in any manner affect the right, title to, or interest of a subsequent purchaser, lessee or incumbrancer without notice thereof of any real estate or any interest therein upon which such attachment or execution may be or may have been levied, except from the time there shall be filed in the office aforesaid a memorandum, showing the number and style of the action in which said attachment or execution issued, the court from which it issued, the number, if any, of such attachment or execution, the date thereof, and the name of the persons in whose favor and against whom respectively it issued."

And in an amended answer they allege that whilst the execution was in the hands of the sheriff, and in full force, they ordered the sheriff, pursuant to an agreement made with J. H. Oldham, to hold up said execution until further orders, and that by reason of such agreement and direction given the sheriff he failed to comply with the requirements of subsection 2 of section 2358a of the statutes. The plaintiff, in its reply, denied that they agreed to hold up the execution, or that they had directed the sheriff to do so, and plead that it was the defendant's duty to have filed the notice required by subsection 2 of section 2358a. The trial court by its instructions confined the case to the defense relied on in the amended petition, telling the jury to find for the company unless they believed from the evidence that, after the execution was placed in the hands of the sheriff and levied upon property of the defendants sufficient to have satisfied same, it directed the sheriff not to proceed with his levy; and that in consequence of such directions the sheriff failed to collect it before the 23d of July, 1898.

The testimony is conflicting. Oldham testified that both the president and secretary of the company consented to suspend the collection of the exe-

uction until there could be a settlement of the affairs of the company; and that with their consent, and by their direction, he communicated this fact to the sheriff, and that he thereafter sold the property to Hall. The sheriff to some extent corroborated the statement of this witness. Whilst Childs, the secretary of the company, emphatically denies that either he or Baum, the president, ever agreed that the collection of the execution should be suspended, or that they so instructed the sheriff. Upon this issue, sharply drawn both by the testimony and the instructions, the jury found for the defendant.

The law is well settled that when a plaintiff issues an execution against the defendant, which is levied upon property sufficient to satisfy it, a lien on the defendant's property enures to the security, and if that lien is discharged or lost through the negligence or misconduct of either the plaintiff or the sheriff, the execution debt is considered paid in so far as the surety is concerned. (*Dills v. Cecil*, 62 Ky., 579; *Herman on Executions*, 254; *Brandt on Suretyship and Guarantee*, 1st edition, section 373.) The appellant was under no obligation to appellee to have sued out the execution against Oldham; they could have looked, if they had so elected, directly to the supersedeas bond for a satisfaction of their judgment. But having elected to proceed by execution, and having acquired by their levy a lien upon the property sufficient to have satisfied their judgment, they were not at liberty to abandon the security so obtained for the payment of their judgment; and if by their orders the sheriff failed to proceed with the collection of their execution, and in consequence thereof their security was lost, they can not look to appellees for its payment.

Judgment affirmed.

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CITY OF LOUISVILLE v. MCNAUGHTON, USE, &c.

(Filed December 10, 1902—Not to be reported.)

Street Improvements—Liens—Statute of limitation—Contracts—Appellee entered into a written contract for the original construction of a street, at a fixed price, both parties expecting that the abutting property owners were liable under the statute for the cost of said improvement. The courts having decided that no liability rested on the property holders for same, appellee brought this suit on his contract against the city to recover said costs. Appellant relies on the statute of limitation of five years as a bar to the action. Held—The action was not barred as it was not based on a liability created by statute, but upon a written contract which is not barred until after fifteen years.

H. L. Stone for appellant.

Lane & Harrison for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Paynter.

The city of Louisville entered into a contract, evidenced by a writing with the appellee, by which he agreed to improve a certain street by original construction. The city agreed that he was to have a certain compensation for the improvement which he contracted to make. The city was authorized to make the contract, but a controversy arose with the abutting property own-

ers as to their liability for the cost of construction. It culminated in a suit which reached this court, where it was held that the abutting property owners were not liable for the cost of construction. (*City of Louisville v. McNaughton*, 19 Ky. Law Rep., 1696.) Following many other cases, this court in that case held that as the city had ordered the improvements made, and accepted same after it was completed, it was liable to the contractor for so much of the cost of improvement for which he could not have a lien upon the abutting property. McNaughton failing to recover \$2,760.62 from the abutting property owners, he brought this action against the city to recover the same.

It is urged that because this court has held the five years' statute of limitations applies to actions against abutting property owners for the cost of street improvements (section 2515, Kentucky Statutes, *Kirwin v. Nevin*, 23 Ky. Law Rep., 947), that it likewise applies to an action by a contractor against the city. Section 2515, Kentucky Statutes, does not apply to an action upon a writing, for such action is expressly excepted from its operation. This is not an action created by statute, but it is based upon a written contract which was entered into between the city and the appellee. The city could only be bound when it was authorized to and did make a contract in writing. It is true the city expected that the abutting property owners to relieve it from liability by paying the contract price, but the statute did not impose such an obligation upon them. If it had, then it would have been a liability imposed by statute, as they were not the contracting parties. (*Gosnell v. City of Louisville*, 21 Ky. Law Rep., 522; *Kerwin v. Nevin*, *supra*. In effect the city by its contract in writing agreed that if the abutting property owners did not pay the contract price it would do so. As this is an action on a contract in writing, the fifteen-year statute of limitation applies.

The judgment is affirmed.

Whole court sitting.

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SPEARS, &c. v. THOMAS, REC'R.

(Filed December 10, 1902—Not to be reported.)

**Allowance to receivers**—This appeal involves the correctness of an allowance of \$15,000 made to appellee as receiver of an estate worth about \$200,000. The affidavits filed with appellee's motion for an allowance show that he managed the estate entrusted to his care admirably, and increased its value about \$36,000, and was, therefore, entitled to a good allowance. Held—That the Court of Appeals is inclined to defer to the judgment of the chancellor in the exercise of his inherent right to fix the allowance of his receivers as he is in possession of the facts, enabling him to fix a reasonable allowance, and will disturb it only where the chancellor has abused his discretion. In this action the allowance is reduced to \$10,000. The statute fixing fees and allowances to commissioners and receivers has no application to cases of this kind.

McMillan & Talbott and E. M. Dickson for appellants.

T. L. Edelen and Hazelrigg & Chenault for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Paynter.

A controversy over the will of Thomas Woodford resulted in the appointment of Claude M. Thomas as receiver by the circuit court. The estate consisted of \$186,000 in promissory notes, more than \$12,000 in bank stocks, and real estate of the value of more than \$40,000. At the time the property of the estate was placed in the hands of the receiver its estimated value was about \$200,000. The receiver managed the estate in the most successful way, and after holding it about three years it was valued at two hundred and forty odd thousand dollars. The receiver made a detailed report as to the management of the estate and as to its condition, with that he filed exhibits and also some affidavits showing the value of the estate and the admirable manner in which it had been managed. The receiver's report was considered upon his motion for an allowance for his services. No other evidence was offered on the question; thereupon the circuit court allowed him \$15,000.

This appeal was prosecuted to have the action of the circuit court in making the allowance reviewed. The conduct in the management of this estate shows that the circuit court selected one eminently fitted to perform such important duties. In accepting the appointment the receiver assumed a great responsibility. The circuit court being acquainted with the character of the receiver and the services performed, was well prepared to fix the amount of compensation to pay him. Under such circumstances the circuit court has a large discretion, and only when we are convinced that he has erred in its exercise will we disturb his finding. The following rule is enunciated by High on Receivers, section 781: "The power of courts of equity to fix the compensation of their own receivers is well established, and results necessarily from the relation which the receiver sustains to the court, he being its officer or agent, deriving his functions only from that source. In the absence, therefore, of any legislation regulating the receiver's salary or compensation, the matter is left entirely to the determination of the court from which he derives his appointment. And in passing upon the compensation of a receiver an appellate court will ordinarily defer much to the judgment of the court below by which the receiver was appointed, that court having had the supervision of his conduct."

The United States Supreme Court, in *Stewart v. Boulware*, 188 U. S., 78, said: "Nor is there any doubt of the power of courts of equity to fix the compensation of their own receivers. That power results necessarily from the relation which the receiver sustains to the court, and in the absence of any legislation regulating the receiver's salary or compensation, the matter is left entirely to the determination of the courts from which he derives his appointment."

"The compensation is usually determined according to the circumstances of the particular case, and corresponds with the degree of responsibility and business ability required in the management of the affairs entrusted to him, and the perplexity and difficulty involved in that management."

But it is urged that our statute fixes the compensation of receivers that the court must allow only such compensation as fixed by it; that however important the duties which are to be performed by the receiver, or how great the responsibilities, he must be limited by the amount fixed by the statute to compensate master commissioners and receivers. This court has not considered that statute controls in the allowance to receivers in cases like this.



and other cases that the court can see might arise. That statute allows only \$3 a day to a receiver for certain duties, and \$10 per tract for sale or renting land, etc., and a certain per cent. for collection and distribution of money. In *Sherley v. Mattingly & Sons*, 21 Ky. Law Rep., 289, this court approved the allowance of 25 per cent. of the entire amount realized for the estate. The court said: "In view of the extraordinary services rendered by Mr. Sherley, as shown by his report to the commissioner, he is allowed \$500 as compensation for his services. It is true that this sum is more than 25 per cent. of the entire amount realized by him for the estate, and when added to the expenses allowed him by the commissioner will very nearly absorb that sum; but, under all the circumstances, the court is of opinion that such an allowance is reasonable.

"The amount to be allowed in cases of this character is peculiarly a question within the chancellor's discretion, and it will not be interfered with in matters of doubt. The chancellor, from the nature of the case, must understand much better than this court the nature of the services rendered by the officer, the value of such services in the community, and equities of the whole case. In this case we have only appellant's report and a partial transcript of the record to guide us. It would seem that he has done a good deal of work and been at considerable trouble, involving both loss of time and mental labor, and if the estate were larger we would think he ought to have a larger sum. But the whole amount collected by him and more will be absorbed in paying his costs and the allowances already made, leaving a deficit to be paid by his successor. In appointments of this character it is understood that if the receiver is fortunate in his management and realizes for the estate a large sum, his allowance will be swelled; but if, on the other hand, the amount coming to his hands is small, although it is due to causes beyond his control, where a great loss will inevitably fall on the creditors in any event, the court should cut down the costs of administering the fund as low as justice to the officers will permit. In measuring the value of services it is always proper to take into consideration not only the work done, but the result accomplished for the estate by it. In view of the other allowances made by the court, the amount received by appellant, and the condition of the estate, we do not feel warranted in saying, on the record before us, that there was an abuse of discretion in the allowance made."

If the petition of the attorneys for the appellant is correct, then a great railroad might be put in the hands of a receiver of great ability and fitness to perform such service, and still he could only be allowed \$3 per day for his services. The same might be true if an immense manufacturing plant was placed in the hands of a receiver. While we recognize the large discretion of the circuit court in making allowances to receivers in cases like the one under consideration, still this court has the right to review the matter and fix a different compensation for the receiver, if in its judgment the circuit court erred in making the allowance. We have examined the report of the receiver and the evidence accompanying it, and have determined that \$10,000 is a sufficient compensation for the services which he performed.

This case is reversed, with directions to the lower court to allow the appellee \$10,000 for his services and for proceedings consistent with this opinion.

OTTER VIEW LAND CO.'S REC'R v. BOLLING'S EX'TX.

(Filed December 11, 1902—Not to be reported.)

**Res judicata—Judgments of sister States—Statute of limitation—Appellee's intestate subscribed for one hundred shares of \$10 each of the capital stock of the appellant company, and paid only \$400 on the subscription. Appellant having become insolvent, and a receiver appointed to take charge of its assets, a decree was rendered by the Virginia Circuit Court in a suit instituted by the receiver by him on June 10, 1893, making an assessment on the stockholders. In an amended petition against several subscribers of said stock a recovery of said assessment was sought. Defendants filed a plea of the three years' statute of limitation, under the statute of Virginia, as a defense. The lower court and the Supreme Court of Virginia held said defense as valid, and released said stockholders. Appellee's intestate was a resident of Kentucky at that time, and until his death, and was not a party to said action. This action was instituted in this State to recover the amount of the assessment against appellee's intestate. The lower court dismissed the action, under section 2541, Kentucky Statutes, and the question involved on this appeal is, does the statute of limitation constitute a bar to the action, and what effect has the judgment of the Virginia court upon the rights of appellee? Held—That neither the statute of limitation of Virginia of three years, nor the five-year statute of this State are sufficiently pleaded. The judgment of the Virginia court, in so far as it fixes the liability of the stockholders on the subscription, is binding on all the stockholders alike, whether they were parties to the proceedings or not, but it does not conclude any liability of a stockholder who may be released by the lapse of time. The plea of the statute of limitation is a personal plea, and the release of stockholders in Virginia on such plea can not enure to the benefit of appellee, who was no party to that proceeding, and she is entitled to set up such defense if she is entitled to it.**

W. W. & J. R. Watts for appellant.

Caruth, Chatterson & Blitz for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge O'Rear.

Appellee's testator, Wm. H. Bolling, had subscribed for one hundred shares of \$10 each of the capital stock of the Otter View Land Co., which was a Virginia corporation. Presumably the contract was made or consummated in Virginia, nothing to the contrary appearing. Payments upon the subscription to the extent of \$400 have been made.

This is a suit by the receiver of the corporation, it having become insolvent, against the stockholder upon an assessment made by the judgment of the circuit court of Bedford county, Virginia. The assessment was made by a decree June 10, 1893. This suit was brought by the receiver in the Jefferson Circuit Court of this State in March, 1898. Appellee was a resident of Kentucky at the time of the proceedings hereinafter mentioned. There was an issue as to whether the subscription was by parol or in writing. There was not sufficient evidence, indeed no evidence, that it was in writing. It was, therefore, necessarily in parol. The circuit court dismissed the petition because of section 2541, Kentucky Statutes: "When, by the laws of any other State or country, an action upon a judgment or decree rendered in such State or country can not be maintained there by reason of the lapse

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of time, and such judgment or decree is incapable of being otherwise enforced there, an action upon the same can not be maintained in this State, except in favor of a resident thereof, who has had the cause of action from the time it accrued."

An amended answer filed by appellee in this case pleaded that no action had ever been filed against any of the purchasers of stock or against appellee upon the call made under the decree of the Bedford Circuit Court of Bedford City, Va., until March 31, 1897.

"When by an amended petition filed in the said Bedford Circuit Court of Bedford City, Va., a court having jurisdiction of the parties and subject-matter, making defendants to said action the Otter View Land Co. and the purchasers of said stock, as shown by the books of the said company, and after issues made the court adjudged that the statute of limitation of said State of Virginia was a bar to all actions against said purchasers of stock of the said Otter View Land Co., and that upon appeal to the Supreme Court of Appeals of Virginia that decree was affirmed, it being the law in that State that actions upon parcel agreements to pay money are barred within three years from the accrual of the right of action."

Appellee relied in this plea upon the decree of the Virginia court as a bar. The Virginia statutes of limitation are not pleaded in this case as a bar to appellant's right of recovery, nor does appellee plead the lapse of time under the Virginia Statute as a bar to appellant's right of recovery under section 2542 of the Kentucky Statutes.

The plea of limitation in this case is as follows: "Further answering, this defendant says that Wm. H. Bolling died on the — day of May, 1891; that more than two years had elapsed since the date of said subscription to stock, and more than five years have so elapsed, and more than five years have elapsed since the date of his decease, and that no demand was ever made of her as executrix within five years after the date of the decease of the said Wm. H. Bolling. Wherefore, she pleads and relies upon the statutes of limitation in such cases made and provided as a bar to any recovery in this case."

It is not pleaded, and so far as this record discloses it is not a fact, that five years had elapsed from the date of the assessment against appellee's testator or his estate upon his subscription before the institution of this action. It is well settled that the subscription to the capital stock of a corporation is a promise to pay money, and that a right of action thereon, and consequently the beginning of the running of the statute of limitation thereon, is not until there has been a call or assessment made by the corporation, or by a court in proper proceedings for that purpose upon complaint of creditors. (Cook on Stock and Stockholders, 104, 105, 195; Hawkins v. Glenn, 137 U. S., 319; Glenn v. Liggett, 135 U. S., 533; Lewis v. Glenn, 84 Virginia, 947; Calloway v. Glenn, 20 Ky. Law Rep., 1447.)

It appears, therefore, that the Kentucky Statute of limitation did not apply, and that the Virginia Statute of limitation of three years was not pleaded nor relied upon.

The sole remaining question then is, did the decree of the Bedford Circuit Court of Virginia, affirmed by the Supreme Court of Appeals of Virginia, relieve appellee of this assessment? In that case, which seems to have been

an action by creditors of the corporation for a liquidation, appellant was appointed receiver, and an assessment of 35 per cent. was made upon all stock subscriptions. In that suit certain stockholders named were made parties defendant. Those stockholders so named, appearing and pleading for themselves alone, relied each upon the statute of limitation of three years above referred to. The circuit court held, which was affirmed by the Supreme Court of Appeals of Virginia, that the stock subscription being by parol, and a cause of action having accrued on the day that the order making the assessment by the court was entered, to wit, June 10, 1893, and the amended petition making the stockholders parties for the purpose of recovering the assessment against them not filed until March 31, 1897, that the three years' statute applied to such stockholders, and that they were discharged. Appellee was not a party to that suit, nor was her intestate.

In *Calloway v. Glenn*, 20 Ky. Law Rep., 1447, this court held that the decree of a court of competent jurisdiction of a sister State in a suit by a creditor of a corporation against the corporation for the purpose of requiring assessments to be made against stockholders was binding upon the stockholders who were not parties to that decree, it being held expressly that such stockholders were such privies to the proceedings as to be bound by the decree. But that case did not hold, nor does the question seem to have been involved, that the decree was binding on such stockholders who were not parties to any other extent than to establish the legal status of the obligation as one due, that is, that it had the effect of being a call made upon stockholders. Of course it could not be said that such a decree bound those who were claimed by the corporation to be stockholders, when in fact that had not been stockholders; and the question of their being bound by their subscription or being discharged by any legal act does not seem to have been discussed. As a matter of fact one stockholder might be relieved by the lapse of time, as, for example, where his subscription was by parol and more than three years had elapsed from the date of the call, and another stockholder might be bound upon a written subscription, and although more than three years had gone by after the call, yet he would not be released under the Virginia statute, five years being the statutory bar upon such written contracts in Virginia, as we understand it.

The Virginia decree making the call and directing the receiver to institute proceedings, therefore, is *res adjudicata* to all who are shown to be stockholders as to the fact of the necessity for the call, of its legality, and of its precipitating the date when the subscription is due to be paid.

The Supreme Court of Appeals did not hold, nor does the judgment of the Virginia Circuit Court hold, that the order appointing the receiver and the order making the assessment upon the stock was invalid, or that the rights of the receiver thereunder were barred by the lapse of time except as to those stockholders whose subscriptions were by parol, and who had been sued in that jurisdiction, and who had pleaded and relied upon that statute. It is universally held that the plea of limitation is a personal plea, to be available alone to the party in whose behalf it may exist. Whether the Virginia statute of three years referred to applies to nonresidents of Virginia upon contracts made in that State, or to those who are beyond the jurisdiction of that court for some period of the time within which suit might have been

brought, and, therefore, could not be sued upon their personal obligations in the courts of that State, does not appear in this action. Generally there are saving clauses in such statutes of limitation for such cases. But that question is not presented. The sole question is whether the matter of appellee's liability is res adjudicata by virtue of the decision of the Virginia court above discussed. We hold that it is not.

It does not appear in this record that an action on the call made by the Bedford Circuit Court of Virginia might not be maintained in the courts of Virginia. For all this record shows it could be, except to such as had been barred by the Virginia statute, when pleaded. But the Virginia statute applicable to one situated as appellee is, is not pleaded, and we are not informed what that statute may be. Nor is section 2541, Kentucky Statutes, pleaded as a defense.

The judgment must be reversed and cause remanded, with directions for a new trial and for proceedings not inconsistent herewith.

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LOUISVILLE & NASHVILLE R. R. CO. v. ROBERTS.

(Filed December 11, 1902—Not to be reported.)

Railroads—Damages—Master and servant—Instructions—Appellee, a section hand, was engaged in drawing spikes from the ties with a clawbar when another workman with a spike maul struck the clawbar for the purpose of facilitating the work of appellee, and a splinter flew off the maul and struck appellee in the eye, destroying his sight, for which this action was instituted to recover damages, and a judgment resulted in favor of appellee. Errors in instructions are relied on for a reversal. Held—That the court properly instructed the jury that it was the duty of the master to furnish safe and suitable tools for these workmen, and that if it failed to do so, and the defect in the spike maul so furnished was known to the master, or it could have known it by the exercise of ordinary and reasonable care, and that appellee did not know of such defect, if defect there was, then the jury should find for the plaintiff. Appellant can not complain of an instruction given as to the measure of damages as it offered no instruction on this point.

C. R. McDowell, R. P. Jacobs and Edward W. Hines for appellant.

Robert Harding, John W. Rawlings and E. V. Puryear for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee, a workman on the section force of appellant road, was injured in this manner: It was his duty as such workman to draw spikes from the railroad ties. To do so he inserted what was called a clawbar under the head of the spike, and when the spike was driven so tight that it would not take the clawbar, it was the duty of a fellow workman to drive it under with a stroke of a highly-tempered steel maul, called a spike maul, and in driving such spike from the stroke of the maul upon the clawbar, which was metal, a splinter flew off of the side of the spike maul and struck appellee in the eye, if not destroying it totally, at least seriously impairing its vision.

The court instructed the jury as to appellee's right of recovery, that it was

the duty of the master to furnish safe and suitable tools for these workmen, and that if it failed to do so, and the defect in the spike maul so furnished was known to the master, or it could have known it by the exercise of ordinary and reasonable care, and that appellee did not know of such defect, if defect there was, then the jury should find for the plaintiff.

The principal objection urged against this instruction is that it did not also submit to the jury the question of appellee's knowledge in this language: Unless the jury should believe that appellee knew, or in the exercise of ordinary care might have known, of the defect in the spike maul, if defect there was, etc.

Whether such an extension should be given in some cases, in this case it was not shown that it was appellee's duty to handle the implement found by the jury to have been defective, that is, the spike maul. Therefore, the question of his opportunity to know its condition does not appear to have been relevant in this case, because, at the utmost, his opportunity for knowing would not be carried further than an examination of those tools with which he himself was required to work. The court is of opinion that the qualification asked for appellant was properly refused.

The instruction to the jury as to the measure of damages is not exactly accurate, but appellant asked for no other instruction on this subject; certainly it did not ask for one embodying the points now urged on the appeal. It has been so frequently held that it is deemed unnecessary to again elaborate the idea, that in a civil case, unless the objecting party offers an instruction covering the point of his objection, he will not be heard upon appeal to complain of the inadequate instruction given. There was evidence in this case that the defective condition of the spike maul might have been known to, or was known to, appellant's inspector of tools, and that there was such evidence of negligence as warranted the submission of the case to the jury and to sustain their verdict.

Judgment affirmed.

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COMMONWEALTH v. VISER, &c.

(Filed December 11, 1902—Not to be reported.)

Criminal law—Indictment—Obtaining money under false pretense—This appeal involves the sufficiency of an indictment against appellees, charging them with representing to D. that a note for \$50 was signed by A and B, and was genuine and obtained thereon the sum of \$75, when in fact said note was null and void, and there was a legal defense to same. Held—That said indictment was insufficient. The charge that the note was null and void: also that there was a legal defense to same, are but legal conclusions and insufficient, as it was necessary to state facts showing the note to be void, and also the facts constituting the legal defense should have been stated.

C. J. Pratt and M. R. Todd for appellant.

E. H. Gaither for appellees.

Appeal from Lincoln Circuit Court.

Opinion of the court by Chief Justice Guffy.

The appellees were indicted by the grand jury of Lincoln county, charged with the offense of obtaining money under false pretenses. The defendants entered a demurrer to the indictment, which was sustained by the court, and the prosecution dismissed, and from that judgment the Commonwealth has appealed. The indictment reads as follows: "The grand jury of the county of Lincoln, in the name and by the authority of the Commonwealth aforesaid, accuse William M. Viser and G. L. Webb of the crime of obtaining money under false pretenses, committed in manner and form as follows: The said Wm. M. Viser and G. L. Webb, in the county and State aforesaid, on the — day of November, 1900, and before the finding of this indictment, did falsely pretend and represent to one George DeBorde that a certain promissory note, dated Stanford, Ky., October 24, 1900, due and payable ninety days after date to defendant, G. L. Webb, or order, for the sum of \$80, negotiable and payable at the Lincoln County National Bank of Stanford, Ky., with interest at the rate of 6 per cent. per annum after maturity until paid, and signed by Henry D. Phillips and H. D. Baughman; that said note was genuine and valid and that there was no legal defense to same, and did by said false pretenses and representations sell to and obtain from said George DeBorde, on the faith of said representations, the sum of \$75 for the sale and transfer to said DeBorde of said note, with intent to commit a fraud upon said DeBorde, the said note being at the time absolutely null and void, and as defendants well knew subject to a legal defense, against the peace and dignity of the Commonwealth of Kentucky."

The sufficiency of the indictment is the only question presented for decision. It will be seen from the indictment that the defendants are charged with selling a certain note executed by certain parties to one DeBorde. It is also alleged in the indictment that the note was absolutely null and void, and that defendants knew it was subject to a legal defense. The law is well settled that an indictment must be direct and certain as to the offense charged, and it must also state the facts constituting the offense with such precision and clearness as to enable the defendant to understand the charge, and to enable him to have a fair chance to answer and make defense. In the case at bar the indictment charges that the note sold by defendants to DeBorde was null and void, and that defendants knew it was subject to a legal defense. The averment as to the note being null and void is at most merely the conclusion of the pleader, and the same may be said as to the legal defense charged. It was necessary to state facts showing the note to be void, and also the facts constituting the legal defense should have been stated. In the absence of such averments the defendants could not know upon what grounds or by what means the Commonwealth would attempt to show that the note was void, or what facts would be relied upon as constituting the legal defense charged.

Our opinion is that the judgment of the circuit court sustaining the demurrer and dismissing the indictment should be, and it is, affirmed.

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BURTON v. COMMONWEALTH.

(Filed December 12, 1902—Not to be reported.)

Criminal law—Evidence—Dying declarations—This appeal is from a conviction of appellant for manslaughter, and involves the correctness of the

ruling of the lower court in admitting statements of the deceased as his dying declarations. The proof shows that the deceased came to his death from stabs inflicted by appellant about 10 o'clock at night, and a physician who lived about twelve or fifteen miles from him was sent for and reached him some time the following day. After making an examination of his wounds the physician stated to deceased the belief that he would die. Deceased then stated his belief that he would die, and made the statement concerning the difficulty which was proposed to be proved as his dying declaration. The deceased lived about twelve days after he was stabbed, and was carried to appellant's house, where he remained a part of the time. Held—That the statements of deceased were properly admitted as his dying declaration. The length of time that transpires after making the declaration before death does not affect the admissibility of the testimony. The court will determine from all the surrounding circumstances whether the declarant at the time of making the statements believed that death was impending. The finding of the jury will not be disturbed.

B. B. Golden, S. H. Kash, A. B. Hampton and H. D. Hall for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Hobson.

This is the second appeal of this case. The facts of the case are stated in the former opinion. (*Burton v. Commonwealth*, 28 Ky. Law Rep., 1915.) The judgment was there reversed for certain errors in the instructions. On the return of the case to the circuit court it was again tried and appellant was again found guilty of voluntary manslaughter, and his punishment fixed at three years in the penitentiary. The court admitted in evidence, over the objection of the defendant, the dying declaration of the deceased, who was stabbed by the defendant about 10 o'clock in the night. Doctor H. C. Hornsby lived about fourteen miles off and was sent for, reaching the wounded man some time the following day. He was permitted to testify as follows as to the declarations of the deceased to him:

"Q. Did you have a conversation with him as to whether or not he would live or die?"

"A. Yes, sir."

"Q. Did he express any hope of recovery?"

"A. I had waited on him previous to this time, when he had been shot and when he had the fever; he said he was in worse fix this time than before. This was before I made an examination. I then made an examination, and I remarked that he was killed."

"Q. What did he say as to whether or not he would get well or die?"

"A. He said he believed that he would die."

"Q. How long did you stay with him?"

"A. I got there in the morning, and it seems to me that I stayed all night; I am not certain that I did."

"Q. Did he make any statement to you as to how the difficulty came up?"

To this question the defendant objected; the objection was sustained by the court and the jury were sent out of the room; the witness was then examined by the court as follows:

"Q. Tell me all about the condition of Mr. Davidson?"

"A. Well, we might say there were six or seven stabs, but the one on the



arm wasn't fatal; the one on the breast wasn't fatal; the one under the arm was fatal; the two or three wounds in the back were each fatal wounds."

"Q. What did he say to you before you examined him?"

"A. He said he thought he was killed; I said probably not so; I hope not."

"Q. What effect did that have on him?"

"A. It roused him up and gave him some hope, seemed like.

"Q. After you examined him, tell how fully you acquainted him with his condition?"

"A. I went ahead and examined him, and after making an examination, and before I dressed the wounds, I told him I thought he was killed."

"Q. How long a time did you spend there?"

"A. I don't remember."

"Q. How long after he was wounded until you saw him?"

"A. I couldn't say exactly; they came after me and I went; its about fourteen or fifteen miles from my house to Henry Martin's."

"Q. What did he say about the llok that killed him?"

"He remarked to me that as they brought him from the place where the difficulty took place they had to come in on a porch, and Mr. Burton stabbed him as they came up on that porch."

"Q. Where did he say that he stabbed him that time?"

"A. Under the arm."

"Q. Did he express any hope of recovery after that?"

"A. Not to me."

The deceased lived about twelve days after he was stabbed. In the meantime he was carried, at his request, from the house at which he was when the above took place to the house of the defendant, and remained there six or seven days before he died. In 1 Greenleaf on Evidence, section 158, it is said: "The length of time which elapsed between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence; though in the absence of better testimony it may serve as one of the exponents of the deceased's belief that his dissolution was or was not impending. It is the impression of almost immediate dissolution and not the rapid succession of death, in point of fact, that renders the testimony admissible."

Where the following length of time elapsed between the making of the declaration and the death of the declarant the evidence was admitted: Ten days (*McDaniel v. State*, 47 Am. Dec., 93); eleven days (*Jones v. State*, 71 Ind., 66); twelve days (*People v. Burt*, 64 N. Y. Sup., 417); sixteen days (*Baxter v. State*, 15 Lea., 637); seventeen days (*Commonwealth v. Cooper*, 81 Am. Dec., 762). In other cases even a longer interval has been held insufficient to prevent the admission of the evidence. (*Kirkham v. People*, 170 Ill., 9; *Fulcher v. State*, 28 Tex. Ap., 465; *State v. Nocton*, 121 Mo., 537; *Titus v. State*, 117 Ala., 18; *State v. Crane*, 120 N. C., 601.)

In *Polly v. Commonwealth*, 15 Ky. Law Rep., 502, the doctor was called in to see the deceased in a few hours after he was shot, and informed him that he would die; he died the second night after he was shot; when he made the declaration he said he could not live. It was held the declarations were properly admitted.

The rule is that in determining whether the declaration was made under

a sense of impending death, the court will not only consider what the deceased said, but the circumstances surrounding him at the time and his condition then as shown by the proof. (*Peoples v. Commonwealth*, 87 Ky., 487; *Commonwealth v. Matthews*, 89 Ky., 287.)

In the case before us, as is shown, the deceased had at least three mortal wounds, either one of which would have been fatal; the physician reached him on the next day after his injury, and after examining him told him that he was killed, and the deceased said he believed he would die. The nature of the wounds, the length of time that had elapsed since he received them, the advice of the physician and the condition of the deceased at the time, all taken together, must have satisfied the deceased that death was impending, and we see no reason for disturbing the ruling of the trial judge in admitting the evidence. We see no error in the instructions of the court; they fairly presented the law of the case. The verdict of the jury appears to have been based on the testimony introduced by the Commonwealth, to the effect that appellee said while he had hold of the gun, and was cutting the deceased with his knife: "A man that will serve my family like you have, I will stab my knife to the hollow in you." The jury also, no doubt, came to the conclusion, from the circumstances shown by the evidence, that appellee had drawn his knife and had it ready for use before he and the deceased got into the struggle over the gun.

Judgment affirmed.

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IGO v. IRVINE.

(Filed December 12, 1902—Not to be reported.)

**Wills—Trusts**—A testator devised his estate to his four children absolutely, but in a subsequent clause of the will expressed a request that either of his children dying without issue would devise his share to the survivors or to the children of any who might be dead. The question involved on this appeal is whether one of the children, as devisee, had authority to sell his land and invest the purchaser with a fee-simple title. Held—That the devisee obtained a fee-simple title under the will, and is not charged with any trust, and could vest his vendee with a fee-simple title.

J. A. Sullivan for appellant.

R. W. Miller for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Burnam.

This appeal brings before us the will of David Irvine for construction. It was probated in the Madison County Court on the 15th day of August, 1872, and divided a large landed and personal estate between his four children, two sons and two daughters. The special question which we are asked to determine upon the appeal is whether his son, David W. Irvine, takes under it a fee simple title to a tract of 222.89 acres of land, which he has contracted to sell to the appellant, B. M. Igo, or whether he takes it charged with a trust, enforceable in equity, in favor of the surviving children of testator or the issue of those who may be dead, in the event of his death without legal issue. The fourth clause of the will of testator is as follows: "I will and

bequeath to my son, David W. Irvine, my tract of land lying and being in Madison county, on the Richmond and Lexington turnpike road, known as the Dudley place, deeded to me by Waller and William Chenault, containing about 180 acres. I also will and bequeath to my son, David W. Irvine, forty-five acres of the Newland land, reserved out of that tract and not willed in the third clause to I. Shelby Irvine, said forty-five acres to be laid off on the Richmond and Lexington turnpike road along the north line of the Dudley tract above mentioned to the Shackelford road, in such manner as to suit the land herein willed to my son, Isaac Shelby Irvine."

It is contended that the title conveyed by this clause of testator's will is limited by a subsequent clause, which reads as follows: "I make it as a request of my children that if any of them should die without issue, that in so far as they may have received any estate from me, that at their death they 'will' the same to my surviving children or the issue of those that may be dead. I think this is but a reasonable request, and I have confidence that it will be complied with by my children."

The doctrine of implied or precatory trusts was carried to great lengths by the early English and American cases. Thus, if a testator made an absolute gift to one person in his will, and accompanied the gift with words expressing a desire, will, request, wish, hope or recommendation, have been held sufficient to raise a trust where the subject and object are sufficiently certain. (Perry on Trusts, section 112, and authorities there cited.) But the later English and American cases have departed from the doctrine of the early cases and have inclined toward the doctrine of giving precatory words and expressions only their natural force. (Hill on Trusts, section 71.) The existing law on this question is well stated by Judge Gray in *Hess v. Singlar*, 114 Mass., 56, and it is quoted with approval in *Colton v. Colton*, 127 U. S., 800, as follows: "It is a settled doctrine of courts of chancery that a devise or bequest to one person, accompanied by words expressing a wish, entreaty, or recommendation, that he will apply it to the benefit of others, may be held to create a trust, if the subject and objects are sufficiently certain. Some of the earlier English cases had a tendency to give this doctrine the weight of an arbitrary rule of construction. But the later cases in this, and in all other questions of the interpretation of wills, the intention of the testator as gathered from the whole will controls the court; in order to create a trust it must appear that the words were intended by the testator to be imperative, and when property is given absolutely and without restriction a trust is not to be lightly imposed upon by mere words of recommendation."

And the question was very fully considered by this court in *Major v. Hernndon*, 78 Ky., 123, and *Bohon v. Barrett's Adm'r*, 79 Ky., 378.

Testator placed no restriction upon appellee's right to sell and convey the tract of land in controversy in the fourth clause of the will, and the words quoted above, which appear in a subsequent clause of his will, were not, in our opinion, intended by the testator to be imperative. They do not refer to any special property, but are general, and amount to a mere request that his children dying without issue will give to their surviving brothers and sisters and their descendants property in the aggregate equal to that received by them under the provisions of testator's will. We are of the opinion that appellee, David W. Irvine, was vested with a fee simple title to the property

in controversy, and that his deed conveyed the same character of title to appellant.

For reasons indicated the judgment is affirmed.

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CALL v. SHEWMAKER, &c.

(Filed December 12, 1901—Not to be reported.)

I. H. Thurman and J. W. S. Clements for appellant.

Nat W. Halstead for appellees.

Appeal from Washington Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

This case is here simply on a demurrer to the petition. There is not enough in the petition to raise the question of laches. This must be done by answer. We only determine now that the petition states a cause of action. We do not determine whether the title to the fifty acres of land referred to in the third item of the will is subject to the same conditions as the remainder of the land referred to in the fourth clause, for the reason that this question is not material now, and whether it will be material at a later stage of the case we can not know now. So no opinion is expressed on this matter.

The petition for rehearing is overruled.

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RUFF v. BAUMBACH, &c.

(Filed December 12, 1902.)

**Wills—Construction**—A testator devised his estate to his widow for her life, and directed that at her death it should be equally divided between his children "then living." It is contended that it was the evident intention of the testator to limit the estate to his children living at the death of the widow, and exclude the grandchildren, provided any of the children should die before the widow. Held—That the use of the word "living" by the testator does not manifest an intention to exclude the descendants of those who may be dead, and they are entitled to stand in the shoes of their ancestor in the division of the estate.

Wm. Marshall Bullitt for appellant.

Gibson, Marshall & Gibson for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Burnam.

In November, 1868, Gallas Ruff and his daughter, Mary Baumbach, whilst driving together, collided with a train of cars, which resulted in the instant death of Mary Baumbach, and that of Gallas Ruff three days thereafter. He left surviving him a widow, Theresia Ruff, and four children, Joseph Ruff, Michael Ruff, Caroline Ruff Klenzlen and Magdalena Ruff Schloemer; and his daughter, Mary Baumbach, left surviving her four infant children and her husband, the appellee, George Baumbach. Shortly after the death

of Gallas Ruff his will was probated in the Jefferson County Court. It reads as follows:

"I, Gallas Ruff, of Louisville, Ky., being of sound mind and disposing memory, do hereby make, publish and declare this to be my last will and testament:

"1st. I direct that all my just debts and funeral expenses be paid as soon as expedient after my death by my executrix, hereinafter named.

"2d. I will and devise to each of my beloved children living at my death the sum of \$100.

"3d. All the balance of my estate, real, personal and mixed, I will, bequeath and devise to my beloved wife, Theresia Ruff, during her life and widowhood, and after her death I devise, will and direct that same shall be equally divided between my children then living.

"4th. I hereby nominate, constitute and appoint my beloved wife sole executrix of this my last will and testament, as well as guardian of my children, and request and direct that no security be required of her in either capacity.

"In testimony whereof, witness my name.

"GALLAS RUFF.

"This 15th of July, 1895."

After the death of the life tenant, Theresia Ruff, the entire estate disposed of by the will of Gallas Ruff was divided between his four children then living to the exclusion of the infant children of Mary Baumbach. In October, 1898, the appellee, George Baumbach, instituted this suit against the surviving children of Gallas Ruff and the Fidelity Trust and Safety Vault Co., as guardian of Minnie and George Baumbach, two of his infant children, in which he alleged that two of his children who survived their mother had died; and that he, as their heir at law, and the two surviving children were entitled to what would have been the interest of Mary Baumbach in the estate of Gallas Ruff, her father, if she had survived him. The defendants answered that by the will of their father his entire estate at the death of the mother belonged to his then living children; and that it had been regularly apportioned between them under a judgment of the Jefferson Circuit Court. The lower court decided that at the death of Mary Baumbach her husband and children became the owners of the share which she would have taken in the estate of her father if she had survived him, and from that judgment the surviving children of Gallas Ruff have appealed.

In construing provisions of wills similar to the one in controversy in this proceeding this court has held in a number of opinions that they must be construed in the light of sections 2064 and 4841 of the Kentucky Statutes, which read as follows:

"Section 2064. When a devise is made to several as a class, or as joint tenants, and one or more of the devisees shall die before testator, and another or others shall survive the testator, the share or shares of such as so die shall go to his or their descendants, if any; if none, to the surviving devisees, unless a different disposition is made by the deviser. A devise to children embraces grandchildren when there are no children, and no other construction will give effect to the devise.

"Section 4841. If a devisee or legatee dies before the testator, is dead at the making of the will, leaving issue who survive the testator, such issue

shall take the estate devised or bequeathed as the devisee or legatee would have done if he had survived the testator, unless a different disposition is made or required by the will."

It was held in *Reneker v. Lemon*, 68 Ky., 211, *Dunlap v. Shrieve's Adm'r*, 68 Ky., 834, and *Chenault's Gd'n v. Chenault's Ex'or*, 88 Ky., 84, that section 4841 of the statutes had changed the common law rule of construction of the word "children" so as to embrace grandchildren, unless a different disposition was required by the will. Appellants do not controvert that such was the intention and effect of these decisions, but insist that by the use of the words "children then living," the testator clearly intended to exclude grandchildren from any participation in his estate. The cardinal rule in the construction of wills, and to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. Before the enactment of the statutes quoted supra the construction contended for would have followed from the plain import of the words of testator, but as the right to dispose of property by last will and testament is a statutory one, the language of the will must be considered in connection with the statutes.

In the case of *Smith*, by *Gd'n v. Miller's Adm'r* the will provided that at the death of testator's widow his estate should be equally divided among his then living children, and it was held that the testator used the term children in the general sense of issue, and that there was nothing in the will to indicate that it was his intention to exclude the descendants of any of his children from an equal division of the property devised. This case is sharply criticised in brief of counsel, but it does not stand alone, as he seems to think; but was substantially followed in the very recent case of *Evans v. Henderson*, 24 Ky. Law Rep., 363. In that case the deviser gave his estate to his wife for life, and provided that at her death the property should go to his living children, share and share alike. One of the children died after the testator, but during the life tenancy of the widow, leaving children, and it was held that the language of the will was not sufficient to show an intention on the part of the testator to deprive the children of his dead son of the share which he would have inherited had he survived the widow; and that the share of the dead child passed under the will to the grandchildren of testator. It is impossible to distinguish these two cases from the one at bar. They hold that a devise to "living children or surviving children" is simply equivalent to a devise to children; that the use of the word "living" by the testator does not manifest an intention to exclude the descendants of those who may be dead, and that they are entitled to stand in the shoes of their ancestor in the division of the estate.

For reasons indicated the judgment is affirmed.

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ILLINOIS CENTRAL R. R. CO. v. TAYLOR.

(Filed December 12, 1902—Not to be reported.)

Railroads — Damages — Negligence — Evidence — Continuance — Appellee brought this action against appellant to recover damages resulting from alleged negligence in the employes of appellant in operating a passenger car and recovered a judgment for \$833, from which this appeal is prosecuted.

She alleges in her petition that she was a passenger on one of its cars and the conductor announced the name of the station, which was her destination; the car stopped and the brakeman picked up her baggage and told her that this was her station. The train had passed beyond the platform, and as she placed her hand on the door facing the car backed, and stopped with a sudden jerk, causing the door to slam and mash her hand and wrist, inflicting permanent injuries. On the trial no instructions were objected or excepted to except the order overruling the motion for a peremptory instruction to find for the defendant. Held—That it was not error to refuse a peremptory instruction. Appellant insists that the court erred in refusing to grant a continuance on account of absent witnesses. All of the witnesses whose statements are embraced in the affidavit except one appeared and testified, and more than one of them testified to the same facts as to slight injury to appellee's hand, and the absence of the testimony of this one witness could not have been prejudicial to appellant. This court will not reverse a case on account of the refusal of the court to permit a witness to testify, who had been present in the court room contrary to a rule providing for a separation of the witnesses where the record does not disclose what his testimony would have been.

H. P. Taylor and Pirtle & Trabue for appellant.

M. L. Heaverin for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Chief Justice Guffy.

The appellee, who was plaintiff in the court below, instituted this action in the Ohio Circuit Court against the appellant to recover \$1,000 for personal injuries caused by the negligence of the appellant.

The substance of the allegation of the petition is that on the — day of January, 1901, she was a passenger on one of defendant's passenger trains from Rosine, Ohio county, Kentucky, to Render, Ohio county, Kentucky, and as such paid the conductor the regular and customary fare; that at the time she arrived at her destination, Render, Kentucky, and was attempting to leave said train, that the defendant, by its servants, etc., managed and operated said train in such a careless and reckless manner as to cause the door of said train to slam to and mash and injure plaintiff's hand; that when the train arrived at Render that the conductor in charge of said train called the station, and that when the train came to a standstill the porter took possession of her grip, or valise, and started to leave the train, he and the conductor telling her that they had arrived at Render, the place where she was to leave said train, and that she being thus informed, did attempt to leave said train, and when she got to the door of said train, and was aiming to get out of same, the servants and agents in charge of said train started to move the train backwards, and in doing so gave the train a sudden and violent jerk, thereby causing the door of said train to violently close, catching her hand between the door and facing, mashing and injuring her hand and wrist to such an extent that she has entirely lost the use of her right arm, which is now perished, and that her said injuries are permanent; that at the time the train came to a standstill it had passed the station, which fact was well known to the conductor in charge and the servants and agents and employes of said defendant, but unknown to the plaintiff, and while

the train was standing still and the agents in charge of same calling the station, which was her destination, she, in good faith, believing that the train was then at the platform, attempted to leave the train, and in so doing received the injuries complained of above, all of which was caused by the negligence of the defendant's servants, agents and employes in charge of said train, and in the careless and reckless manner in which they operated and managed said train; that her injuries are permanent, and she is now, and has been continuously since the time she received said injuries, unable to labor or even to dress herself; that her hand is so that she can not use it, to her great damage in the sum of \$1,000, for which she prayed judgment.

The answer is a traverse of the averments of negligence or carelessness upon the part of the defendant, as well as a denial that the conductor called the station as alleged, or at all, or that the train came to a standstill; and, in short, may be taken as a traverse of all the allegations of the petition which show a right to recover.

In the second paragraph of the answer it is alleged that the plaintiff attempted to leave one of the coaches at Rendar, and in attempting to do so she carelessly, negligently and recklessly placed her hand upon the door facing of said coach while the train was in motion, and that the necessary stoppage of said train at said place caused the door to slam against plaintiff's hand, catching the same, but without injuring the same, or permanently hurting or injuring plaintiff at all; and that the plaintiff was reckless, careless and negligent in this, that she went to said door of said coach while the train was in motion, knowing well that the train would come to a full stop, and that she had ample time to alight from same, and that the injury complained of, if plaintiff was injured at all, was caused and occasioned by her own carelessness, recklessness and negligence, and would not have occurred except for her own fault, and was without fault upon the part of defendant. The reply of plaintiff is a complete traverse of all the affirmative averments of the answer.

A jury trial resulted in a verdict and judgment for plaintiff for \$688, and appellant's motion for a new trial having been overruled, it prosecutes this appeal. The grounds relied on for a new trial are as follows:

1st. Because the court erred in refusing to sustain a demurrer to the petition.

2d. Because the court refused to sustain defendant's motion for a peremptory instruction.

3d. Because the verdict of the jury is against the evidence, and is contrary to the law.

4th. Because of incompetent testimony allowed by the plaintiff in the case over defendant's objections and exceptions

5th. Because the court failed and refused to permit the defendant to introduce competent testimony, which is fully set out in the affidavit filed herein.

The absent witnesses were Ed. Rowe, Judson Rowe, Leslie Myers, Dr. E. W. Ford and Dr. E. B. Pendleton, whom it is alleged were subpoenaed herein; that it could prove by Ed. and Judson Rowe that at the time of the alleged injury the plaintiff visited their house; that they, and each of them, knew that she was not injured by the defendant on her hand, or otherwise,



because she attended persistently, day by day and night by night, a protracted meeting that was in session at Render, this county; that she took an active part in said meeting, and that she participated in the exhortations belonging to same, by throwing up her hands and shouting, and that if her hand was injured to any extent that might hurt or injure her permanently, or at all, the same was caused by her own fault; that U. M. Everly, a witness herein, will state practically the same that Ed. Rowe and Judson Rowe will state; that he knew, saw and was with plaintiff immediately after her arrival at Render upon the occasion of the alleged injury, saw her clap her hands and shout in church, and that she was perfectly well and without injury at that time; that by Ford and E. B. Pendleton, regular practicing physicians, it can show on a trial of this case by the testimony of said physicians, that an injury occurring to the hand, as described in the petition by the slamming of the door, on the 23d of January, 1901, or at any other time, if serious, would have resulted in fever, serious swelling, and probably an amputation within three days, and that the plaintiff could not have received such injuries as would have affected her permanently by the slamming of the door, except that she would have been within three days laid up, suffering with fever, and possibly an amputation of the fractured bones.

It appears that the Rowes and the doctors named in the affidavit were introduced as witnesses in the case, and that the two Rowes proved substantially the same facts that it is said that Everly would have testified to. The affidavit does not show what was expected to be proven by the other witnesses. The instructions given by the court were quite as favorable to the appellant as it was entitled to, and no exceptions were taken to any of the instructions given, nor any complaint made of the refusing of instructions, except the refusal of the court to give a peremptory instruction for the defendant.

The plaintiff testified in substance that when the train got to Render that the porter halloed at the door and said "Render," and picked up her valise, and said "this is your station," and after the train stopped she got up and went to the door, and just as she got to the door they commenced moving the train back, and two men motioned for her to move back, and she stopped; she did not know where they had to move it to, and when they moved the train it crushed on her hand, the door came to on her hand, and the train went with a terrible jerk; that the train had gone on down and the porter got off down in a ditch, beyond the getting off place, and had her valise. She then exhibited her hand and arm to the jury, and testified that her hand was swelling away, and that she could not dress herself, or even comb her hair. She also stated she did not call in the services of a physician, and that Mrs. Rowe furnished her some liniment, and that she stayed there three days, and that she did attend the meeting day and night that was going on at Render.

R. F. Stevens fully sustained the plaintiff in regard to the announcement of the stoppage, and then the backing of the train with a jerk. Mrs. Stevens also sustained the plaintiff in her testimony in regard to the injury, and to the same effect is the testimony of Miss Lilly Austin.

The conductor, Putman, testified for the defendant in effect that the train was in good order, and that he only ran about the length of a car beyond the platform, and had no recollection of seeing Mrs. Taylor.

William Curley is a locomotive engineer; was on No. 121, between Louisville and Paducah; knew nothing about the injury; did not know whether he ran past the station and had to back, or not; testified that such things often happen; that they had an extra car on that day.

R. A. Moore was called on behalf of the defendant and sworn, but his testimony was objected to because of the ruling that the witness should not remain in the courthouse during the trial, he having testified that he was in most of the time and heard Curley testify, and heard part of Putman's testimony.

Ed. Rowe was examined for defendant, and testified in substance that he saw the plaintiff on that day; after she got to his house she spoke to him about her injuries; he did not think she did before. She said she put her hand on the door facing and the door slammed and caught her hand; she did not ask for a doctor or medical service; he saw a little raised place on her hand, and it looked more like a contraction of the muscles; that she got to his house on Wednesday and left Friday, and did not ask for any treatment that he knew of, but might have gotten some treatment; did not hear her complain very much; he furnished no medicine; the doctor was there in the house, and she asked for no medical treatment; he did not know what his wife did for her.

Judson Rowe was called for defendant. He saw the plaintiff at his father's house on the 23d of January, at night; she had been to church that night; saw her up in the crowds, she was shaking hands in the crowd, but did not know whether she was shouting or not, and that she never complained of any injury to her hand in his presence, and that he knew and saw her every day while she stayed at his father's house. At this point the attorney for defendant offered to read his affidavit for continuance, which was overruled.

Dr. E. W. Ford was called as a witness, and testified in substance that he did not think a woman near on to sixty years of age, with such mash of her hand as that, it would perish away and she could not use it, would be able to attend a protracted meeting of three or four days, day and night, without complaint, or able physically to go to that meeting without complaint; and his testimony tended to show that if such an injury had been inflicted she would have had fever, and not been able to have attended meeting. He was also of the opinion that vinegar and saltpeter would not cure a broken bone.

Dr. E. B. Pendleton testified to the same effect substantially, but said that there had been bones broken in the body without the person being conscious of it.

Leslie Myers also testified in this case, but his testimony is unimportant.

It is insisted for appellant that the court erred in not granting a continuance upon the affidavit filed, and especially erred in not allowing so much of it read as stated the facts that it could prove by Everly. It will be seen that the two doctors referred to in the affidavit were introduced by the defendant and testified, and so were the two Rowes. The affidavit does not state what it could prove by the other witnesses mentioned herein, and Myers was introduced and knew nothing pertinent to the case. Rowe proved substantially the facts that it was proposed to prove by Everly, which facts were not contradicted by the plaintiff. Everly's statement was not material to the defense, and especially in view of the fact that substantially

the same evidence was introduced by other witnesses and not disputed by the plaintiff.

Complaint is made because the court refused to allow R. A. Moore to testify for the reason that a rule had been entered requiring the witnesses to remain out of hearing of the witness testifying, it appearing that Moore had been in the courthouse hearing the testimony of other witnesses. It does not appear that Moore had ever been summoned or theretofore sworn as a witness, nor is there any statement or avowal made by the defendant as to what it expected to prove by Moore. We are, therefore, of the opinion that the court did not err in refusing to allow Moore to testify; nor did it err in refusing to allow the affidavit to be read as the deposition of Everly. At any rate, it does not appear at all that defendant was prejudiced by the ruling of the court in respect to the affidavit, or in respect to the testimony of Moore. As to the other objections of testimony, the court did not err to the prejudice of defendant. In fact almost, if not every, objection to testimony made during the trial was decided by the court in favor of the defendant.

The fact that plaintiff was seriously injured without any fault or negligence on her part seems to have been abundantly proven, and no attempt was made by the appellant to show that, as a matter of fact, her arm had not perished, or to show that her testimony as to her inability to use it, or to dress herself, or to comb her hair, was not true. As stated before, the instructions of the court were extremely favorable to appellant, and the verdict is abundantly sustained by the testimony, and is evidently no more than reasonable compensation for the injury inflicted.

After a careful consideration of this entire record we are clearly of the opinion that the plaintiff clearly showed herself entitled to recover, and that no error to the prejudice of the substantial rights of the appellant occurred.

Judgment affirmed, with damages.

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RONE v. COMMONWEALTH.

(Filed December 17, 1902—Not to be reported.)

1. Criminal law—Manslaughter—Instructions—Appellant was indicted and convicted for manslaughter and prosecutes this appeal. The facts show that appellant and the deceased were drinking some, and left Bowling Green in a buggy together after night, and that appellant shot and killed the deceased while they were in the buggy together, some difficulty having arisen between them. Appellant complains because the court in an instruction used the words "that he had no other safe, or apparently safe, means of escape from said danger." Held—That said words were error, but under the circumstances proven were not prejudicial.

2. Continuance—The affidavit filed as a basis for a motion for a continuance asked a continuance on account of the absence of counsel, who he thought he had employed, but who refused to go into the trial unless his fee was paid; also on account of absent witnesses, who would prove that four or five days after the killing they noticed a bruise on appellant's face. Held—That the court did not err in refusing a continuance as the counsel who acted in the case were competent, and, besides, the attorney, on account of whose absence the continuance was asked, appeared during the trial and participated in it. The evidence of the absent witnesses was immaterial, be-

sides, appellant was permitted to prove on the trial that on the night of the killing there was a mark of a blow on appellant's face.

3. Evidence—Evidence as to a difficulty between appellant and appellee in Bowling Green on the day of the difficulty was competent as is showed that the deceased had interfered and took up for some negroes, as appellant had stated that was the cause of the difficulty.

Sims & Grider and Nerge Clark for appellant.

N. A. Porter, T. W. Thomas, C. J. Pratt and M. R. Todd for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge White.

The appellant was indicted by the grand jury of Warren county and charged with murder in killing C. V. Savory. Upon trial he was convicted of voluntary manslaughter, his punishment being fixed at twenty-one years' confinement in the penitentiary, and he appeals.

The facts of the killing, so far as they are undisputed, appear to be that appellant and deceased left Bowling Green together in a buggy, their destination being Tim Cherry's, near Richardsville, some eight or ten miles distant. They were drinking some. Appellant was sitting on the right-hand side of the buggy driving. When these two got within hearing of Cherry's house Savory was shot and killed, receiving four shots from a pistol in the head, one above and back of the ear, one in the back of the head, one in the neck under the ear, severing the jugular vein and another in the chin near the corner of the mouth. Either of the first three above described wounds would have been fatal. Several persons at Cherry's heard five pistol shots, and shortly afterwards appellant drove up in a buggy and informed them he had had some trouble with Savory. They started to go, and it was suggested that water and camphor be taken, when appellant said neither would do Savory any good. The Cherrys and appellant went to Savory, who was found dead, lying on his side in the road, with his feet in the middle of the road and his head toward the ditch, his hands were in front of him and very bloody inside and out. Near his hands lay a pistol, full loaded, but without any blood on it. Deceased's hat was found twenty-one steps back towards Bowling Green, and from the hat to the body were blood spots on the ground. Before the body was reached by the Cherrys with appellant he was asked why he shot Savory, what the trouble was about; he replied he did not know; had better not talk. Two of the witnesses (Cherrys) say appellant said in addition to the above: "I got into two or three fusses in the town at Savory's house and the damn son-of-a-bitch took up for the negroes." However, appellant denies this.

No person witnessed the difficulty, and the only statement of the facts of the killing is related by appellant himself. His testimony is that in coming out a small package was lost out of the buggy, and Savory accused him, Rone, of losing it, and demanded pay for the value of the package and when he refused to pay Savory struck him and drew a pistol; appellant grabbed the pistol and held the hand, drew his own and shot Savory. All this occurred in the buggy. Appellant then jumped out of the buggy, leaving the body of Savory in the buggy, and after the body had fallen out of the buggy appellant caught the horse and drove over to Cherry's and informed them of the difficulty.

The Commonwealth was permitted to prove over appellant's objection that while in Bowling Green appellant had a difficulty, or war of words, with some negroes while at Savory's house, and appellant drew his pistol on an old negro woman and attempted to make a negro boy dance and stand on his head, by threats and exhibiting his pistol; that Savory remonstrated with him for such conduct and told him to apologize to the negroes.

This testimony was all objected to by appellant. The Commonwealth also showed that appellant when he started to Bowling Green carried a pistol, and when there got another, thus having two. When appellant got to Cherry's house he gave up a pistol that had been fired in all five chambers, and had no other. There was a rifle in the buggy that belonged to Savory, but does not seem to have been used at all in the difficulty.

On the trial the court gave six instructions, on murder, voluntary manslaughter, doubt as to degree, two on reasonable doubt as to guilt and one on self-defense, which is the only one criticised. The objection to the sixth instruction is as to the use of the expression "that he had no other safe, or to him apparently safe, means of escape from said danger."

It is contended that this means that appellant was compelled to flee or run away, and that, therefore, it is error. Appellant complains of the action of the trial court in refusing a continuance. Appellant's affidavit for a continuance sets forth two grounds for continuance. One, that his counsel, whom he thought he had employed, refused to go into the trial of the case without the fee being paid or secured in advance, which at that time he was unable to do because of the lack of time. Another reason for continuance was the absence of two witnesses. By these two witnesses appellant proposed to prove that some three or four days after the killing of Savory they saw appellant, and he had a bruised place on his nose as if from a blow of some sort. After appellant's motion for continuance had been overruled, and during the trial, his attorney who it was said had refused to appear, did in fact appear and did assist in the defense. Counsel who prepared and filed the affidavit for continuance, and who selected the jury, was familiar with the case, and competent to present the defense.

We are of opinion there was no error in refusing the continuance. The testimony of the absent witnesses would have proved no fact pertinent to the case. Appellant proved by one witness that on the night of the difficulty there was a mark of a blow on appellant's face. There were two theories of the killing of Savory: One was a willful shooting by appellant because of the difficulty with the negroes, and the placing of the body and pistol in the road so as to appear that deceased had a pistol in his hands when shot; the other, was appellant's story showing a clear case of self-defense. This was submitted to the jury and they rejected appellant's story and found him guilty of manslaughter, when they were justified in a verdict of murder.

Under either state of case, as presented, the shooting was shown and admitted to have been while both were in the buggy side by side.

If the jury had concluded that appellant's account of the shooting was true, the expression escape from the danger by safe or apparently safe means, as used in the instruction, would not have prevented an acquittal. If there was a struggle with Savory, having his pistol drawn, there was no safe, or apparently safe, means to escape even. If Savory had threatened to kill ap-

pellant and drawn his pistol to do so, there was no means to escape as the two men were so close together. We are of opinion, therefore, that the instruction given did not, and could not, prejudice the substantial rights of appellant. If the jury had believed his story they must have said not guilty, regardless of his duty to avert the danger, or escape from the danger, as laid down in the instruction. They must have concluded also that there was no safe, or apparently safe, means of escape. We do not approve of the instruction as being a correct statement of the law, but we are of opinion that in this case, in view of the verdict and the facts proven, it was not prejudicial to appellant.

We are also of opinion there was no error in admitting the evidence as to the difficulties in Bowling Green as it proved that Savory had interfered and "took up for the negroes," as appellant stated was the cause of the shooting. Upon the whole case, as presented by this record, we conclude that appellant has had a fair trial, and that no error prejudicial to his substantial rights has been committed.

The judgment is, therefore, affirmed.

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COMMONWEALTH v. COVINGTON AND CINCINNATI BRIDGE CO.

(Filed December 12, 1902.)

1. Taxation—Assessment for franchise taxes—The question involved on this appeal involves the fixing of a correct method for assessment of the franchise of a bridge company for taxation for the year 1901, where its tangible property is partly within and partly without the State. Held—That the correct method of making said assessment is to take the entire value of its entire property in both States and deduct from it the value of its tangible property, and the remainder will represent the value of its franchise for taxation, and as the length of the bridge in Kentucky is 59 per cent. of its whole length, this State is entitled to tax that proportion of the value of its franchise. The property of a bridge company, tangible and intangible, must be assessed as a whole. It will be presumed the part in this State is of equal value to the part of it out of the State.

2. Estoppel—The State Board of Valuation and Assessment can not, by fixing one method of assessment for one year, bind a subsequent board for another year to follow the same method. Each board may fix a different method of assessment if the law warrants it.

Clem J. Whittemore for appellant.

J. W. Bryan for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

This was an agreed case submitted to the circuit court on the following agreement of facts: "The defendant, the Covington and Cincinnati Bridge Co., is, and was at all times herein referred to, a corporation both in Kentucky and Ohio, it having been incorporated in Kentucky by an act of the general assembly of the Commonwealth of Kentucky, approved 17th of February, 1846, entitled 'An act incorporating the Covington and Cincinnati

Bridge Co.,' and having been incorporated in the State of Ohio by an act of the general assembly of the State of Ohio, approved 26th of March, 1849, entitled 'An act to confirm the charter of the Covington and Cincinnati Bridge Co.,' it being specifically empowered by the said special act of the legislature of Ohio to construct and operate a bridge over the Ohio river, from Cincinnati, in that State, to the city of Covington, in Kentucky, and to charge and collect toll from persons going on such bridge in the State of Ohio, and to purchase and hold real estate in Ohio for the purpose of said bridge, and when the same could not be acquired by agreement, then to condemn such property in Ohio. Under the power and authority thus conferred in its charter by the legislatures of Kentucky and Ohio respectively, defendant constructed, and still owns and operates, a toll bridge over the Ohio river, and extending from Second street, in the city of Cincinnati, State of Ohio, to Second street, in the city of Covington, State of Kentucky. It on and before the 15th of September, 1900, owned the real estate therewith connected in the State of Ohio, a part of which it was compelled to, and did, acquire by and through condemnation proceedings, under the laws of the State of Ohio, in the courts of that State, in some instances going through the Supreme Court of Ohio.

"Said bridge is not, and never has been, a steam railroad bridge, but has been and is used by persons traveling on foot, horseback and in vehicles; also by street cars.

"On the 15th of September, 1900, the total length of this bridge, including approaches, which are a part thereof, was 2,720 feet. Of that there was in Kentucky (to low-water-mark on the Ohio side of the river) 1,604 feet, leaving 1,116 feet thereof in the State of Ohio, that is, 59 per cent. in length thereof was and is in the State of Kentucky. On the 15th of September, 1900, it made a written verified statement to the auditor of public accounts, as provided by section 4078, Kentucky Statutes, a copy of which is attached hereto as part hereof, marked 'A.'

"On the 15th of September, 1900, the value of the capital stock of defendant was \$750,000, and such amount was its worth on the market, and it then had an outstanding mortgage bonded indebtedness of \$580,000, being bonds it had issued and which were and are bearing interest at 4 per cent. per annum. For the year 1900 it paid a dividend of 4 per cent. on its said \$750,000 of capital stock, and had not paid a greater annual dividend on said stock for several years prior thereto. The value and worth on the market of its capital stock, and the bonded indebtedness on the 15th of September, 1900, was \$1,330,000, and no more.

"The Commonwealth of Kentucky assessed for taxation for the year 1901 the tangible property of defendant in Kentucky at \$452,000, and it has paid its taxes thereon to the State. The State of Ohio assessed for taxation for that year that part of defendant's bridge in that State at \$237,984, and defendant has paid to the State of Ohio the taxes thereon.

"The Board of Valuation and Assessment of Kentucky fixed the value of defendant's franchises for taxation by Kentucky for the year 1901 in this way, to wit:

"It took what said board had fixed as the value of all defendant's property or capital stock for the preceding four years, to wit: Capital for 1897,

\$902,070; capital for 1898, \$698,206; capital for 1899, \$668,060, capital for 1900, \$663,060, and adding these four years together made \$2,931,396, and dividing that by four got an average for the four years of \$730,349, and then fixed said \$730,349 as the capitalization of defendant for the year 1901, and deducting therefrom the assessment of the tangible property in Kentucky, left \$278,349 as the franchise valuation, and the tax rate being 47½ cents, made defendant's franchise tax for 1901 \$1,322.16.

"Defendant denying the correctness or legality of this fixing or valuation of its franchise, and denying the right or power of said board to adopt such a mode or basis of arriving thereat, or its liability for the tax claimed thereon, refused to pay said \$1,322.16, and defendant further insisting that the correct legal and proper valuation of its said franchise was, and would have been, for said year 1901 the sum of \$180,489, and the tax it owed to the plaintiff, the Commonwealth of Kentucky, thereon was \$857.32, and no more, paid in to the auditor of public accounts the said sum of \$857.32 under an agreement that such payment of \$857.32 was in no way to affect the question of defendant's liability for said claimed balance of \$464.84, the question of such liability and of said assessment or valuation of defendant's franchise, and the method or basis upon which defendant's said franchise should be valued or fixed for taxation by said board to be determined by the courts.

"The earnings or receipts of defendant's bridge in Ohio for said year 1901 were \$80,871.55, while in Kentucky they were \$38,800.81.

"Wherefore, the parties presenting the questions herein made pray the judgment of the court thereon, such judgment embracing and giving such relief to the parties hereto respectively as they may be entitled to receive.

"ROBT. J. BRECKINRIDGE,

"Attorney General for plaintiff, the Commonwealth of Kentucky.

"J. W. BRYAN,

"Attorney for defendant, the Covington and Cincinnati Bridge Co."

On these facts the following questions were presented to the court for decision:

1st. Does the defendant (the bridge company) owe the plaintiff (the Commonwealth) the sum of \$464.84, or any part thereof, on account of a tax of its franchise for the year 1901?

2d. What method or basis should be adopted by the State Board of Valuation and Assessment for fixing the value of the defendant's franchise for taxation by the Commonwealth of Kentucky?

The circuit court adjudged that the board in making the assessment adopted an improper mode, and that the defendant by the payment to the auditor of the sum of \$857.32 had fully paid to the State the tax on its franchise for the year 1901 and owed no part of the \$464.84 claimed by the State in addition to the amount which had been paid.

The court reached its conclusion by taking the total value of the bridge company's capital stock and bonded indebtedness, \$1,380,000. From this amount it deducted the tangible property assessed for taxation in Ohio, \$337,984, which left a balance of \$1,042,016. As 59 per cent. of the bridge lay in Kentucky and 41 per cent. in Ohio, it took 59 per cent. of \$1,042,016, which is \$664,289, and from this it deducted the tangible property assessed



in Kentucky, \$452,000, which left a balance of \$192,289 as the value of the Kentucky franchise.

It is insisted by the State that this is an erroneous method of arriving at the proper valuation of the franchise, for the reason that thus the bridge company is not taxed upon its entire property, and that the Kentucky authorities are not dependent upon the action of the officers of Ohio in fixing the value of the property of the bridge company. It is insisted for the State that the proper way to arrive at the valuation of the franchise is to take the total value, \$1,830,000, and get 59 per cent. of it, which is \$782,700, and that this represents the total of the tangible property and of the franchise in Kentucky. Therefore, if we deduct from this total \$782,700 the assessment of the tangible property in Kentucky, \$452,000, the balance, \$330,700, is the value of the franchise. The board fixed the value of the franchise at \$278,849, or considerably less than the result thus obtained.

It is insisted for appellee that the court below followed the case of *Henderson Bridge Co. v. Commonwealth*, 99 Ky., 628, and that this case has been approved in a number of subsequent opinions by this court. But that suit and all those following it were actions by the Commonwealth to recover taxes based on the assessment made by the board. The State was not complaining of the assessment; on the contrary it was endeavoring to enforce it. It had no right of action, except upon the assessment and no question, therefore, could be presented by the State as to the propriety of the assessment which it sought to enforce. The bridge company resisted the assessment, and in response to this the court said at the bottom of page 642 that the board followed out the line claimed by the defendant. But this action of that board did not prevent another board for another year from adopting a different line, if the law warranted it. There is nothing, therefore, in any of these cases determining that the board did not have a right to adopt another basis of assessment.

It is also insisted for appellee that the basis adopted by the board in this case, or the mode by which it reached its results, was erroneous. If this be conceded, still if the result reached by the board was correct or not more onerous on appellee than it should have been, the assessment can not be disturbed, for no principle is better settled than that if an officer is right in his conclusion, the fact that he gives bad reasons for it, or reached it in the wrong way is immaterial. If we subtract from the total value of all the property of appellee the value of its tangible property the balance represents necessarily its intangible property; and as the Constitution requires all property within the taxing district to bear its equal part of the public burden, this intangible property, so far as it is within the State, must be taxed as other property. While it does not necessarily follow that all parts of a bridge are of equal value, still the fact remains that its whole value is due to its entirety, and that one part of the bridge is practically of no value, at least as a bridge, without the other. *Prima facie* it should be presumed, where part of a bridge lies in Kentucky and part in another State, that the value of the structure in the two States is in proportion to the length of the bridge in each, for the value of the property depends upon its use as a bridge, and the franchise, it seems to us, must necessarily be apportioned the same way. If it should be shown that the property in the other State

was of greater value per foot than the property in Kentucky, our officers are not concluded by the action of the officers of the other State, but could for themselves fix the value of the entire tangible property of the bridge and deduct this from the total value, which was in this case \$1,880,000. But there being no showing that there was any discrepancy in value between the Kentucky end of the bridge and the Ohio end, it should be assumed, in the absence of proof, that the value of the property in Kentucky was in proportion to the length of the bridge in Kentucky.

We, therefore, conclude that the basis urged by appellant is the proper one for the assessment of the property under the agreed facts, and the board having fixed a lower assessment than this would make, the court erred in not enforcing the collection of the tax on the assessment made by the board, for it is easy to see that if the appellee's property is assessed in Kentucky on the line claimed by it, and also assessed in Ohio on the same line, it will escape payment of taxes on a part of its franchise. For in that event the value of its tangible property will not be subtracted from the total value of its property, but from a per cent. of it, and the balance is necessarily smaller than if the entire value of its property was taken as the basis and the value of its tangible property subtracted from it; and if the property was so assessed in Kentucky and not in Ohio, Kentucky would lose a part of her just revenue, although as to Ohio there would be no loss.

Judgment reversed and cause remanded for a judgment in favor of the State for the amount claimed.

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EARLY v. COMMONWEALTH.

(Filed December 12, 1902—Not to be reported.)

Criminal law—Manslaughter—Appellant having been indicted as a principal for murder, was convicted and sentenced to confinement in the penitentiary for twelve years, and prosecutes this appeal, urging as grounds for reversal errors in instructions prejudicial to him. Held—That as appellant was indicted as a principal in the killing, the failure of the court to give an instruction as to who was principal was not prejudicial to appellant as the proof shows that he fired the fatal shot. Where the proof shows that the person shot died within about five minutes after he was shot, it was not error to submit an instruction requiring the jury to believe that he died within a year and a day. The failure of the instruction on self-defense to leave out the words "without previous malice," was not prejudicial to the accused. The Commonwealth might have complained that they were omitted.

W. R. Ramsey and Ed. Parker for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Paynter.

The appellant was charged with the murder of Ed. Jones, and a trial resulted in a verdict of manslaughter and a sentence to the penitentiary for twelve years. It is urged that the case should be reversed because instruction No. 1 is erroneous and prejudicial to the appellant. It reads as follows: "If you shall believe from the evidence, beyond a reasonable doubt, that the

defendant, Ab Early, in this county, and before the finding of the indictment herein, feloniously shot and killed Ed. Jones, or feloniously shot and wounded him so as to hasten his death, not in the necessary, or reasonably apparent necessary, self-defense of the defendant, you ought to find the defendant guilty; guilty of willful murder as charged in the indictment, if you shall believe from the evidence, beyond a reasonable doubt, that said shooting was done with malice aforethought; guilty of voluntary manslaughter, if you shall believe from the evidence, beyond a reasonable doubt, that said shooting was done in sudden heat of passion or in sudden affray. If you shall find the defendant guilty of willful murder, you will fix his punishment at death or confinement in the State penitentiary for life, in your discretion. If you shall find the defendant guilty of voluntary manslaughter, you will fix his punishment at confinement in the State penitentiary not less than two and not more than twenty-one years, in your discretion. If you shall find the defendant not guilty you will say so, and no more."

The appellant was indicted as a principal jointly with Joe Harp and William Underwood. The instruction is criticised because the question was not submitted to the jury, as to who was the principal or whether the deceased was killed instantly or died within a year and a day after the shooting. It is further criticised because it only submits the question of shooting, not of wounding.

The testimony in the case shows that the appellant and Underwood both shot at and wounded the deceased. There was no occasion for submitting to the jury the question as to whether he aided and abetted in the killing. He was tried as a principal, and the testimony conclusively shows that he fired the fatal shot. He was not standing by and encouraging Underwood and Harp, but was actively engaged in it himself. Had such an instruction been given it would have been only in aid of the prosecution. The appellant can not complain because an instruction was not given upon that aspect of the case. Under the instruction the jury must have believed that the appellant wounded the deceased, because they could not have found him guilty unless they believed he shot and killed Jones. If he shot him he necessarily wounded him, and the jury of course so understood it. Besides the second instruction, which was on the subject of self-defense, the court submitted the question as to whether the appellant shot and wounded deceased. Instructions Nos. 1 and 2 show that the question of shooting and wounding was fairly submitted to the jury, even if instruction No. 1 was subject to the criticism just considered. If the wound was inflicted willfully, maliciously and with malice aforethought and not in self defense, and it hastened the death of deceased, the appellant was guilty of murder. If it hastened the death, of course the death was the result of it. Death resulted within less than five minutes after deceased received the wounds, and there was no occasion for submitting the question as to whether he died within one year and a day after being shot. We think that instruction No. 2 sufficiently submitted the question as to whether the defendant believed, and had sufficient grounds to believe, etc., that he was in danger of death, etc. This instruction recognized the right of defendant to exercise his judgment as to whether or not there was an impending danger, and as to the necessity,

or apparent necessity, for slaying deceased to avoid it. It is true the instructions leave out the words "without previous malice." The omission of these words did not prejudice the right of the appellant. The Commonwealth might have complained that they were omitted.

We are of the opinion that the defendant had a fair trial, therefore, the judgment is affirmed.

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KLOSTERMAN, &c. v. CHESAPEAKE & OHIO RY. CO., &c.

(Filed December 17, 1902—Not to be reported.)

Harvey Myers for appellants.

Simrall & Galvin for C. & O. Ry. Co., &c.

J. W. Bryan and E. W. Hines for Louisville R. R. Co.

Appeal from Kenton Circuit Court.

Judge O'Rear delivered the following dissenting opinion:

This action was brought to recover damages alleged to have resulted from the operation of railroad trains over appellee's tracks at the intersection of Lewis and Craig streets, in Covington, Ky. The double tracks of appellee's road pass diagonally across the intersection of Lewis and Craig streets, and over these two streets all railroad trains of appellee's road moving between Covington, Ky., and Cincinnati, O., pass. Appellants' property is situated at the southeast corner of Lewis and Craig streets, fronting thirty-five feet on Lewis street, and extending back seventy-five feet on Craig street. Upon this lot is a three-story brick house at the corner, and a two-story brick house on the rear of the lot, fronting on Craig street. These tracks were constructed across the intersection of Lewis and Craig streets in the year 1889, since when they have been constantly used in substantially the same condition as they were when first built. At the time of their construction the property involved in this litigation was owned by Frank Klosterman, the husband of one of the appellants, and the father of the others. He died February 10, 1892, and this suit was brought December 5, 1895, by his widow, as executrix, and by his devisees for injuries to the property arising from the operation of trains on and over said tracks, that is, from the noise, smoke, cinders and vibrations arising from the operation of the cars. The petition does not allege that appellees' operation of its railroad trains was negligent, or unusual, or other than the usual and customary service, nor does the petition proceed upon the ground that by the construction of appellee's railroad tracks and the operation of its trains there has been an interference with appellants' right of egress and ingress from and to their said property.

It is the contention of appellants, as set out in this petition and made here in argument, that appellees' occupancy of the street in question, to the extent of one of its tracks, was without legislative or municipal authority, and it was, therefore, a continuing nuisance for appellee to operate on such tracks its railroad trains and locomotives. It becomes important, therefore, to determine whether appellees' occupation of the streets in question by its double track of railroad was or has become authorized. If it

was, this action is confessedly barred under the principles announced in *L. & N. R. R. Co. v. Orr*, post. The tracks were built by appellee, the Covington and Cincinnati Elevated Railroad, Transfer and Bridge Co., hereinafter called the bridge company. This company was incorporated by an act of the legislature, approved February 9, 1886. Prior thereto the Kentucky Central R. R. Co. had acquired certain corporate rights and franchises, including that of operating and maintaining a line of railroad into the city of Covington, and on to the Ohio river. The bridge company was authorized to construct a railway and highway bridge across the Ohio river between the cities of Cincinnati and Covington, and to operate railroad trains thereon. It was authorized to construct approaches to the bridge on the Covington side, and to build and maintain connection with the railroad tracks of such other roads as might then be in Covington, or might thereafter be constructed to Covington. At that time, so far as the record discloses, there was but one road in Covington, to wit, the Kentucky Central. The 8th section of the act of incorporation is as follows: "The said company shall construct and maintain tracks connecting its bridge with the Kentucky Central Railroad in such manner as to enable other railroads to connect these lines of railway with said tracks approaching said bridge. Connections made by any other railroad with such connecting tracks shall be so made as to permit other railroads to connect therewith; and any railroad now existing, or to be hereafter constructed, within the city of Covington, shall have the right to connect its railway with said connecting tracks, and shall have the right to use the same for the purpose of and to cross said bridge with its locomotives and cars upon the payment of tolls and upon the terms in this act expressed."

Section 10 is as follows: "The said company shall not have the power to acquire more than one right of way from any depot in Covington to its bridge, and shall obtain no permit or privilege from the city council of Covington for such right of way without first having given at least one week's notice of its intention to make application therefor, which notice shall be in writing, and be served on the city clerk of said city, and said corporation shall also cause said notice to be published in some newspaper circulating in Covington at least seven days before the making of such application, but nothing herein shall be construed to prevent said company from acquiring a right of way by assignment as provided in section 6 hereof."

Under this charter appellee bridge company did construct the bridge contemplated by the act, and did build approaches thereto on the Kentucky side of the river, and did connect its tracks with the tracks of the Kentucky Central R. R. Co. The Maysville & Big Sandy R. R. Co., now operated and controlled by the Chesapeake & Ohio Ry. Co., had constructed a railroad into the city of Covington, and the track was built on the same roadway, and parallel to the other track connecting this road with the bridge company's road. In other words, the bridge company has built tracks from its bridge connecting it over one roadway with two different railroads operating in Covington, Ky., which were under the charter of appellee bridge company entitled to transfer privileges over said bridge into Cincinnati.

For appellant it is argued that the authority to appellees to construct a

double-track road is not shown in this case, because there was not a compliance with section 10 of appellee bridge company's charter, above quoted, in which it was required to give notice in writing to be served on the city clerk and published in some newspaper circulated in Covington for at least seven days before application of such application for roadway. Whether such notice was given is not shown. It is not argued nor shown that a specific grant of roadway to the bridge company was made by the city council. It seems from the record that the bridge company's connecting tracks were in fact built by the C. & O. Ry. Co., and are operated by it, under the management and charter of the bridge company. The record discloses abundant instances, as early as 1889, when the C. & O. Ry. Co. was building, or shortly after it had completed, the line of the road in question, that the city council were negotiating with that company as to the manner of making certain grades on certain of the streets over which it crossed in the construction of such approach to the bridge, and wherein the railroad company was required to, and did agree to, bear the expenses of regrading certain parts of such streets, and of constructing sewers, etc., and of maintaining gates across certain streets, including Lewis and Craig streets crossing.

Was this equivalent to a grant by the municipal corporation of a right of way across the street in question? In this State the legislature might have authorized the construction of a railroad across or along the streets of a town or city without the consent of the latter. (*L. & N. R. R. Co. v. Orr*, 91 Ky., 114.) The legislative authority to appellant to construct the railroad in question was undoubtedly conferred. The only thing remaining was the assent of the municipal corporation of the city of Covington. The manner of giving this assent, that is, whether it should be by deed or by ordinance, is not stipulated; that the municipality had notice of appellees' purpose to construct the railroad in question, and as now operated, is evident; that it raised some objections to the exercise of this purpose in certain particulars, which were finally adjusted to its satisfaction, is also shown; that the railroad company, evidently relying upon these facts in connection with the charter of the bridge company, built the tracks upon the route in litigation, with the knowledge and assent of the city, is apparent. Under these circumstances, would the city be permitted to say to the railroad company that it had not complied with the prerequisites named in the statute, and, therefore, it must leave the streets? We think not. It would be held estopped by its conduct and appellees' reliance thereon to the extent that it constructed an expensive railway over the streets in question. Appellees' having the right to construct its "railroad tracks" over such streets as the city might permit, and the city of Covington having acquiesced in the construction of the tracks, for the purposes and to the extent authorized by appellees' charter, it must be held to be bound by its conduct in the premises as fully and to every extent as if such authority had been granted by ordinance duly passed. There is no good reason why the municipality should not be held to the same standard of honesty in such matters when applying to it an estoppel as other persons would be.

In *Kneeland v. Gilman*, 24 Wis., 39 (cited and adopted as basis of text in *Herman on Res Adjudicata and Estoppel*, 1363), it was said: "But of late years, much more than formerly, the doctrine of estoppel, most wholesome

and just in its operation when properly applied, has been extended to these municipal corporations, so as to bind and conclude them by their own acts and acquiescence, and the act and acquiescence of their officers, whenever an estoppel would exist in the case of natural persons. It is now well settled that as to matters within the scope of their powers and the powers of their officers, such corporations may be estopped upon the same principles and under the same circumstances as natural persons."

We conclude, therefore, that appellees have acquired the right to build the double track road at the places now occupied and in question in this suit. It, therefore, follows that, applying the doctrine of the cases of L. & N. R. Co. v. Orr, *supra*, and Roulston v. C. & O. Ry. Co., 21 Ky. Law Rep., 1507, the statutory bar of five years pleaded by appellees in this case against appellants' right of recovery was applicable, and that the circuit court rightfully gave a peremptory instruction based thereon.

The majority opinion proceeds upon the theory that although appellees had a perfect right to build a single track railway over the route in question, yet by building an additional track they have become liable for the damages resulting from all operations of trains over it, the additional track, but not for the smoke, noise, etc., caused by the operation of the trains on the first track. The damages for which appellants sue are not really due to the existence of the two tracks, but the existence of noise, smoke, cinders and jarring caused by the trains. These conditions would exist just the same whether these trains passed over one or two tracks, it not being shown in the record that both tracks were ever used at this point at the same moment.

Judges Burnam and DuRelle concur.

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POWERS v. COMMONWEALTH.

(Filed December 17, 1902.)

J. C. Sims, J. R. Morton and J. B. Finnell for appellant.

T. C. Campbell, R. B. Franklin, B. G. Williams, John K. Hendrick, Lewis Dundon, Earl Ashbrook, T. B. Seabee, Victor Bradley and L. W. Arnett for appellee.

Appeal from Scott Circuit Court.

Judge Hobson delivered the following dissenting opinion (for syllabus see ante, 1007):

The pivotal question in this case is whether the circuit judge should have vacated the bench on the affidavit filed by the defendant. In refusing to do so he followed the decision of this court in the case of Schmitt v. Mitchell, 101 Ky., 570. In that case the affidavit was substantially the same as that filed in this case. It was held insufficient, and the refusal of the circuit judge to vacate the bench was sustained. That opinion was written by Judge DuRelle, and was concurred in by the entire court. It followed the cases of German Insurance Co. v. Landram, 88 Ky., 434, and Vance v. Field, 89 Ky., 178, and has since been regarded as settling the question in the State. The case of Massey v. Commonwealth, 93 Ky., 588, was distinguished by the

court from these cases, and not intended to lay down a different rule. We see no reason for disturbing a rule so well settled, for justice can not be administered properly if the rule on this question is uncertain. There are sound reasons for the rule thus declared. Otherwise the regular judiciary of the State may be displaced on the second trial of any case when the ruling of the judge on the first trial does not suit the litigant. Substantially the same ground of objection might have been made by appellant to a larger number of the circuit judges of the State, and the rule now adopted by the court is in substance an overruling of the cases above referred to.

In order to a proper understanding of the exceptions to the rulings of the court in the admission and exclusion of evidence and their bearing on the case, it will be necessary to state, in a general way, the facts established by the proof. For convenience these will be grouped under the following heads:

1st. Where was the shot which killed the deceased fired from?

The east building in the Capitol Square is known as the executive building. On the first floor of this building, on the south side, at the west end, is a small room known as the private office of the secretary of state. This room has a door opening into the hallway, and one opening into the room on the east called the reception room. East of this room is the governor's office and north of it the treasurer's office. Across the hall, and on the north side of the building, is the auditor's office. The upper floors of the building are occupied by the other State officials. The deceased was shot a little after 11 o'clock in the morning, as he came up the walk approaching the State buildings from the street lying south of them. Shortly before he was shot Henry E. Youtsey, now in the penitentiary under a life sentence for complicity in the murder, went over to the office of the commissioner of agriculture, which is west of the main building, and brought a squad of men armed with guns, stationing them near the foot of the stairway in the hall, not far from the door leading from the hall into the private office of the secretary of state, and telling them that after a little a man would come out of that room and join them and they should all go off together and scatter. Just after the shooting Youtsey was seen running down the stairway leading from near this door to the basement, apparently carrying something under his coat. Witnesses skilled in the use of firearms testify that the report of the shot which killed the deceased showed that it came from a rifle loaded with nitro-powder, which is smokeless. The deceased was facing the building, or nearly so, and, as was shown by the post-mortem examination, the ball struck him in front and came out behind, slightly lower than the point of entrance. Not only was the clothing mashed inward in front and outward behind, but particles of bone were carried along by the ball, showing its course. The effect of the ball on the bones showed that it was a steel bullet, of 38 calibre. A few days before the shooting Henry E. Youtsey had in his possession a box of nitro-powder cartridges with steel bullets, which he said was the slickest scheme yet to settle the contest. These bullets were 38-calibre. The point where the deceased was when shot is identified not only by the persons with him at the time, but is fixed further in this way: Four different persons saw him fall, or after he fell from different standpoints, and were enabled to fix their line of vision from a tree or some other object in the yard, which was between them and him. These lines intersect practi-



vally at the point identified by the persons present at the time. In a back-berry tree beyond this point, and in a direct line with it and the window of the private office of the secretary of state, a ball was imbedded, a steel ball of 38-calibre. From the point where the ball struck the tree, a straight line to the bottom of the window would pass over the place where the deceased was shot at just the height from the ground at which the ball entered his body. It was a cold, raw day. A witness who passed up the walk shortly before the shooting noticed this window up and the blind drawn down, his attention being attracted to it from the character of the day. Another witness, who accompanied the deceased, observed the same, and a third, who looked at the window just after the shooting, testified to seeing a gun barrel sticking out of it. When the deceased was shot he raised himself on his elbow and looked in the direction of the window, and a number of witnesses testify to the sound coming from that direction. When a surveyor was making some measurements several days after the shooting, with a view to locating where the shot came from, a witness, Wharton Golden, who has since confessed as an accomplice, asked appellant "what are they doing?" He answered: "He is trying to find out where the bullet came from," and added: "There is no doubt that the bullet came from this office."

After this great mass of evidence, the defendant introduced some proof to show that deceased was south of the point fixed by the Commonwealth when shot, and also to show that the shot came from the space between the executive building and the center building. But the witnesses who located the place where the deceased fell as further south, were some distance from him, and to the south of him, and had nothing by which they could determine accurately how far he was from them, and they might naturally make a mistake in thinking that he was nearer to them than he was, as he was walking away from them; while the testimony for the Commonwealth is by persons who were with the deceased, or picked him up after he was shot, and those to the right and left, who observed the certain obstructions between him and them, and thus identified the point beyond the question. The proof, too, about the shot coming from between the buildings is equally uncertain and is met by the positive testimony of a reputable witness who was standing there at the time in this space, and testifies that the shot was not fired from there, but the sound came from around the corner, in the direction of the window referred to.

In view of the facts it is submitted that he who will not believe, under the testimony, that the shot which killed the deceased came from the window of appellant's private office, would not be persuaded, though one rose from the dead.

2d. Was the deceased killed pursuant to a conspiracy?

The shooting occurred in broad daylight, just in front of the Capitol of the State, when the legislature was assembling. The shot was fired from the private office of the secretary of state in the executive building, in which were the offices of the executive officers of the State. Can it be believed that an assassin, single-handed and without accomplices, could have done such a thing and vanished without immediate detection? Beside the fact of Youtsey's bringing the crowd of men over above referred to, it is shown in the evidence that on previous days there were always a number of persons

belonging to the crowd that appellant had brought to Frankfort in front of the Capitol buildings about this time. On this morning there were none. Just after the shooting men with guns in their hands were stationed at the entrance to the executive building to prevent persons from coming in. That morning at the arsenal a company of militia, which had been there for some days, were, for the first time, issued ammunition and overcoats and kept in line, and these, a very few minutes after the shooting, were marched to the Statehouse.

Other circumstances might be mentioned, but it is unnecessary to extend this opinion by setting them out, for it is manifest that the thing had not only been carefully planned, but that it could not have happened as it did, except as the result of a well-laid conspiracy.

8d. Was the defendant a party to the conspiracy?

Appellant was not in Frankfort at the time of the assassination. He was on the train going to Louisville. If he had been in his office the shot could not have been fired from it without his being directly involved. His absence at that time gave opportunity for its execution. The assassination was on Tuesday. On the Saturday before Powers saw Youtsey sitting at the window referred to; he had the window raised six or eight inches, with the curtain down, and with a gun pointed out of the window, and said trouble had started. The witness who testifies to this was the governor's private secretary; he said he did not see any signs of trouble. Youtsey then said if trouble started he was going to be prepared. On the following Monday appellant, Caleb Powers, and his brother, John, were thinking of going to Louisville. Youtsey asked John to give him the key to his private office. John gave him the wrong key. The next morning before Caleb Powers and John started to Louisville they came to the office, and Youtsey met them in the hall. He had an angry conversation with John, and finally John gave him another key. After this Caleb and John Powers went to Louisville together. This key Youtsey evidently used to enter this office, raise the window as he had done on Saturday and lower the blind, as it was seen just before the assassination, for he entered through this door and the door next to the reception room was locked; and he was given this key, after he had more than once declared that the way to settle the contest was with steel cartridges and after appellant knew what had occurred on Saturday. Appellant, on getting to Louisville, took the first train to Frankfort, and when he got there jumped off the train while running, in front of the Statehouse, instead of going on up to the station, a few squares away, for fear, he says, that he would be arrested there, although no prosecution of any kind had then been begun, and, so far as appears from the record, it was not then definitely known where the shot had come from, as far as he had been informed. A few weeks later he attempted to leave, disguised in a soldier's uniform, with a supposed pardon in his pocket, and a considerable sum of money. Besides this, he is positively connected with the conspiracy by two confessed participants in it, W. H. Culton and F. Wharton Golden, the former a clerk in the auditor's office and the latter a close friend of appellant, and both men who, until then, stood well. Culton disbursed large sums of money for appellant, and Golden was entrusted by him with important undertak-

ings. On the 25th of January, or five days before the assassination, appellant organized and brought to the Capital a body of about a thousand or fourteen hundred armed men. Many of these men were of desperate character, others were members of the State guard, but came with their uniforms concealed. Appellant insists that this crowd was brought to Frankfort on the peaceful mission of petitioning the legislature. On the other hand, the proof for the Commonwealth tends to show that they were brought here for the purpose of intimidating the legislature, and that it was contemplated that if intimidation failed, members of the legislature would be killed. It is hard to understand why, if the purpose of this assemblage was peaceful, they should have been brought to the seat of government armed. Not only so, but about this time appellant wrote a letter referring to the London and Williamsburg companies, which he wanted to go with him, and in this he said: "We must have these men and guns. We are undertaking a serious matter, and win we must. Send some one to London and Williamsburg with such orders as will have these two companies join us Wednesday night." On the evening of January 25 the greater part of the mountain army was sent home, but two hundred picked, armed men were retained. These men were about the legislative halls and the public buildings from that time until the assassination. Appellant was the admitted leader in all this. He gave Culton the money; he directed as to the character of men to be brought. His declared object was to intimidate the legislature, and in the absence of any proof showing that the killing of members of the legislature was contemplated, we must know that such a result should be anticipated as the natural outcome of bringing and maintaining a body of desperate, armed men at the seat of government to intimidate them, and that their hostility would be especially directed to the deceased, who was a member of the senate and the contestant for the high office of governor. There is proof that different plans were contemplated and different members of the legislature planned to be killed. In letters written by the defendant, and by word of mouth, he said he was an advocate of open war, and after the assassination of the deceased he declared that the disorganization of the Democratic party was due more to him than to any other man. He also said that with Goebel dead, there was no other person who could hold the Democratic party together. According to all the testimony appellant was the leading spirit and the director of the armed men brought to the seat of government, and kept there for the purpose of intimidating the legislature from the time they were so brought until the assassination.

Some other details are shown by the evidence, but these need not be noticed. The material evidence which was admitted and is held incompetent by this court will now be considered:

1st. The testimony as to the statements of Leander Guffy. This evidence simply tended to show that there was a conspiracy to kill the deceased. It in no way connected the appellant with the conspiracy. The fact that there was such a conspiracy was abundantly proved by other evidence, and as this testimony did not connect appellant with the conspiracy, it could not have been prejudicial to him. Besides, the court instructed the jury in effect that the acts and declarations of other persons not in the presence of the de-

fendant were competent against him only so far as these persons were members of the conspiracy, and their acts or declarations were in furtherance thereof. The jury, therefore, could not have considered this testimony unless they believed from the evidence that the declarant was in the conspiracy. I do not think there was any error of the circuit judge in submitting the question to the jury under the testimony; but if there was, it could not possibly have prejudiced the appellant.

3d. The testimony of Barlow and Rousseau was competent to impeach the witness, Taylor, who had been introduced on behalf of appellant, and testified that he had met appellant in Louisville by appointment on the day of the assassination to consult about bringing a body of men from Western Kentucky, and that as soon as they heard of the shooting of Goebel they abandoned their plan. For his statement to these witnesses, that "they had got men that would kill the deceased, it is fixed," tended to show that he knew that the assassination was to take place before he left home, and that the meeting with appellant was not for the purpose which he assigned. It is shown by the evidence that just after the assassination telegrams were sent out and a large body of militia brought to Frankfort under the orders of W. S. Taylor, then acting governor of the State, who is indicted as an accomplice of appellant in the assassination, and that these men were brought here to repel any attack that might be made to avenge the death of the deceased. The purpose of appellant's trip to Louisville, and his meeting Taylor there, was a material matter in the case, and the jury were warranted from this evidence in inferring that the witness had not assigned the true reason, but that the body of men proposed to be brought from Western Kentucky was aimed for the purpose for which the militia was brought.

3d. What has been said as to the admission of the statements of Leander Guffy applies equally to the statements of J. L. Bosley, as proven by the witness, Stivers. This testimony only went to show a conspiracy, and did not connect the defendant in any way with it. The defendant was not prejudiced by its admission if the court was in error in submitting this question to the jury under the proof, which is not perceived.

The other matters referred to in the opinion are too small to be noticed. There are something like twenty-five hundred pages of this record, and when viewed by the side of the evidence heard before the jury, which was clearly competent, the matters objected to singly, or all taken together, dwindle into insignificance. This court is not warranted in reversing a judgment of conviction unless upon the whole case the substantial rights of the appellant have been prejudiced. In this case, outside of the refusal of the circuit judge to vacate the bench, all the errors complained of may justly be compared to fly specks on the surface of the shell of a hen's egg. They could not possibly have affected the result, for the only real question in the case was whether the deceased was connected with the conspiracy. The case, therefore, is simply reduced to this: Was the circuit judge right in following the rule laid down unanimously by this court, not only in the last case before it, but in the two preceding cases, which it followed? And if judgments are to be reversed for this, how is justice to be administered?

On the whole case, from an actual reading of the record, I am satisfied

that the circuit judge presided at the trial with rare ability and with entire impartiality. I am also satisfied that appellant has had a fair trial, according to the law of the land, and that the evidence warrants the verdict.

I, therefore, dissent from the opinion of the court.

Judge Paynter and Judge White concur in this dissent.

*Ex. J. M.*  
*12/04*

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

## KENTUCKY COURT OF APPEALS.

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BUTTON v. KREMER.

(Filed December 17, 1902.)

1. Street improvements—Liens—Municipal government—An ordinance of the city of Louisville provided for the original construction with vitrified brick of a portion of Fourth street, beginning at the center line of Brandies avenue extended, and said work was done and accepted by the city and apportionment warrants for the cost of same were issued to the contractor. Appellee, as assignee of the warrant, brought this suit to enforce liens against the property holders; also against the city to recover in the event it should be decided that the property holders were not liable for said improvements. Appellant, one of the property holders, answered, denying his liability for the cost imposed under section 2883, Kentucky Statutes, because he says that his lots do not front the improvement, and the contiguous territory is not defined into squares by principal streets. Held—That the statute has failed to provide for the exact conditions shown to exist in this case. The tax can not be assessed in either mode pointed out by statute. The general council have no power to impose the cost of the construction of this small part of Fourth street upon any property; and that its cost necessarily falls upon the city under its contract with the contractor.

Lane & Harrison for appellant.

Carroll, Carroll & Tyler for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Burnam.

On the 6th of June, 1898, the general council of the city of Louisville adopted the following ordinance for the original construction of the carriage-way of Fourth street, from the center line of Brandies avenue extended to the south line of Brandies avenue extended:

“Be it ordained by the General Council of the City of Louisville:

“That the carriage-way of Fourth street, from the center line of Brandies

avenue extended to the south line of Brandies avenue extended, shall be thirty-six feet in width, and shall be improved by grading, curbing and paving with vitrified brick, with corner stones, footway crossings across all intersecting streets. Said work shall be done in accordance with the plans and specifications on file in the office of the board of public works, and at the cost of owners of ground on the east side of Fourth street from Brandies avenue to a line 210 feet south and parallel to Brandies avenue and extending back to a line 200 feet east of and parallel to Fourth street, and on the west side of Fourth street from an outer line of Brandies avenue extended to a line 210 feet south of and parallel to Brandies avenue extended, and extending back to a line 200 feet west of and parallel to Fourth street.

"The cost to be equally apportioned among the owners of property, according to the number of square feet of ground owned by the parties respectively within the limits above set out, and that all ordinances in conflict herewith be, and are, hereby repealed.

"WM. M. FINLEY, C. B. C.

"SAM'L S. BLITZ, P. B. C.,

"CHAS. C. MARTIN, C. B. A.

"PAUL C. BARTH, P. B. A.,

"Approved the 6th of June, 1898.

"CHAS. P. WEAVER, Mayor."

The work was duly constructed in accordance with the specifications of a written contract made with the city by V. Humpich, and was accepted by the city, and the cost, amounting to \$280.17, apportioned among the following named owners of property as appears from the list furnished by the city assessor:

Albert Button, 40x200 .....	8,000 sq. ft.	\$26 33
Josephine Berry, 40x200 .....	8,000 sq. ft.	26 33
A. Button, 33 ft. 6 in. x 116 .....	2,434 sq. ft.	13 94
Mary Callahan, 30x116 .....	3,460 sq. ft.	11 45
Ella Friedlieb, 30x116 .....	3,480 sq. ft.	11 45
A. Button, 23.5x116 .....	2,726 sq. ft.	8 97
A. Button, 50x120 .....	9,600 sq. ft.	31 60
Totals East Side .....	39,520 sq. ft.	\$130 08
WEST SIDE.		
Chess-Wymond Co., 31x95 .....	2,945 sq. ft.	\$9 69
Gertrude W. Pate, 65x95 .....	6,175 sq. ft.	20 32
Frank Schwab, 30x95 .....	2,860 sq. ft.	9 38
Elijah Riggs, 28x95 .....	2,660 sq. ft.	8 76
Chess-Wymond Co., 27 ft. 4 in. x 95 .....	2,597 sq. ft.	9 55
Emma A. Sigel, 30x95 .....	2,850 sq. ft.	9 38
R. T. Meek, 27 ft. 4 in. x 95 .....	2,507 sq. ft.	8 55
Chess-Wymond Co., 1.384x95 .....	116 sq. ft.	41
Chess-Wymond Co., 240x95 .....	22,800 sq. ft.	75 05
Totals West Side .....	45,600 sq. ft.	\$150 05
Total East Side .....	85,120 sq. ft.	130 09
Total amount of contract .....	85,120 sq. ft.	\$280 17

And apportionment warrants were issued to the contractor against the property liable for the cost of the improvement, which was subsequently assigned to the appellee, Henry L. Kremer, who instituted this suit, asking an enforcement of the lien against the property. The city of Louisville was also made a party with a view of taking a judgment against it in the event the court refused to subject the lots of the other defendants. The defendant, A. Button, answered that his lots could not be subjected to the apportionment warrants for the reason that the territory contiguous to Fourth street between, the center line of Brandies avenue extended and the south line of Brandies avenue extended, was not, on or prior to the 6th day of June, 1898, nor since, defined into squares or included within territory bounded by principal streets, and further alleged that none of the lots sought to be subjected fronted upon Fourth street between the center and south lines of Brandies avenue extended. The following facts were agreed to:

"1st. That Fourth and Brandies avenue are principal public streets of and in the city of Louisville.

"2d. That Fourth street extends from the north limits of Louisville south to a point beyond Brandies avenue extended.

"3d. That Brandies avenue extends from First street west to the east line of Fourth street and no further.

"4th. That there is no street west of Fourth street opposite to the improvement authorized by the ordinance set up herein.

"5th. That the territory fronting said improvement is not defined into squares by principal streets."

The following plat of the territory assessed by the ordinance will assist in illustrating the situation:

Button, \$31.60				Button, \$26.33	Improve- ments	
Button, \$8.97			Button, \$13.94			
BRANDIES AVE.					4TH AVE.	



The chancellor held that the property of the defendant, Button, was in lien for the apportionment warrant and adjudged their sale, and the defendant has appealed. He insists that as the contiguous territory is not defined into squares by principal streets and his lots do not front the improvement, they can not be charged with payment therefor under section 2833 of the Kentucky Statutes, which is a section of the charters of cities of the first class, and which reads as follows: "When the improvement is the original construction of any street, road, lane, alley or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the board of public works according to the number of feet owned by them respectively. And in such improvement the cost of the curb shall constitute a part of the construction of the street or avenue and not of the sidewalk. Each subdivision of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public way shall state the depth on both sides fronting said public improvement to be assessed for the cost of making the same according to the number of square feet owned by the parties respectively within the depth as set out in the ordinance."

It will be observed that the statute provides for two conditions in which a tax may be levied: First, if the territory to be charged with the cost of constructing the street is bounded on all sides by principal streets, the cost must be apportioned among the owners of lots in each one fourth of a square contiguous to the improvement. If, on the other hand, the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public way must state the depth on both sides fronting said public improvement which are to be assessed for the cost of making same, according to the number of square feet owned by the parties respectively, within the depth set out in the ordinance. This case does not fall within either of the conditions recited in the statute. It is admitted that the contiguous territory is not defined into squares, and it is apparent from the admitted facts that appellant's property does not front that part of Fourth street, with the improvement of which they are sought to be charged in this proceeding. The statute has failed to provide for the exact conditions shown to exist in this case. The tax can not be assessed in either mode pointed out by the statute, and if it be upheld the chancellor must exercise the legislative function of establishing for this particular case a rule of assessment not provided for.

"It is a principle, universally declared and admitted, that municipal corporations can levy no tax, general or special, upon the inhabitants or their property unless the power be clearly and unmistakably given. \* \* \* And this rule applies to the assessment for local improvements." (Dillon on Municipal Corporations, 605; Caldwell v. Rupert, 78 Ky., 183.)

And such power is always strictly construed. Applying this principle to the facts of this case, we reach the conclusion that the general council have no power to impose the cost of the construction of this small part of Fourth street upon any property; and that its cost necessarily falls upon the city under their contract with Humpich.

COMMONWEALTH, BY, &C. V. NEWELL, JUDGE. 1197

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

The whole court sitting.

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COMMONWEALTH v. DETTLINGER.

(Filed December 17, 1902—Not to be reported.)

C. J. Pratt, J. M. Huffaker and Pirtle & Trabue for appellant.

Kohn, Baird & Spindle for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge White.

The question presented in this record is identical with that in the case of Commonwealth against Chas. G. Kichie, this day decided.

For the reasons given in that opinion, the judgment dismissing this proceeding for want of jurisdiction is reversed and cause remanded for further proceedings consistent herewith.

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COMMONWEALTH, BY, &c. v. NEWELL, JUDGE.

(Filed December 17, 1902.)

Mandamus—Taxation—Construction of Statutes—Application was made to appellee as county judge of Mason county by an auditor's agent, under authority of section 4241, Kentucky Statutes, to have certain property belonging to the C. & O. Ry. Co. assessed for taxation. The application was dismissed on the ground that the court had no jurisdiction of the matter. This action was then instituted in the circuit court for a mandamus to compel the county judge to hear the application and decide the matter. The petition was dismissed, from which this appeal is prosecuted. Held—That appellant is entitled to the mandamus. Where the county court fails to hear and determine as to the liability of property for assessment, a mandamus should be awarded against him, not to control his judgment as to the liability of the property to assessment, but merely to compel him to hear and determine the question. After such a decision either party may appeal to the circuit court. A dismissal by the county judge for lack of jurisdiction is in no sense a judgment determining whether the property was liable to assessment or not.

A. E. Cole & Son, R. J. Breckinridge and John S. Power for appellants.

W. H. Wadsworth for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Guffy.

It appears from the petition in this case that F. Stanley Watson, auditor's agent, filed in the clerk's office of the Mason County Court a statement authorized by the Kentucky Statutes, section 4241, the object of which was to have certain property belonging to the Chesapeake & Ohio Ry. Co. assessed for taxation.

It further appears that the county court of Mason county refused to take jurisdiction of the complaint, and refused to determine whether or not said

property was liable to assessment or subject to taxation. The object of this action is to obtain a writ of mandamus against the county judge of Mason county, requiring him to entertain jurisdiction of said case and to decide the same on its merits; to proceed upon the facts placed before him by the relator; to ascertain as near as practicable, and to cause to be forwarded to the auditor the compulsory reports of these corporations thus obtained, and to proceed as required by law.

To this petition a demurrer was filed on behalf of the defendant on the ground that the petition did not state facts sufficient to constitute or support a cause of action, which demurrer was sustained by the court with leave to plaintiffs to amend, and they declining to amend, the petition was dismissed. From which judgment this appeal is prosecuted.

The only question which we deem it necessary to consider is whether or not appellants were entitled to the peremptory mandamus, and we shall not undertake to decide whether the property sought to be subjected to taxation was in law liable to assessment or taxation. It will be seen from this record that the appellee county judge refused to try or consider the question as to the liability of the railway, or whether the property in question had been omitted by any of the authorities authorized to assess the same. In short, the county judge declined to try, and pass upon, the legality of plaintiff's claim, and it appears also that from the petition, and as a matter of law, we hold that no appeal could be prosecuted from the order of the county judge aforesaid. It is contended for appellee that the writ of mandamus could not be legally issued. If this be true, and if also it be true that there is no appeal from the order refusing to entertain jurisdiction, then the appellant is without any remedy. It will be seen from an examination of section 4241, Kentucky Statutes, that it is made the duty of the sheriff or auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted, by the assessor, board of supervisors, board of valuation and assessment, or railroad commission, for any year or years. The section further provides for the filing of a statement containing a description, etc., of the property, and the value of corporate franchise, if any, together with the names and places of residence of the parties owning such property.

It is further provided that at the next regular term of the county court, after notice has been served five days, if it shall appear to the court that the property is liable for taxation and has not been assessed, the court shall enter an order fixing the value thereof at its fair cash value, estimated as required by law; if not liable, he shall make an order to that effect.

It is further provided as follows: "From so much of the order of the court deciding whether or not the property is liable to assessment, either party may appeal, as in other civil cases, except that no appeal bond shall be required where the court decides that the property is not liable to assessment or taxation."

Various other provisions are embraced in the section not necessary to refer to. It seems clear to us that there can be no appeal from any order of the county court in respect to the matter in controversy except as provided by the section supra; and inasmuch as the court refused to adjudge whether or not the property was liable to assessment or taxation, and that being the only judgment or order from which an appeal is allowed, it seems clear that

no appeal could be prosecuted from an order dismissing the proceeding without rendering a judgment as provided by law. If the facts stated by plaintiff are true, the property in question was omitted; but, as before stated, we shall not undertake to decide whether the property ought to have been assessed in Mason county, or whether it had been omitted. That question must be primarily decided by the county court of Mason county. It seems to us that the duty and power of the circuit court to issue a mandamus in a case like the present one is not an open question. This court, in *Hoke v. Commonwealth*, 79 Ky., 567, discussed at great length the duty of the county court to make an assessment of omitted property upon the institution of proceedings in the county court by the auditor's agent; and also expressly held that where the county court failed to hear and determine as to the liability of the property to assessment, that a mandamus should be awarded against him, not to control his judgment as to the liability of the property to assessment, but merely to compel him to hear and determine that question. The common pleas court of Jefferson county had awarded a mandamus to compel the county judge to hear, consider and determine the question, and this court, in a very exhaustive opinion, affirmed the judgment of the common pleas court.

We deem it unnecessary to discuss the various authorities relied on by the parties. We are of opinion that it was the duty of the county judge to hear the case presented by the auditor's agent, and render a judgment holding the property liable to be assessed, or holding that it was not liable. In which event, either party could have appealed to the circuit court. The dismissal by the county judge for lack of jurisdiction was in no sense a judgment determining whether the property was liable to assessment or not.

For the reasons indicated the judgment appealed from is reversed and cause remanded, with directions to the circuit court to overrule the demurrer and for proceedings consistent herewith.

Whole court sitting.

Judges Paynter, Hohson and Burnam dissenting.

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THE FORT JEFFERSON IMPROVEMENT CO., &c. v. DUPOYSTER, &c.

(Filed February 25, 1902.)

1. Subrogation—The owners of a half interest in land executed a mortgage on the whole land to pay a debt. Subsequently the owners of the other half interest, although their land was not subject to the mortgage, executed an agreement to the effect that the mortgage debt should be paid out of the entire land. This agreement was made at the request of their father, whose lands were primarily liable for the original debt. They afterwards satisfied the mortgage debt by executing their own obligation for it. In this action they seek to be subrogated to the prior lien of the mortgagor against subsequent lien holders for purchase money. It is insisted that as they have not actually paid the debt they are not entitled to subrogation. Held—That they became entitled to be subrogated to the debt when the creditor accepted their obligation for it in the place of the original obligation. The doctrine of subrogation is one of equity to promote justice, and it may or may not arise from a contract. The right to it depends upon the facts and

circumstances of each particular case, and to which must be applied the principles of justice. Where a person furnishes money to pay the debt of another if it is equitable that he should be substituted for the creditor, it will be done. One is not a volunteer in a transaction where he has paid the money at the request of the person whose liability he discharges; neither can one be regarded as a volunteer who pays money to relieve his own property therefrom for which some one else is liable.

2. Joint tenants—Where one joint tenant conveys a specific portion of the joint lands it is not void. The other joint tenants could have joined in the conveyances, and thus have vested the purchasers with title. Their power to ratify the sale of specific parcels is unquestioned, but they can not do so to the prejudice of another purchaser of a specific boundary.

3. Parties to actions—An interest in land can not be subjected to a debt in a proceeding to which he was not required to make a defense.

J. M. Nichols & Son and F. H. Sullivan for appellants.

John W. Ray, Geo. W. Reeves and Bugg & Wickliffe for appellees.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Paynter.

This is the second appeal of the case to this court. The opinion delivered on the former appeal is found in 21 Ky. Law Rep., 515. The court decided: First, that by the deed of Thomas Dupoyster, made in 1859, his son, Ben S. Dupoyster, took a life estate in the land conveyed, and that the children of J. C. Dupoyster, as they were born, took vested remainders; second, that Ben Dupoyster, claiming under the deed of 1859, purchased adverse claims and was holding under this deed at the time it was sold to the appellants; third, that in the Thomas Dupoyster deed his son, Ben S., had the "discretion of allotting, of dividing, or of partitioning," as he saw proper, the lands among the children of Joe C., but not so as to create inequality or lessen the interest of any one of the children; fourth, that Joe C. had born to him four children, two of whom are dead; that the interest of the dead children passed by the law of descent to their lawful heir or heirs; fifth, that there should be a rescission of the sale by Joe C. and Ben S. to the appellant; and on whatever of the land Joe C. is the owner by inheritance from his dead children a lien should exist in favor of the appellant for the purchase money wrongfully received by him.

Numerous questions are raised, but we will not here summarize them. From our consideration of the case the questions raised will be seen.

Before Joe C. and Ben S. made the deed to the appellant they had executed what is known as the Harkless mortgage on the land in controversy, but which mortgage did not recognize any one as being the owners of the land except the grantors. J. B. and his sister, Mrs. Edwards, are the surviving children of Joe C. and own one-half the land embraced in the Thomas Dupoyster deed, because of the vested remainders which they took. In this suit they asserted their right under the Thomas Dupoyster deed to the entire boundary, but it was decided that they took it together with the other children of Joe C., and two having died, their father inherited part of their (deceased children) interest in the land. It may be added here that Joe C. inherited three-eighths of the tract of land, and his wife, Rebecca, one-eighth. The grantors in the Harkless mortgage could not create any lien

on any interest in the land except their own. The rights of J. B. Dupoyster and Mrs. Edwards were not affected by that mortgage. Pending this suit, and before the judgment was entered from which the former appeal was prosecuted, J. C. Dupoyster and those representing the Harkless mortgage and J. B. Dupoyster and his sister entered into an agreement, by which, if persons last named were adjudged the land, then the judgment for the Harkless debt should go against the entire tract. It is averred in the pleadings, and not denied, that the appellant, Fort Jefferson Improvement Co., took its judgment subject to that agreement, and approved it. Pursuant to that agreement a judgment was entered giving a lien on the entire tract of land for the Harkless debt. This was in the former judgment from which no appeal was prosecuted, and that part of it has never been reversed, nor does any complaint seem to have been made on the former appeal as to that part of it. Subsequently J. B. Dupoyster and his sister, pursuant to the agreement which had been made and the judgment of the court, executed their obligations for the Harkless debt, and also gave a mortgage to secure its payment and have paid \$5,000 on it. It is insisted that J. B. Dupoyster and Mrs. Edwards are not entitled to be subrogated, because, first, they had not paid all the debt; second, they were volunteers; third, a surety is not entitled to subrogation as against a prior surety; fourth, the lien of the original Harkless mortgage was released by extension granted on the mortgage debt by appellees.

First, it may be said that the Harkless mortgage created a superior lien upon Joe C. Dupoyster's interest in the land to that of the appellant for the purchase money which it had paid, and which it was entitled to have refunded to it. J. B. Dupoyster and sister have paid all the debt, inasmuch as they executed their note in lieu of the one which existed. So far as the right to subrogation goes it is equivalent to the payment of the money, because they made it their own debt. There was a novation. The rule which the appellant claims should exist in equity can not have any application to the facts of this case. It is a universal rule of interpretation that one who voluntarily pays the debt of another when he is under no obligation to pay, does not create a liability in his favor; nor can he be subrogated to the lien held by the creditor to secure its payment. It is equally as well settled, if one is bound for the debt of another, he has the right to discharge it, and when he does so, an implied liability arises in his favor against the debtor, and he will be subrogated to the rights of the creditor. By the consent and agreement of the parties J. B. Dupoyster and his sister's interest in the land became bound for the Harkless debt, the same as the property of their father and mother, if the latter joined in the mortgage. It did not then become their debt, but it continued to be the debt of their father, and in order to relieve their interest in the land they were compelled to pay it. They were not volunteers in the matter. They consented that their land might become impressed with the liability, at the request of their father and with the approval of the appellant. However, it was not necessary to have the latter's approval. It did not increase the burden on the interest of J. C. Dupoyster, nor did it lessen the chances of the appellant to make its debt out of his interest in the land. The effect of the transaction is that J. B. Dupoyster and his sister have paid off a lien debt for which the in-

terest of J. C. Dupoyster was primarily liable to protect their interest in the land, and did so at his request.

This court in *Ostameyer v. Ostameyer*, 18 Ky. Law Rep., 1024, recognized the right of one thus paying the debt to release his own interest in property to be subrogated to the rights of the creditors; and also held that an implied liability would arise. The mere fact that those holding the Harkless debt were willing to accept the obligation of J. B. Dupoyster, etc., for the mortgage debt, and give him time for the payment of it, did not have the effect of preventing subrogation; the right of subrogation arises out and from the transaction. It accrued the instant those representing the Harkless mortgage accepted the new obligation.

The doctrine of subrogation is one of equity to promote justice, and it may or may not arise from a contract; the right to it depends upon the facts and circumstances of each particular case, and to which must be applied the principles of justice. Where a person furnishes money to pay the debt of another, if it is equitable that he should be substituted for the creditor, it will be done. One is not a volunteer in a transaction where he has paid the money at the request of the person whose liability he discharges. Neither can one be regarded as a volunteer who pays money to relieve his own property therefor, for which some one else is liable. Pomeroy on Eq. Jurisprudence, section 793, says: "The rule is well settled that when a life tenant, or any other person having a partial interest only in the inheritance or in the land, pays off a charge, mortgage, or incumbrance on the entire premises, he is presumed to do so for his own benefit. The lien is not discharged unless he intentionally release it. He can always keep the incumbrance alive for his own protection and reimbursement. His intention to do so will be presumed, even though he has taken no assignment. In fact his payment constitutes him an equitable assignee." Same author, section 1211, says: "This equitable result follows, although no actual assignment, written or verbal, accompanied the payment, and the securities themselves were not delivered over to the person making payment, and even though a receipt was given speaking of the mortgage debt as being fully paid, and sometimes even though the mortgage itself was actually discharged and satisfied of record. This equitable doctrine, which is a particular application of the broad principle of subrogation, is enforced whenever the person making the payment stands in such relations to the premises, or to the other parties, that his interests, recognized either by law or equity, can only be fully protected and maintained by regarding the transaction as an assignment to him, and the lien of the mortgage as being kept alive, either wholly or in part, for his security and benefit."

Counsel for appellant avers that a surety is not entitled to subrogation as against a prior surety. We are unable to understand what application that doctrine has to the facts of this case.

Under the contracts which Ben S. Dupoyster made there was a lien upon what is known in this record as the Norton and Terrell tracts. Ben S. Dupoyster made to J. B. Dupoyster a deed embracing these tracts, in which was provided that the grantee pay the lien debts on the land. This deed was made when the grantee was an infant. The court in this case directed these tracts to be sold to pay the debts against them. J. B. Dupoyster be-

came the purchaser. The Norton tract brought about \$400 more than was necessary to pay the debt against it, and that excess was applied as a credit to appellee's judgment against J. C. Dupoyster and against him as the personal representative of the estate of Ben S. Dupoyster. If the Terrell land was embraced in the Thomas Dupoyster deed of 1859, J. B. Dupoyster and his sister owned one-half of this land, therefore, J. B. Dupoyster was put in the position of buying a part of his own land to discharge a debt which his uncle made and for which he could not bind the vested remaindermen. Perhaps the Norton land is outside of the boundary embraced in the Thomas Dupoyster deed. The appellant got the entire benefit of this sale, except the part which went to pay a pre-existing claim against it. Both tracts were sold under judgments in this action, and the appellant is bound by them. The sales were confirmed by a sale of part of the Terrell tract and appellant's lien was made valid on the balance of the tract, and to that extent was benefited by the sale, besides being relieved of a prior encumbrance. Notwithstanding this, the appellant claims it had a lien on the Terrell and Norton tracts superior to the rights which J. B. Dupoyster acquired under his purchase. Its right to assert this claim is barred by the judgments and proceedings in this case. If it were not, it would be inequitable to permit the appellant to assert its lien against these tracts.

It appears that after Thomas Dupoyster made the deed to Ben S. Dupoyster, etc., in 1859, and before the deed was made to the appellant, Ben S. Dupoyster and J. C. Dupoyster sold to several persons tracts out of the Thomas Dupoyster boundary, and in the deeds of the purchasers their respective parcels were defined by metes and bounds. On the return of this case J. C. Dupoyster, J. B. Dupoyster and Mrs. Edwards pleaded these facts, and the last two named expressed their willingness to ratify the sales which had been made to the several persons; and thereupon asked that J. C. Dupoyster be charged in the division of the remaining part of the tract with the parcels which he and Ben S. Dupoyster had sold to persons prior to their sale to the appellant.

The practical effect of this would have been to have given to J. B. Dupoyster and Mrs. Edwards out of the boundary sold the appellant an amount equal in value to their one-half interest in the tract of land which their father and uncle had sold prior to the sale to appellant. To do this would compel the appellant to suffer the loss which should be borne by all the purchasers. Where one joint tenant conveys a specific portion of the joint lands it is not void. The other joint tenant could have joined in the conveyance, and thus have vested the purchasers with title. Their power to have ratified the sales of the specific parcels is unquestioned. That is not the question. The question here is, when sales have been made by one joint tenant to specific boundaries, can the other joint tenant say what sales he will ratify, and do so to the prejudice of another purchaser of a specific boundary? The court below held that this could not be done. If Joe C. Dupoyster was alone to be affected by such ratification, then a different question would be presented, because it would be eminently just, if the other joint tenants would ratify the sales of specific parts of the joint property, to charge him in the division therewith. But here J. C. Dupoyster has sold it all. As a result, of the sale to appellant the part which he sold it is in lien for the money-



which he wrongfully obtained on the contract of sale. The appellants occupy the same position it would occupy had the sale been upheld. If the co-tenants before the sale to appellant had ratified a previous sale by a deed duly recorded, or otherwise, and the appellant had had actual notice of the latter mode of ratification, then a different question would be presented for our consideration. To sustain the claim of the co-tenants (J. B. Dupoyster and Mrs. Edwards) would be to allow the exercise of their will after all the sales, determine what part of the land should be assigned to J. C. Dupoyster, and who should suffer from such an assignment. They have no legal or equitable rights which enables them to determine how the rights of the others to this suit shall be adjudged.

It is urged that the court erred in putting the land in the hands of the receiver. This is done upon the idea that the interests owned by J. B. Dupoyster and Mrs. Edwards were not encumbered by the plaintiff's debt, and the fact that J. C. Dupoyster's interest was, would not authorize the court to place the whole tract in the hands of a receiver. It seems to us that J. B. Dupoyster and his sister could have complained of the action of the court in placing the land in the hands of a receiver, but they seem to have been adjudged their parts of the rents which came into the hands of the receiver, and by consent order agreed to pay their part of the expenses of the receiver. Under such circumstances they should not be heard to complain of the original error. The court did not dispose of the other half of the rents, therefore, we do not decide whether or not they should be applied to the appellant's debt.

As there seems to have been a provision in the deed of Dupoyster to Fort Jefferson Improvement Co. that the Fort Jefferson Co. was to convey to the assignor of Mrs. Fannie Jackson three blocks in the town of Fort Jefferson, we are of the opinion that the court properly decided that (she having died) her children were entitled to have conveyed to them one-half of the same, to be charged to J. C. Dupoyster in the division of the land.

Mrs. R. S. Dupoyster is the wife of J. C. Dupoyster; she joined in the deed to the Fort Jefferson Co. and she was the owner, by inheritance from her children begotten by J. C. Dupoyster of one-eighth of the land embraced in the deed of Thomas Dupoyster. The court adjudged that her one-eighth was subject to the payment of the amount due the appellant on the rescission of the contract. She was not made a party to this action before the first appeal in this case. She was made a defendant in the cross petition of J. B. Dupoyster and Mrs. Edwards, wherein they asked for the partition of the land. She filed an answer to that, in which she expressed her willingness to the partition of the land, claiming one-eighth. The Fort Jefferson Improvement Co. never made her a defendant in the action, nor by any pleading to which she was made a defendant did it seek any relief against her. As we have said, she filed an answer to the cross petition of J. R. Dupoyster and Mrs. Edwards, and to this answer the appellant filed a reply, in which it said it was entitled to have its lien in her interest, for the payment of the judgment rendered in its favor against J. C. Dupoyster and the estate of Ben S. Dupoyster. No rejoinder was filed and no issue was, therefore, made upon the question of the appellant's right to have its lien extended over her interest in the land.

As there was no pleading filed by appellant seeking relief against her in which she was made a defendant, it failed to manifest any right to have her interest in the land sold to pay the judgment against her husband.

The case is affirmed on the appeal of the Fort Jefferson Improvement Co., and on the appeal of J. C. Dupoyster and J. B. Dupoyster and Mrs. Edwards, and is affirmed on cross appeal of Jackson, but is reversed on the appeal of Mrs. Rebecca S. Dupoyster for proceedings consistent with this opinion.

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KELLER v. FERGUSON.

BRISTOW v. RHOTON.

FINNELL, JR. v. KELLEY.

ASHURST v. LUSBY.

LEMON v. ADAMS.

BRADLEY, JR. v. WOLFE.

GLASS v. SCOTT.

JOHNSON v. MAGGARD.

BATES, &c. v. CRUMBAUGH, &c.

(Filed December 17, 1902.)

1. Contested election—City officers—Appellants were candidates for city officers and magistrate in the city of Georgetown on the Republican ticket, and appellees were candidates for the same offices on the Democratic ticket, at the November election, 1901, and the canvassing board gave the certificate of election to appellees, whereupon appellants instituted this action, contesting their election. There were three precincts in the city of Georgetown: The engine house, the city school and the courthouse precincts. Upon the hearing of the contests the vote of the city school precinct was rejected entirely on account of failure of the officers to properly certify the returns. In all three of the precincts there was a failure to certify the returns in the voting place immediately after the election. In the city school precinct the returns were made out on the inside of the cover of the stub-book, and the Democratic clerk affixed his signature. The other officers failed to affix their signatures purely through oversight, and the two Republican officers appeared before the county clerk on the day following the election and demanded the right to affix their signatures, and subsequently appeared before the board of election commissioners and demanded the right to sign the certificate. The Democratic judge did not offer to sign the certificate, but expressed his willingness to do so if he was assured that the figures were the same as those made by the officers in the voting place. In the courthouse precinct, which gave a Democratic majority on the face of the returns, no returns were made out in the stub book until after the delivery of the ballot boxes to the county court clerk, when he called the attention of the officers to their omission. In the engine house precinct, where the returns showed a majority for the Democratic candidates, the certificate was not signed by the election officers until the day after the election. The ballot boxes, returns and ballots were produced before the circuit court on the hearing of the contest. The court decided in favor of appellees, and this appeal is prosecuted from said judgment. Held—That the court improperly

rejected the returns from the city school precinct, as the officers of the election seem to have complied strictly with the requirements of the election law, except in regard to signing the returns, as these were only signed by the Democratic clerk; and as the Republican officers demanded the right to sign them and the other Democratic officers admitted the correctness of the returns at the time they were made, and as there is no suggestion that the ballots have been tampered with, the vote of that precinct should not be thrown out and a third of the city of Georgetown disfranchised by an inadvertent omission on the part of the election officers.

2. Marking of ballots—Three ballots, where stencil marks appeared in the circle under the device of the regular Republican ticket and also in the circle under the device of the independent Republican candidate for police judge, were improperly rejected by the circuit court. Five ballots were improperly rejected by the election officers because they were not signed by the clerk, as the rule is settled that a voter should not suffer from the negligence of an officer. Three of these ballots which were not signed by the clerk which were marked under the Republican device should have been counted for all the Republican candidates except one, who was scratched. A ballot voted in the circle under the Republican device, and a cross mark made in the blank under the name of Brooks, a Democratic candidate for the council, should have been counted for the Republican candidates except as to Brooks, who is entitled to that one vote. Three ballots marked with irregular black marks in the circle under the Democratic device were properly counted for that ticket. A ballot marked with a blurred figure under the Republican device should have been counted, and a ballot marked under the Republican device, but which was torn on the side, should be counted for that ticket. As it had been counted by the officers it will be presumed that the tearing was done subsequent to that time. A ballot cast in the courthouse precinct was improperly rejected by the circuit court because of two ink blots on the back, as there is nothing to show that these marks were placed there by the voter as distinguishing marks. The evidence showing strongly that ballots marked in the circle under the Republican device, also in the squares to the right of contestees' names, have been tampered with, they can not be counted for contestees, and are rejected, as they would not change the result. Counting for contestant sixteen so-called mutilated ballots, the eight "Hotel Lancaster" ballots, and seven ballots showing an erasure in the circle under the Republican device and the stencil in the circle under the Democratic device, the contestants are elected with the exception of contestant Clark, and contestee Kelley is elected to the council.

J. R. Morton, J. B. Finnell and L. F. Sinclair for appellants.

John R. Allen and W. S. Kelley for appellees.

Appeal from Scott Circuit Court.

Opinion of the court by Judge DuRelle.

At the election held November 5, 1901, in Georgetown, Scott county, there was a full Democratic ticket upon the ballot, under the emblem of the chicken cock, for all the county and city offices to be filled in that county and city at that election. There was a full Republican ticket for the same offices, except for the offices of State senator and county school superintendent, under the device of the log cabin; and there was an independent candidate for police judge under his individual device, of a picture of Abraham Lincoln. There was also a submission to the voters of a proposal to incur

an indebtedness of not exceeding \$25,000 for the purpose of building a sewerage system in Georgetown.

The Democratic candidates for county offices appear to have won by a comfortable majority, but the vote in the city for city offices, and for magistrate of the city district, was close. The county board of election commissioners, after its canvass of the returns, issued certificates of election to A. L. Ferguson, as mayor; H. S. Rhoton, as police judge; W. S. Kelley, as city attorney; Z. D. Lusby, as chief of police; D. A. Adams, as city clerk; Geo. C. Wolfe, as city treasurer; J. T. Scott, as city assessor; M. H. McGard, as magistrate, and Jas. Y. Kelley, B. A. Lair, Chas. O'Neill, J. Thacker, A. G. Crumbaugh, J. T. Brooks, J. A. Hamon and A. B. Bailey, as councilmen, who were the Democratic candidates for the various offices named. The Republican candidates instituted contests for the various offices in the Scott Circuit Court. The cases were not consolidated, but were heard together, under an agreement that the depositions taken and used in one case should be considered as evidence in all the cases. On the hearing of the cases by the circuit court judgments were rendered dismissing contestants' petitions.

There were three precincts in the city of Georgetown, the engine house, the city school and the courthouse precincts. Upon the hearing of the contests the ballots preserved and produced from the city school precinct were rejected entirely, on account of failure of the officers to properly certify the returns.

It appears from the record that in all three of the precincts there was a failure to certify the returns in the voting place immediately after the election.

In the city school precinct the returns were made out on the inside of the cover of the stub book, and the Democratic clerk affixed his signature. The other officers failed to affix their signatures, as appears from the testimony, purely through oversight; and the two Republican officers appeared before the county clerk and demanded the right to affix their signatures on the day after the election, and subsequently appeared before the county board of election commissioners and demanded the right to sign the certificate. The Democratic judge did not appear before the clerk or before the board of commissioners, but seems to have stated on the outside that he was willing to sign the certificate if it was legal to do so, and in his testimony stated that he was willing to do so if he could be assured that the figures were the same as those made by the officers in the voting place.

In the courthouse precinct, which gave a Democratic majority on the face of the returns, no returns were made out in the stub-book until after the delivery of the ballot boxes to the county court clerk. The evidence indicates that the county court clerk called the attention of the officers to their omission, and there is some evidence showing that this was done on the suggestion of the clerk of election at the city school precinct.

In the engine house precinct, where the returns showed a majority for the Democratic candidates, varying from twenty-three to sixty odd, the returns were not signed until the day after the election, owing to a dispute as to whether certain ballots not endorsed by the clerk of election with his signature should be counted.

The ballot boxes, returns and ballots were all produced before the circuit court upon the hearing of the contest.

Taking the count there made as the basis, we find that in the engine house precinct there were uncontested ballots counted for the various officers as follows:

Democratic Ticket.		Republican Ticket.	
Ferguson.....	183	Keller.....	115
Rhoton.....	179	Bristow.....	119
Kelley.....	178	Finnell.....	118
Lusby.....	197	Ashurst.....	104
Adams.....	158	Lemon.....	135
Wolfe.....	175	Bradley.....	118
Scott.....	170	Glass.....	123
Haggard.....	185	Johnson.....	106
Kelley.....	188	Bates.....	120
Lair.....	174	Bradley.....	126
O'Neill.....	170	Braden.....	117
Thacker.....	182	Clark.....	102
Crumbaugh.....	173	Caden.....	108
Brooks.....	167	Jenkins.....	125
Hamon.....	165	Nunnally.....	126
Barkley.....	171	Offutt.....	120

There were three ballots which were not counted by the circuit judge, because stencil marks appeared in the circle under the device of the regular Republican ticket, and also in the circle under the device of the independent Republican candidate for police judge. Under the doctrine laid down in the recently decided cases of Herndon v. Farmer and Little v. Hall, ante, 1060, these ballots should have been counted.

There appear five ballots which were rejected by the election officers because not signed by the clerk. Both parties to these records have argued in support of the proposition that where the clerk of election fails to sign his name upon the back of the ballot, as required by the statute, whether by design or through inadvertence, the ballots should not be rejected merely on account of such failure. The trial court so decided, and, in our opinion, correctly. The principle should be borne in mind that as to duties required of the voter himself and duties required of election officers, a different rule prevails, and that when officers of election, by neglect or fraud, fail to perform their duty, in a matter over which the voter has no control, the inclination of the courts is, always, that the voter shall not suffer by reason of the negligence of the officers; and, while the provision may be regarded as mandatory with regard to the officer, and his failure may subject him to punishment, it shall not disfranchise the voter who is not guilty of the violation. (McCrary on Elections, sections 225 and 283; Payne on Elections, section 528.)

In Moyer v. Van de Vanter, 50 Am. St. Rep., 900, a statute providing that official ballots lacking the endorsement of an inspector or one of the judges should not be counted, was held unconstitutional, on the ground that the mere failure of the officer to perform a directory duty should not disfranchise the voter.

In *Parvin v. Winberg*, 80 Am. St. Rep., 254, an endorsement by the clerk in the wrong place was held not to vitiate the ballot. (81 Am. St. Rep., 804.) And the principle here applied seems to have been the one followed in *Clark v. McKenzie*, 7 Bush, 528.

These five ballots should, therefore, be counted unless they are open to some other objection. Three of them were marked under the Republican device, and should have been counted for all the Republican candidates, except one, which was scratched in favor of Rhoton. One was voted for Kelley, Bristow, Finnell, Ashurst and Johnson in the squares opposite their names, and for no other candidate. One was not voted in any of the races in contest; and one was voted in the circle under the Republican device and a cross mark made in the blank under the name of Brooks, a Democratic candidate for the council. Clearly this last-mentioned ballot should be counted for the Republican candidates except in that race. There is nothing to show that this mark was intended by the voter as a distinguishing mark, and we are inclined to the belief, from the position of the mark with reference to the small square, that it was intended to be a vote for Brooks. It follows, therefore, that it must be counted for him.

Six other ballots which had been counted by the officers of election were considered by the trial court, three of which had irregular black marks in the circle under the Democratic device, and were properly counted for the Democratic ticket, under the ruling in *Houston v. Steele*, 98 Ky., 610. One marked under both devices was properly rejected. One marked with a blurred figure under the Republican device should be counted for the Republican ticket, and one which was marked under the Republican device, but which was torn on the side, should be counted for the Republican candidates, for, having been counted by the officers, the presumption must be indulged that the tearing occurred subsequent to its consideration by them, upon the theory that the officers did their duty, even if we were of opinion that such a tear as the one in question vitiated the ballot.

Making these changes, we have the following result for the engine house precinct:

Democratic Ticket.		Republican Ticket.	
Ferguson.....	186	Keller .....	125
Rhoton.....	183	Bristow.....	125
Kelley.....	181	Finnell .....	128
Lusby.....	200	Ashurst.....	114
Adams.....	161	Lemon.....	144
Wolfe.....	178	Bradley.....	127
Scott.....	178	Glass.....	181
Haggard.....	191	Johnson .....	116
Kelley.....	191	Bates .....	129
Lair.....	177	Bradley.....	135
O'Neil.....	173	Braden .....	126
Thacker.....	185	Clark.....	111
Crumbaugh.....	176	Caden .....	117
Brooks.....	171	Jenkins.....	188
Hamon.....	168	Nunnelly.....	135
Barkley.....	174	Offutt.....	129

In the city school precinct the proceedings seem to have been conducted with perfect accord between the officers, and with exemplary care in the ascertainment of the result, and in complying with all the requirements of the statute except in the one matter of signing the returns, which were, as stated, signed only by the clerk of election. It is unnecessary to consider whether it was the duty of the county court clerk to permit the election officers, who had forgotten to sign the returns from this precinct, to sign them after they had been placed in his custody, as he did in the courthouse precinct. It is sufficient to say that there seems to be no substantial attack upon the accuracy of the count or the correctness of the returns which were made and signed by the Democratic clerk, and which are further verified by the tally sheets, which were returned with the ballots, and substantially agree with the tally made by the circuit judge. A third of the city of Georgetown is not to be disfranchised by an inadvertent omission on the part of the election officers.

There is some conflict of opinion upon this question. In some cases it has been held that the requirement of signatures to the certificate of the count is mandatory, and that a return not thus authenticated can not be received by the officers or in a contest. In *Butler v. Lehman*, 1 Bart. El. Cas., 353, such returns were not rejected. The New York assembly held the requirement to be directory merely (*N. Y. Cont. El. Cas.*, 180). And in Nevada (*Stinson v. Sweeney*, 17 Nev., 309) it was held that where there was no question of the correctness of the return, or the qualifications of the officers or voters, the vote would not be rejected for the lack of a certificate. In *People v. Nordheim*, 99 Ill., 558, the court said that "the offer by the officers to sign the returns after it was discovered that they had omitted to sign them, and after the returns had been sent in to the proper authorities, was sufficient to treat the returns as if they were in fact signed, and they should have been so treated." (*McCrary on Elections*, sections 190 and 192.)

In *Moyer v. Van de Vanter*, 29 L. R. A., 672, the Supreme Court of Washington said: "There is good grounds for recognizing a distinction between the obligations placed upon the individual voter and those matters which relate to the duties of election officers. Great care should be taken to distinguish between those requirements designed to prevent fraud, and which are necessary to the purity of elections, and those which, while designed for the same purpose, are not essential thereto, or we may overreach the salutary effect sought to be obtained from provisions of the character first mentioned, by going so far, in construing as valid and mandatory provisions of the second class, as to open the very door to fraud that was sought to be closed thereby. The individual voter may well be called upon to see that the requirements of the law applying to himself are complied with before casting his ballot; and if he should willfully or carelessly violate the same, there would be no hardship or injustice in depriving him of his vote; but if, on the other hand, he should in good faith comply with the law upon his part, it would be a great hardship were he deprived of his ballot through some fault or mistake of an election officer in failing to comply with a provision of the law over which the voter had no control. It is also a question in which the public has a direct and important interest, for the loss of such vote may have a controlling effect upon a public matter."

This principle was distinctly recognized in *Clark v McKenzie*, 7 Bush, 526.

We conclude, therefore, in this case, that as there is no question of the correctness of the returns which were signed by a clerk representing that party against which the majority appeared, and as the officers representing the other party demanded the right to sign them, the other representative of the minority party at that precinct admitting their correctness at the time, they were made, and as the ballots themselves, upon examination, confirm the accuracy of the count by the officers, and there is no suggestion that they have been tampered with, this precinct should not be thrown out.

The tally made by the circuit judge shows the vote at this precinct to have been :

Democratic Ticket.		Republican Ticket.	
Ferguson.....	105	Keller .....	199
Rhoton.....	110	Bristow .....	199
Kelley.....	100	Finnell.....	202
Lusby.....	104	Ashurst .....	202
Adams.....	93	Lemon.....	202
Wolfe.....	99	Bradley.....	206
Scott.....	98	Glass.....	205
Haggard.....	102	Johnson.....	199
Kelley.....	109	Bates.....	205
Lair.....	101	Bradley.....	208
O'Neil.....	101	Braden.....	198
Thacker.....	107	Clark.....	198
Crumbaugh.....	104	Caden.....	197
Brooks.....	99	Jenkins.....	199
Hamon.....	96	Nunnally.....	208
Barkley.....	104	Offutt.....	204

At the courthouse precinct there was some trouble in the count of the ballots. The returns showed forty-nine ballots questioned or rejected. The evidence shows quite conclusively that seventeen of these were rejected by the officers as mutilated ballots the contention of contestants being that this was fraudulently done by the clerk of election during the count. The evidence shows that twenty three of the ballots were not signed on the back by the clerk of election, and that eight of the rejected ballots were signed by him, not with his own name, Geo. D. Lancaster, but by the words "Hotel Lancaster." Contestants claim that forty-eight of the forty-nine ballots questioned or rejected should be counted for them. There is little doubt of the accuracy of the count of the ballots at this precinct, so far as they were counted. There seems to be no question on either side as to the proper preservation of the ballots which were counted. They were found intact when the ballot box was produced on the hearing of the contest. The tally made by the circuit judge accords with that of the officers, except that he rejected one ballot apparently because of two ink blots on the back. This ballot, we think, should have been counted for the straight Republican ticket, as there is nothing to show that these marks were put there by the voter for the purpose of distinguishing his ballot. Taking the circuit judge's tally, we have the vote at this precinct as follows:



Democratic Ticket.		Republican Ticket.	
Ferguson	147	Keller	109
Rhoton	146	Bristow	112
Kelley	146	Finnell	114
Lusby	153	Ashurst	111
Adams	131	Lemon	118
Wolfe	146	Bradley	117
Scott	148	Glass	111
Haggard	149	Johnson	107
Kelley	155	Bates	108
Lair	145	Bradley	112
O'Neil	146	Braden	110
Thacker	149	Clark	99
Crumbaugh	152	Caden	103
Brooks	145	Jenkins	111
Hamon	144	Nunnelly	111
Barkley	151	Offutt	105

Adding these returns, together with the one ballot improperly rejected by the court, to the votes ascertained in the other two precincts, we have the following result, without in any way considering the forty eight rejected ballots which contestants claim should have been counted for them.

Democratic Ticket.		Republican Ticket.	
Ferguson	438	Keller	434
Rhoton	439	Bristow	430
Kelley	427	Finnell	445
Lusby	457	Ashurst	428
Adams	385	Lemon	452
Wolfe	423	Bradley	451
Scott	414	Glass	418
Haggard	442	Johnson	423
Kelly	455	Bates	443
Lair	424	Bradley	456
O'Neil	420	Braden	430
Thacker	441	Clark	404
Crumbaugh	433	Caden	417
Brooks	415	Jenkins	444
Hamon	408	Nunnelly	450
Barkley	429	Offutt	439

This would give the election to the contestants, Finnell, Lemon, Bradley Glass, and to five of the Republican candidates for the council.

The difficulty arises when we come to consider the votes which were not counted by the officers. Upon the hearing there were found in the box only nineteen of the twenty-three unsigned ballots, sixteen of the so called mutilated ballots, and six of the "Hotel Lancaster" ballots. The evidence goes strongly to show that the unsigned ballots and the "Hotel Lancaster" ballots are not in the same condition that they were when returned by the officers. Although at the count by the officers at the voting place the eight "Hotel Lancaster" ballots were counted and tallied as straight Republican

ballots, four of the six ballots which were produced on the hearing are marked in the squares to the right of the names of all of the contestees and in the circle under the Republican device, the other two of the six, which we have before us, being marked only in the circle under the Republican device. As to the twenty-three unsigned ballots, which were not counted by the officers, there is some conflict of testimony. Some of the persons who were officers and inspectors insist that they were not examined. The others insist that they were examined by all of those present at the count, or at least that they examined them, and they were all practically straight Republican ballots; that there were no straight Democratic ballots, and that upon only a few of them was any scratching done in favor of any Democratic candidate. An examination shows that the unsigned ballots, numbered 1, 2, 3, 7, 11, 12, 14, 15 and 19, nine ballots, are marked in the circle under the Republican device and in the square at the right of the names of all the contestees, and in no other place. Ballot No. 6 is marked in the same way, except that it has in addition a slight blur, apparently made with an inky finger, in the circle under the Democratic device. Ballot No. 4, while it bears no signature of the election clerk, should be properly classed and considered with the so-called mutilated ballots. Seven of these unsigned ballots, Nos. 5, 9, 10, 13, 16, 17 and 18, show that some mark has been erased from the circle under the Republican device, and have a cross mark in the circle under the Democratic device. In four of them, notwithstanding the erasure, the outline of the cross mark in the erasure in the circle under the Republican device can still be seen in a strong light. The remaining ballot is marked in the circle under the chicken cock, and besides some marks in the squares to the right of the two Democratic candidates for county offices, is marked for both Ferguson and Keller, for both Kelly and Bates, for both Thacker and Clark, for both Crumbaugh and Caden, and also for Ashurst and Lemon on the Republican side, and Barkley on the Democratic side.

One of the so called mutilated ballots, including the one unsigned by the clerk, one (being No. 6) is imperfectly marked with the stencil in the circle under the Republican device, and is marked with a pen, with a cross (X), in the circle under the Democratic device. The remaining sixteen are all marked unmistakably in the circle under the Republican device, with a stencilled cross (X) having all the appearance of being made by the same stencil, or the same kind of stencil used in marking all the counted ballots in this and both the other precincts. Nine of them also have a mark in the circle under the Democratic device, just as unmistakably not made by that stencil or by that kind of a stencil. This mark is of a different size and shape, the arms of the cross are of a different thickness, the ink seems to be of a slightly different color, and about each of these marks under the Democratic device is a small white space, and around that a shadowy blur, evidently made by an inky thumb or finger, and plainly showing the lines of the skin. The other seven of these ballots have, in addition to the cross (X) under the Republican device, a blurred mark in the circle under the Democratic device, not made by a stencil, but apparently made by an inky thumb or finger. Nothing seems to have been done to these so-called mutilated ballots since the count. They are in substantially the same condition that the evidence indicates they were in at the time the count was made. The whole

appearance of the ballots themselves, and the great weight of the testimony, tend to show that they were voted for the straight Republican ticket by the voters who cast them, and that they were fraudulently marked by a rubber cross (X) attached to a finger or thumb.

We do not decide that the clerk of election did this. We know that some one did it. We can not think it was done by the voters. Whoever did it, it must have been done for the purpose of defrauding the Republican candidates of votes which has been rightfully cast for them, and we think the attempted fraud should not be permitted to have effect. Therefore, these votes should be counted for the contestants.

The evidence is almost equally conclusive that the contestants were improperly deprived of eight votes signed by the clerk "Hotel Lancaster," and that fraud was perpetrated subsequent to the count by the abstraction of two of those ballots from the box, and by the marking of four of them in the squares to the right of contestees' names. This conclusion is strongly supported by the condition of the other ballots which were returned as not counted because not signed by the clerk, and which, despite the evidence of all the officers who claim to have examined them at the count that they were straight, or practically straight, Republican ballots, appear as scratched in favor of contestees, and of no one else. The condition of the ballot box, either key of which will open both locks, and the condition of the linen envelope in which the uncounted ballots were returned, and which, while at one end it was sealed with hot wax and an impression of the county seal, is palpably easy of entrance at the other end, show that access could have been obtained to these ballots; and the condition of the ballots themselves points strongly to the conclusion that access was actually had. The change is manifest of seven of these ballots from Republican ballots to Democratic ballots. The remaining ballots, which now appear stamped not only in the circle under the Republican device, but in the square to the right of each contestee's name, and nowhere else, are exceedingly suspicious, and are not passed upon, and are not counted for any one.

An examination of the ballots themselves shows a very suspicious state of fact, even if there were no other evidence of tampering with the ballots which were returned in the accessible envelope, and if there were no evidence as to how the ballots appeared at the time of the count.

The eight "Hotel Lancaster" ballots were undoubtedly all straight Republican ballots; but as four of them now appear, and as ten of the unsigned ballots now appear, they present a most remarkable variety of scratching. Why a voter should desire to vote the straight Republican ticket in the county, where the Republican ticket had no chance, and should also desire to defeat the candidates of what appears to have been his party in the city, where they had a chance to win, is, to begin with, exceedingly peculiar. And it further appears that the voters who had this peculiar desire stamped in the circle of the device with very varying degrees of pressure and of steadiness of hand, and varied also in the amount of ink taken up on the stencil, but when they came to scratch in favor of the Democratic city candidates every one of them showed a singularly uniform pressure, precision and care in the amount of ink taken up upon the stencil.

Inasmuch as it would not change the result to count for contestants the

unsigned ballots which we find marked in the circle under the Republican device and also in the squares to the right of contestees' names, and as we can not, under the circumstances shown in this case, count them for contestees, they are not counted at all. Counting for contestants the sixteen so-called mutilated ballots, the eight "Hotel Lancaster" ballots, and the seven ballots showing an erasure in the circle under the Republican device and the stencil in the circle under the Democratic device, the contestants appear to have been elected, with the exception of contestant Clark, and contestee Kelley appears to have been elected to the council. The vote for the entire city will then stand as follows:

Democratic Ticket.		Republican Ticket.	
Ferguson.....	438	Keller .....	465
Rhoton.....	439	Bristow .....	461
Kelley.....	427	Finnell.....	476
Lusby.....	457	Ashurst.....	459
Adams.....	385	Lemon .....	513
Wolfe.....	423	Bradley .....	483
Scott.....	414	Glass.....	479
Haggard .....	442	Johnson .....	454
Kelley.....	455	Bates.....	474
Lair.....	424	Bradley.....	487
O'Neil .....	420	Braden .....	461
Thacker.....	441	Clark.....	435
Crumbaugh.....	432	Caden .....	448
Brooks.....	415	Jenkins.....	475
Hamon.....	408	Nunnally.....	481
Barkley .....	429	Offutt.....	470

Applying the same rules of evidence, drawing the same deductions from the facts before us, which we would apply and draw in an ordinary case of contest over property rights, as was done in *Tunks v. Vincent*, 21 Ky. Law Rep., 478, we are satisfied that we can ascertain the result of these elections as held, and counting these contested ballots in the manner indicated, we have no doubt that we thereby establish the will of the voters of Georgetown.

At the hearing a motion was made to dismiss some of the appeals for want of bond. A bond seems to have been given in each case, and no ground for the motion is pointed out by brief or otherwise. The motion is, therefore, overruled.

For the reasons given the judgments in each of the cases are reversed and causes remanded, with directions to enter judgments for the appellants, except as to contestant Clark and contestee Kelley, as to whom the judgment is affirmed.

Whole court sitting.

Judge Hobson did not sit in the cases of *Finnell v. Kelley and Bates, &c. v. Kelley, &c.*

## STEWART v. GARDNER-WARREN IMPLEMENT CO.

(Filed December 17, 1902—Not to be reported.)

Constitutional law—Liens—Section 2463, Kentucky Statutes, prescribing lien on real estate in favor of mechanics and material men, is constitutional.

J. P. O'Meara and James C. Poston for appellant.

W. H. Marriott for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge O'Rear.

This cause involves alone the constitutionality of section 2463, Kentucky Statutes, as follows: "A person who performs labor or furnishes materials in the erection, altering or repairing a house, building or other structure, or for any fixture or machinery therein, or for the excavation of cellars, cisterns, vaults, wells, or for the improvement, in any manner, of real estate by contract with, or by the written consent of, the owner, contractor, subcontractor, architect or authorized agent, shall have a lien thereon, and upon the lands upon which said improvements shall have been made, or any interest such owner has in the same, to secure the amount thereof, with costs," etc.

This section was held to be constitutional in *Hightower v. Bailey, &c.*, 22 Ky. Law Rep., 88. This was followed in *Hodges, &c. v. Arvidson*, 23 Ky. Law Rep., 2078, and later in *Browinski v. Pickett*, 24 Ky. Law Rep., 306. The circuit court having adjudged this case in accordance with the views announced in those opinions, and no other question being raised or discussed, the judgment must be affirmed.

## BROWN v. SAMUELS, &amp;c.

(Filed December 17, 1902—Not to be reported.)

Landlord and tenant—Forcible detainer—S. rented to B. a lot of ground for five years, with the privilege of five years more, B. agreeing to erect improvements thereon, which S. was to have at the end of the term as rent. At the end of the five years S. saw B., and wanted him to pay rent for the next five years, which he declined to do. S. then sued out a writ of forcible detainer to recover the possession, claiming that B. having failed to give any notice of his intention to remain five years longer, had terminated his lease. Held—That no notice was necessary to continue the lease, as under its terms it was a continuation of the old term, and simply holding possession was sufficient notice of his intention to continue his term.

J. F. Combs for appellant.

Chas. Carroll for appellees.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Hobson.

In October, 1895, appellee Samuels leased to appellant Brown, by a written contract, for five years, with the privilege of five years more, three-fourths of an acre of ground on which stood a box house about twelve feet wide and twenty-four feet long, made of rough lumber. The house had been used for

a storeroom, but had been vacant for two years. Appellant built on the premises a house of two rooms, a porch and hall, a warehouse, a cellar house, a porch or platform in front of the store, a chicken house, a stable and some other outbuildings, dug a well and built a fence around the premises. The original house was covered with clapboards and so were the houses that appellant built. He puts his improvements at \$500, while appellee puts their value at less than half that, \$200 or \$225. At the end of the five years Samuels saw Brown and wanted him to pay rent for the property for the next five years. Brown said he was not to pay any rent, and that by the contract he was to hold for five years more. Samuels said that he would sue him if he did not pay, and Brown answered that he did not think he owed him anything, and added: "If I do, you are sure to get it; and if I don't, you are sure not to get it. Look at your lease." Samuels then instituted this proceeding of forcible detainer against Brown, and obtained a judgment in his favor both before the county judge and in the circuit court. The ground of the proceeding is that Brown, by refusing to pay rent, failed to exercise his option to hold the property for the second five years on the idea that he thereby repudiated the contract or abandoned his right to hold under it. The case turns largely upon the writing itself, which is in these words:

"This lease made and entered into by and between John Samuels and wife, parties of the first part, and Charles Brown, party of the second part, both of Bullitt county, Kentucky, witnesseth: The parties of the first part have this day leased unto the party of the second part the following described piece of real estate, lying and being in Bullitt county, Kentucky, and described as follows: One storehouse and three-quarters of an acre of ground surrounding said storehouse. The said first parties do hereby lease unto the party of the second part, his heirs and assigns, for the period of five years, with the privilege of five years more. The premises is hereby leased to the said second party for the consideration of one dollar cash in hand paid by said second party. The receipt of the same is hereby acknowledged. For the further consideration, the said second party agrees and binds himself to leave said improvements on said premises made by said second party upon the acceptance and occupancy of said premises heretofore described. Said above mentioned consideration is for the occupancy and control of said premises at the expiration of said term heretofore mentioned.

"And it is hereby agreed by and between said first and second parties that the party of the second part shall not sell or rent the above mentioned premises to any one without the consent of the said parties of the first part.

"In witness whereof the parties of the first part and second part have hereunto signed their names, this the 4th day of November, 1895.

"JOHN SAMUELS,

"SALLIE SAMUELS,

"CHARLES BROWN."

It will be observed that by this instrument the premises were leased to Brown for "the period of five years, with the privilege of five years more." In the Amer. & Eng. Ency. of Law, volume 18, page 693, 2d edition, it is said: "A provision ~~in~~ lease giving to the lessee the privilege of extending the term is to be distinguished from a provision giving to the lessee the option to renew. In the former case no notice of the lessee's election to extend the

term is required, in the absence of a stipulation therefor in his lease, his mere remaining in possession being sufficient notice." (Wood on Landlord and Tenant, 678; Taylor on Landlord and Tenant, 278; Terstege v. First German Benevolent Society, 47 Am. Rep., 185, and cases cited.)

The reason for this rule is that the additional time is not a new demise, but a continuation of the old one. Brown, therefore, by remaining in possession exercised his privilege of five years more, and if he failed to pay rent that he owed Samuels' remedy was an action to recover the rent. He could not dispossess Brown because he and Brown differed as to the proper construction of the contract, and Brown claimed that he did not owe any rent. The writ for forcible detainer should, therefore, have been dismissed.

Judgment reversed and cause remanded, with directions to dismiss the proceeding.

#### COMMONWEALTH v. RICHIE.

(Filed December 17, 1902.)

Disbarring attorneys—Jurisdiction—An information based on an affidavit charging, under the common law, that appellee by reason of acts therein charged to have been committed, was no longer such character of person as was entitled to hold the office of attorney, was filed by the Commonwealth's attorney in the chancery division of the Jefferson Circuit Court. That court dismissed the proceeding for the want of jurisdiction. Objection to the jurisdiction was based on section 137 of the Constitution on the idea that the proceeding was of a criminal nature, of which the criminal division of that court had exclusive jurisdiction. On appeal, Held—That the power given to the circuit courts, regardless of the different branches or divisions to license persons to practice as attorneys, and thereby to become officers of the court, must also include the power and authority to revoke the license granted upon proper cause being shown. It would necessarily follow that one division of the court, like the circuit court of any county, would have jurisdiction to hear and determine charges against an attorney practicing before it regardless of the court granting him license. Any branch of that court has jurisdiction to try and determine proceedings to revoke the license of an attorney just as it has to punish contempt. The chancery division had jurisdiction of this proceeding, and should have awarded the rule to show cause.

C. J. Pratt, J. M. Huffaker and Pirle & Trabue for appellant.

Kohn, Baird & Spindle for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge White.

This proceeding is to revoke the license of appellee, Charles G. Richie, as an attorney, and to disbar him from further practicing such profession.

The attorney for the Commonwealth in the Thirtieth Judicial District, comprising Jefferson county; filed an information based upon an affidavit, and also the affidavit, in the chancery branch, first division, of the Jefferson Circuit Court, and asked that a rule issue against appellee to show cause why his license should not be revoked. Objection was made to the order for rule on the ground that that branch of the court was without jurisdiction in

the matter, and could make no order therein. Upon this objection being heard the court refused to award the rule or to take jurisdiction in the matter at all, and dismissed same for want of jurisdiction. The Commonwealth appeals.

Section 137 of the present Constitution, so far as applicable herein, provides: "Each of the judges in such district shall hold a separate court, except when a general term may be held for the purpose of making rules, or as may be required by law. \* \* \* Criminal causes shall be under the exclusive jurisdiction of some one branch of said court, and all other litigation in said district, of which the circuit court may have jurisdiction, shall be distributed as equally as may be between the other branches thereof, in accordance with the rules of the court made in general term, or as may be prescribed by law."

It is contended by counsel for appellee that this proceeding is a criminal cause, and that it is within the exclusive jurisdiction of the criminal branch of the Jefferson Circuit Court.

The charge in the affidavit and information is not under the statute for failing to pay over money collected, while that is a part of the alleged misconduct of appellee, but the charge is under the common law, that appellee, by reason of acts therein charged to have been committed, was no longer such character of person as was entitled to hold the office of attorney at law. If guilty of the charge as stated in the affidavit and information the punishment prescribed by statute, of suspension for one year and until the money was paid, would not apply, but the court would be authorized to revoke the license entirely, and to disbar the attorney from practice entirely. The question is then presented as to whether the criminal division of the Jefferson Circuit Court alone has jurisdiction to try a person on proceeding to disbar him from practice. The question as to whether a proceeding of this character is civil or criminal is not one about which the courts have agreed. There is eminent authority to sustain both sides of the question.

The direct question has not been decided by this court. In *Baker v. Commonwealth*, 10 Bush, 592, the court said the proceeding is more in the nature of a criminal than civil proceeding. That is as far as we have gone. This is true of contempt proceedings, yet it must be conceded by all that every court has inherent power and jurisdiction to protect itself by punishing contempt shown it. We are of opinion that any branch of the Jefferson Circuit Court has jurisdiction to try and determine proceeding to revoke the license of an attorney, just as it has to punish contempt. If the proceeding was a criminal cause, as meant by the constitutional provision supra, the accused could claim a trial by jury, which has never been the rule in this character of case. It seems to be conceded that if an attorney was to commit some crime, as to destroy or mutilate a writing used as evidence, in the presence of the court, and in the progress of the trial, the court would have the right and power to make an order revoking his license and disbarring him from practicing further in that court as well as all others.

If the court other than criminal division has power and jurisdiction to disbar at all for any cause, the exclusive jurisdiction would not be in the criminal division. Every court must of necessity have the power to protect itself in the administration of justice, by preventing dishonest and corrupt



persons from appearing as counsel in the trial of cases before it. It would not comport with reason to say that it was ever intended that either branch of the circuit court could grant license, and that then the whole question was turned over to the criminal division as to how long a person could enjoy the benefits and privileges thereby given, and when any division might be outraged by the misconduct of an attorney, such division or court would be required to go before the criminal division for redress. This court has jurisdiction by statute and the Constitution, appellate in its nature only, supervisory over the subordinate courts, yet we think it would not be questioned that for misconduct in this court, and in our presence at least, we would be without jurisdiction to disbar the offending attorney.

An attorney is an officer of the court, created by the court and is always subject to the rule requiring honesty and good demeanor toward the court in which he practices his profession. When it appears by due process of law in such cases provided that an attorney has forfeited his right to longer be an attorney or officer of the court in the administration of justice, by reason of dishonest practices, it is the duty of the court to take from such offender the right to appear as an attorney. Without referring and quoting from the many conflicting authorities, we have reached the conclusion that the power given to the circuit courts, regardless of the different branches or divisions, to license persons to practice as attorneys, and thereby to become officers of the court, must also include the power and authority to revoke the license granted upon proper cause being shown. It would necessarily follow that one division of the court, like the circuit court of any county, would have jurisdiction to hear and determine the charges against an attorney practicing before him, regardless of what court in the State granted the license.

For these reasons we conclude the chancery division of the Jefferson Circuit Court had jurisdiction of this proceeding, and should have awarded the rule to show cause. The judgment dismissing the proceeding for want of jurisdiction is, therefore, reversed and cause remanded for further proceedings consistent herewith.

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DILLEHAY v. HICKEY, BY, & CO.

(Filed December 17, 1902—Not to be reported.)

Construction of statutes—Section 68, Kentucky Statutes, changes the common law rule as to the liability of the owner of a dog to a person bitten by him. Unless a person is on the premises of another after dark or engaged in some unlawful act thereon, he is not deprived of the right to recover damages.

C. R. McDowell and R. P. Jacobs for appellant.

Robt. Harding, John W. Rawlings and W. J. Price for appellees.

Appeal from Boyle Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

It is earnestly insisted in the petition for rehearing that the plaintiff, for her own convenience and not in the discharge of any duty to the defendant, or on any business, went on the defendant's premises, knowing that the dog

was dangerous, and that she thus by her own act placed herself outside of the legal pale of remedy. In support of this contention we are referred to section 51 of Meach. on Contributory Negligence, and to the case of Marble v. Ross, 124 Mass., 44. These authorities rest on common law principles. But our statute has changed the rule of the common law as to the liability of the owner of a dog to a person bitten by him. It provides: "Every person owning, having or keeping any dog shall be liable to the party injured for all damages done by such dog. But no recovery shall be had in case the person injured is at the time upon the premises of the owner of the dog after night, or engaged in some unlawful act in the day time." (Kentucky Statutes, section 68.)

The rule of the common law, that statutes in derogation thereof are to be strictly construed, does not apply to this revision; on the contrary its provisions are to be liberally construed with a view to promote its object. Common words and phrases are to be understood according to their ordinary sense. (Kentucky Statutes, section 460.) The injury in this case did not occur after night, and in determining the meaning of the words "engaged in some unlawful act in the day time," we must give the words their proper force, according to the common and approved usage of language. There is a material difference in these words and the words "shall be on the premises, unlawfully in the day time." The contention of appellant, if adopted, would amount in substance to making the statute so read. This was not the purpose of the legislature. It exempted the owner from liability where the person injured was upon the premises after night, or where he was engaged in some unlawful act in the day time. Appellee's purpose on the premises of appellant was entirely innocent. She went there to get her milk, according to custom, and not finding appellant at the house, went down to the stable to speak to her socially, and was not engaged in doing an unlawful act within the meaning of the statute. The question of contributory negligence on the part of appellee was by proper instruction aptly submitted to the jury.

Petition overruled.

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CRATE, &c. v. STRONG, &c.

(Filed December 17, 1902—Not to be reported.)

Marcum & Pollard for appellants.

J. J. C. Baoh, A. C. Baker and W. W. McGuire for appellees.

Appeal from Breathitt Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

The mandate in this case is modified so as to direct the circuit court to, perpetuate plaintiffs' injunction as to all the land within their boundary, with the exception of the one hundred acres patented to S. L. Stacy upon the survey bearing date January 16, 1871, and to adjudge to the plaintiffs, the proceeds of ~~the~~ timber out from their thirty-six hundred acre boundary outside of the Stacy one hundred-acre patent above mentioned. The record is not so presented as to enable us to satisfactorily fix the amount of this timber, and on the return of the case the parties may be allowed to take,

further proof on the question. In other respects the petition for rehearing is overruled. The authorities relied on are not applicable where the defendant is a trespasser without title. What is said in the opinion is intended only to apply to the parties before the court. The rights of the other parties are, of course, not defined.

Rehearing refused.

### ROACH v. T. J. MOSS TIE CO., &c.

(Filed December 17, 1902—Not to be reported.)

1. Title—Burden of proof—This was an action to recover for the value of timber cut from a tract of land. The defendant by answer set up title to the land, and a verdict resulted for defendant. On appeal appellant insists that the court erred to his prejudice in giving to defendant the burden of proof. Held—That appellant having taken no exception to the ruling of the court fixing the burden of proof, can not complain on appeal.

2. Practice—Court urging jury to make a verdict—Appellant can not complain because the court urged the jury to hasten a verdict, as it is not shown that this action was prejudicial to him.

3. Appeals—Where appellant brought his action to recover \$195, the value of timber cut from land, and defendant's answer sets up title to land, appellant may prosecute an appeal from a judgment against him, as it involves the title to land.

E. P. Neal and W. H. Barnes for appellant.

M. L. Heaverin for appellees.

Appeal from Ohio Circuit Court.

Opinion of the court by Chief Justice Guffy.

The appellant, Roach, instituted this action against the T. J. Moss Tie Co. and Eliza J. Taylor, seeking to recover judgment for \$195 for the taking and cutting of timber on land, as plaintiff alleges, owned by him and in his possession. Defendants deny plaintiff's title and Mrs. Taylor's asserted ownership of the land. The Moss Tie Co. is not before the court on this appeal, hence its rights will be in no manner affected by the opinion and judgment rendered upon this appeal, nor is it necessary to notice the defense relied on by it. The plaintiff traversed the answer of Mrs. Taylor. A jury trial resulted in a verdict and judgment in favor of the defendants. Plaintiff's motion for a new trial having been overruled he prosecutes this appeal.

The grounds relied on are in substance: First, the verdict of the jury is contrary to the law and evidence; second, error of the court in ruling that the burden of proof is on the defendant; third, error of the court in overruling plaintiff's motion to continue at the cost of defendants upon their filing an amended answer on the day of the trial; fourth, in allowing the amended petition to be filed; fifth, the verdict of the jury is palpably against the evidence and clearly the result of passion and prejudice; sixth, the court erred in admonishing the jury to remain out only thirty minutes on Saturday evening, and repeatedly sending to and for them Monday morning to hasten in their finding of a verdict.

It may be said that the evidence in this case is somewhat conflicting, but we are clearly of the opinion that there was abundant evidence to sustain

the verdict of the jury. The second ground for a new trial complains of the court ruling that the burden of proof was on the defendant. We fail to find in the bill of exceptions that the court ever made a distinct ruling as to the burden of proof, or that any exception was taken to the introduction of defendants' testimony first. It is true that certain papers purporting to be copies of judgment, and some orders attested by the circuit clerk and filed by appellant at the time he sued out his appeal, show that such an order was made, and that the plaintiff excepted thereto; but that paper is simply signed by the clerk and for the purpose of this appeal. The bill of exceptions signed by the judge constitutes the entire record upon which this appeal must be tried. We doubt if plaintiff suffered any injury by the defendant taking the burden of proof, but be it as it may, the propriety of that ruling is not before us for revision for the reason aforesaid.

We do not think the court erred in permitting the amended answer to be filed, or in refusing to continue the case on that account. No affidavit was filed showing any reason for continuing it. Moreover, the amended answer was substantially the same as the original answer. There is nothing in the bill of exceptions showing that the court admonished the jury on Saturday to remain out only thirty minutes, nor does the bill show that the jury were directed to hasten their finding on Monday morning. Moreover, such matters are largely within the discretion of the court, and if it did appear that the statements in the motion for a new trial are true, the same would not be grounds for reversal unless it otherwise appeared that probably such conduct was prejudicial to the plaintiff. There is nothing in this case to indicate that the jury were influenced by passion or prejudice. The appellee insists that this court has no jurisdiction of this appeal for the reason that only \$195 are in controversy. It will be seen, however, that the title to real estate is in fact involved in the controversy. The case of *Stillwell v. Duncan*, 19 Ky. Law Rep., 1701, is conclusive of the question of jurisdiction, hence the motion of appellee to dismiss must be overruled.

After a careful reading of this entire record, we fail to find any error to the prejudice of the substantial rights of the appellant. The jury being presumably acquainted with the witnesses and understanding the description given by them of the various tracts of land and boundaries involved in the suit, were peculiarly well qualified to find the real truth of the matter in controversy. No complaint is made by the appellant as to the instructions, hence no question of that kind is before us.

Judgment affirmed.

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#### COMMONWEALTH v. FAYETTE BUILDING AND LOAN ASSOCIATION.

(Filed December 17, 1902—Not to be reported.)

Taxation of property of building and loan associations—A building and loan association, since June 23, 1894, is not liable as a corporation for taxes on notes and mortgages held by it as the law which took effect on that date required the owners of stock to assess same for taxation.

Webb & Farrell and R. J. O'Mahoney for appellant.

Mat Walton and J. H. Mulligan for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Burnam.

This proceeding was instituted in the county court by the auditor's agent for Fayette county to require the defendant, the Fayette Building and Loan Association, to assess certain mortgage notes owned by it, which it was alleged they had omitted to assess from 1891 to 1900, inclusive. The building and loan association filed a response to the motion in four paragraphs. In the first it denied the right of the auditor's agent to require the notes recited in his motion to be assessed for taxation, or that they were of the value therein set forth. In the second paragraph they allege that they are a joint stock company, their capital being represented by certificates of stock and invested in loans to the members and shareholders in the association and secured by mortgages on real estate; that by the express terms of the statute the shares of stock of the association are made liable for assessment and taxation in the hands of the individual holders of the same, and not in that of the association. In the third paragraph they allege that the mortgage notes and other choses in action in which the capital of the association is invested is not liable for assessment. In the fourth paragraph they plead and rely upon the act of the general assembly, approved May 28, 1890, in bar of plaintiff's right to maintain this proceeding.

General demurrers were sustained to the first and fourth paragraphs of the response and overruled as to the second and third. Plaintiff then filed a reply to the second and third paragraphs, in which they allege that the defendant was incorporated and organized on the 29th of February, 1888, and was in existence prior to the adoption of the present Constitution; that it has never at any time filed in the office of the secretary of state any acceptance of the present Constitution as required by section 190; and that by reason of their failure to comply with this provision of the Constitution and the statute passed pursuant thereto they were not entitled to avail themselves of the act of the general assembly approved on the 23d of March, 1894, now known as section 4093 of the Kentucky Statutes, which provides that the shares of building associations, or building and loan associations shall be taxed as other individual personal property, and shall be listed with the assessor by the owners of said shares. The amount so listed by every owner or shareholder to correspond with the amount paid in and not withdrawn by the said shareholder on the 15th of September of each year. A general demurrer was sustained to the reply, and plaintiff declining to plead further, the trial court dismissed the proceedings, hence this appeal. Under the provisions of the general law as it stood prior to the adoption of the act of the 23d day of March, 1894, the property of building and loan associations was required to be assessed in the name of the corporation in the same manner as that of natural persons, that is, they were required to list for taxation their capital, surplus, undivided profits, etc., but they were not required in addition to list in items their notes, mortgages, and other evidences of indebtedness in which their capital stock was invested. The general assembly by the act of March, 1894, changed this mode of assessment so far as building and loan associations were concerned, and required that the shares of stock should be assessed by the individual stockholder instead of by the company. There can be no question of the power of the general assembly

to prescribe this mode of assessing the property of this class of corporation, it was wholly a matter of legislative discretion, and after the enactment of this statute it was not a matter over which the defendant had any control; they were bound to comply with the provisions of the law and assess the property in the manner pointed out by the statute. We are, therefore, of opinion that from the time this statute took effect, on the 23d of June, 1894, the corporation itself was not liable for the taxes. It is unnecessary for us to determine whether the statute approved May 23, 1890, would be available as a defense to a proceeding instituted by the auditor's agent to assess the capital stock, surplus, etc., of the defendant for the years prior to 1894, as that question is not before us.

For reasons indicated the judgment is affirmed.

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HOWARD v. COMMONWEALTH.

(Filed December 17, 1903.)

1. Criminal law—Misconduct of attorney for the Commonwealth in argument—In the closing argument of the attorney for the Commonwealth he seemed determined to get around the former opinion of the court, and by indirection and innuendo get before the jury exactly what this court had said should not be directly proven with regard to appellant having been indicted for the murder of George Baker, and he succeeded in his undertaking, and the prejudicial matters thus brought in would not, separate and alone, be sufficient to entitle appellant to a reversal, but taken together in the manner in which they were presented to the jury, they were prejudicial in a high degree.

2. Evidence—Good character—Legislative journals—Where the character of a witness for the prosecution was attacked the reading of the legislative journal, showing that Republican members voted for witness for doorkeeper in 1900, was improper, but not material.

3. Discretion of court as to order of introduction of evidence—The lower court has a large discretion as to the order of introduction of evidence. Introduction of evidence in rebuttal which was properly primary evidence was not an abuse of discretion.

4. Rebuttal testimony—Where the prosecution introduced evidence to the effect that the accused was seen running away from the executive building with a black, stubby moustache, while the accused and other witnesses testified that he had been smooth shaven for a year, it was competent in rebuttal to show that the accused, some months before the killing, was in the possession of a stubby false moustache.

5. Instructions—Where a conspiracy is not charged, but nevertheless the Commonwealth is permitted to introduce evidence that a conspiracy existed; that the accused was a member of it, and that various persons who are claimed to be co-conspirators did acts and made declarations in furtherance of the purpose of such conspiracy, it follows inevitably that the jury should be told in effect how far, and under what circumstances, they could consider evidence of the acts and doings of the co-conspirators as evidence against the defendant on trial.

6. Res judicata—The rule that the law, as declared on the first appeal, is the controlling principle of the case on the second appeal is recognized, but this principle is sharply limited to decisions on a prior appeal on points

necessary to a determination of the cause. On matters not essential or questions incidental or not considered, the court is not conclusively bound on the second appeal.

7. Instruction—Good character—The law presumes a person to be of at least ordinary good character; that this presumption continues throughout the case and is evidence in favor of the accused, but a refusal to give an instruction upon this point was not reversible error.

Gordon & Gordon, J. A. Scott and J. A. Violett for appellant.

T. C. Campbell, R. B. Franklin, B. G. Williams and L. W. Arnett for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge DuRelle.

Appellant, James B. Howard, having been jointly indicted with Henry Youtsey, Berry Howard, Harlan Whittaker and Richard Combs for the murder of William Goebel, was upon separate trial found guilty.

Upon the former appeal of this case (22 Ky. Law Rep., 1845) enough was written in the opinion and in the separate concurring opinions of Chief Justice Paynter and Judges Hobson and White to give a general idea of the circumstances surrounding the murder as disclosed by the record, and to show the contentions on behalf of the Commonwealth and the accused. Upon that trial the contention of the accused was that he had not been in Frankfort for over a year before the morning of the assassination, except when summoned as a witness in the Federal court; that he wished to obtain a pardon from Taylor, who had received a certificate of election as governor, for a crime whereof he stood indicted in the Clay Circuit Court; that he was notified by one of his friends that the contest over the governorship between Taylor and Goebel would soon be decided and probably in favor of Goebel, and, therefore, if he desired to apply for a pardon to Taylor he should do so before the judgment; that immediately thereafter he went to Frankfort for the purpose of making the application, and arrived there about one hour before the shooting. His effort, therefore, was to show that his visit to Frankfort was solely for the purpose of obtaining a pardon, and had nothing to do with the murder of Senator Goebel.

The crime of which appellant was accused in Clay county was the murder of George Baker. It is perfectly evident, under the doctrine laid down in the case of *Welsh v. Commonwealth*, 23 Ky. Law Rep., 151, that neither the fact that he was indicted for that crime in Clay county, nor the fact that he committed the crime, could have been shown against him in this case, either as a defendant or as a witness in his own behalf. Such facts could not be shown against him as a defendant, because irrelevant; they could not be shown against him to impeach him as a witness, because such a mode of impeachment is forbidden by the statute. On the former trial, as he had the right to do, he waived his right, and upon direct examination, stated that he was indicted in Clay county for killing George Baker, and came to Frankfort on the 30th of January, 1900, to try to get a pardon. Upon cross-examination he was asked, and compelled to answer, against objection, whether Baker was not an old man, unarmed, with his hands up, begging Howard for God's sake to spare his life. There was other cross-examination

of like character as to the shooting, from a curtained window, of Tom Baker, in the presence of his wife and infant child, and as to whether Howard was guilty of that killing and had been indicted therefor, which cross-examination was not objected to, but was referred to in the opinion for the guidance of the circuit court upon the second trial. That the cross-examination, which was objected to, was improper was conceded by all the court, six of the judges concurring in the opinion that it was seriously prejudicial, and the whole court concurred in the reversal of the case on account of the improper statements to the jury by one of the counsel for the Commonwealth. The court's view of the law was thus stated in the concurring opinion of Judge Hobson, which must be regarded as the law of the case: "Judge White and I concur in the opinion of the court in the reversal of the judgment on this case on the ground that the particulars of the shooting of Baker by appellant should not have been admitted in evidence, and that, as the record stands, the statement of the attorney for the State in his closing speech set out in the opinion was peculiarly prejudicial. Appellant can not be convicted in this case because he may have committed another crime of like character, and proof that he had done so, or even such an impression, might seriously prejudice him before the jury, who might consider that such proof showed he was the character of person who would commit such a deed as that charged herein."

When put on trial for the second time the accused had the same rights as he had upon his first trial. He might waive them or not at his election, for he had been granted a new trial. He was not estopped by the course he pursued upon the first trial in objecting, or failing to object, to the admission of incompetent testimony, nor by his own statement of a fact which could not properly be proved against his objection. Nevertheless, in the opening statement, counsel for the Commonwealth was permitted to state to the jury, against objection, describing the situation upon the day of the murder: "At that time W. S. Taylor had the pardoning power, and at that time James B. Howard, the defendant in this case, was under indictment for the murder of George Baker." Counsel further was permitted to state, against objection, that "he has stated in the presence of a jury, in this court room, that he came to get a pardon. Surely the gentleman won't object to that." That this was improper there can be no doubt, under the rulings of the former opinion, where the court said: \* \* \* "And it is a well-established rule that it is error sufficient to reverse a judgment for the court to suffer counsel, against the objection of the defendant, to state facts not in the evidence or pertinent to the issue, and the evidence of which would have been ruled out. (Encyclopædia of Pleading and Practice volume 2, page 737; Kennedy v. Commonwealth, 77 Ky., 360; 23 Ky. Law Rep. 1854)." Whether it was prejudicial must be determined from the subsequent proceedings in the case.

After Howard's direct examination, in which he detailed the circumstances of his trip, he was asked on cross-examination, and compelled against objection to answer, the question: "For what purpose were you going to Frankfort?" He replied: "I came here to get a pardon—to try to get one."

"Q. To get a pardon from whom?"

"A. From Governor Taylor."

"Q. For what?"



To this question the court sustained an objection. He was compelled to state, against objection, what was contained in a letter read to him by Bev. White from the latter's brother, viz.: That the latter thought Taylor would be ousted in a few days, and if Howard wanted to get a pardon he had better come on and see him before he was ousted, as well as some matters in regard to Mr. Parker assisting Howard in seeing a Laurel county jury about assisting him in obtaining a pardon.

The witness, Feeny, having on direct examination stated that he had known Howard for some three or four years, was compelled to answer that he first met him in the Richmond jail.

The witness, W. F. Phillips, a witness for the accused, was asked on cross-examination if a short time before Senator Goebel was shot Jim Howard, Bev. White and John G. White were not holding secret conferences and caucuses there, and not inviting the witness to be present, or permitting him to hear, so much so that it became unpleasant for him, and for that reason he sold out his interest and moved to Burning Springs in that county: to which he answered "no." He was then asked if, in a conversation with W. D. Weaver, he had not asked Weaver if he knew they were accusing Jim Howard of having killed Mr. Goebel, and if Weaver did not say: "No, I didn't know it; but I suspected it, because it was done on the same plan that Tom Baker was killed at Manchester;" and if witness did not then state that he had been in business with Bev. White, and Bev. White and Jim Howard and others were constantly caucusing at the store and holding secret conferences to which he was not invited, conducting themselves in such a manner that it became unpleasant for him, and that he dissolved the partnership and moved his stock of goods to Burning Springs. The witness answered that he did not remember it. Afterward the witness, Weaver, was permitted to answer, against objection, that the conversation between Phillips and himself did occur as indicated in the question, thus permitting Weaver, when under oath, to detail to the jury a statement by him, when not under oath, of his suspicion of the accused in connection with another murder, and that the murder of another Baker, committed under peculiarly revolting circumstances, and in a manner similar to that in which the murder of Goebel was committed. This suspicion of Weaver was clearly incompetent, and as clearly unnecessary to the contradiction of the statement of the witness Phillips. (*Commonwealth v. Hourigan*, 89 Ky., 311; *Crittenden v. Commonwealth*, 82 Ky., 167.) The procedure complained of here goes a step further than what was condemned in the two cases cited. There the court condemned an effort to show that the witness who was being cross-examined had stated out of court facts which he failed to prove in court, and thus to transform such hearsay testimony into substantive evidence which did not have the oath of the witness to support it. Here it was not the hearsay statement of a cross-examined witness which was transformed into substantive evidence against the defendant, but evidence of what a third party said to the witness.

The leading counsel for the Commonwealth in his address to the jury, referring to the testimony given on compulsion, that Howard's visit to Frankfort was for the purpose of obtaining a pardon, was permitted to say, against objection: "Why did he leave his home? He tells us that he lef

For the purpose of getting a pardon, but he declines to tell us for what that pardon was to be. Let us try and reason for ourselves what it was, and I ask you to think what kind of a pardon did he need that would take him from his home so suddenly? He didn't get the word until the afternoon of Saturday, the 27th, and yet we find him on his way on Sunday morning. What was it? They objected to James Howard telling it, and you are, therefore, left to guess for yourselves what it could have been. What is it that this man required such hot haste for him to leave and come by London and stop at Winchester, reaching Frankfort on the morning of the 30th? What kind of a crime? It would not be for carrying a pistol. It would not be for disorderly conduct. It would not be for stealing. I don't believe Jim Howard would steal. I give him credit for that. Then it was something, was it not, that we are not permitted to know, and we are forced to guess? Would you guess it was murder? It must have been a heinous murder that would require this man to leave his home, surrounded by his friends, to come to Frankfort."

And again, after an impressive reference to the mountain feuds and to "waylayings and ambushings day after day, and month after month, and year after year," counsel was also permitted to say: "Goebel was killed as Tom Baker was killed. Clay county invented that method. I am not saying that Jim Howard did that, but Clay county did." And again counsel exclaimed, alluding to the trial of Powers at Georgetown for the same offense: "Let them prove it, let them prove it, was the cry at Georgetown."

It is impossible in reading this record to escape the conclusion that counsel determined to get around the former opinion of this court, and by indirection and innuendo, get before the jury exactly what this court had said should not be directly proven, and that they succeeded in their undertaking. Having got before the jury a statement that the defendant was indicted for the murder of George Baker; that he was seeking a pardon for that offense; that he had been in the Richmond jail; that he was seeking the assistance of a Laurel county jury to obtain his pardon; that he was under suspicion of the murder of Tom Baker, committed under circumstances similar to the murder of Goebel, with which he is here charged, these matters are argued to the jury as if proven, and doubtless produced the same effect upon the minds of the jury. And if "appellant can not be convicted in this case because he might have committed another crime of like character," and if "proof that he had done so, or even such an impression might seriously prejudice him before the jury," can we say it was not prejudicial to permit these statements to be made to the jury, with all the color and fire of the practiced jury orator, doubly impressive because of the sanction of the respected circuit judge, and supported by the incompetent evidence and suggestions which had been adroitly injected into the record? We do not undertake to say that each and every one of these matters would in and of itself alone be sufficient to entitle appellant to a reversal; but, taken together, in the manner in which they were presented to the jury, they were prejudicial in a high degree. Certain objections to testimony are urged upon this appeal which were argued, and must be presumed to have been considered, upon the former appeal, but there are some objections urged which should be considered. The witness, J. B. Matthews, was asked if, at a speaking in Somerset before the election, in the fall of 1899, he

said in substance: "Goebel will never be governor. Some one will kill him first." While this might be permissible on cross-examination, it was clearly collateral. It occurred long before the date at which it claimed any conspiracy was formed, and the Commonwealth should not have been permitted to prove by the witness, Epperson, that Matthews made the statement. Whether this was prejudicial, however, is doubtful. The witness, Sanderlin, called for the Commonwealth on his re-examination, was permitted to state, against objection, that Robert Webb had a conference with Beverly White in the courtyard, after which Webb told the witness that White would give him \$50 if he would leave. This would seem to be hearsay.

It is also objected that the Commonwealth was permitted to read the legislative journal showing that in 1900 Republican members of the legislature voted for the witness, Stubblefield, for doorkeeper, the evidence being introduced for the purpose of sustaining Stubblefield's character, which had been attacked. This does not appear to be an authorized mode of establishing the fact sought to be established, but does not seem to be particularly material. It is objected that Chadwell testified that, in the presence of himself and one Jones, accused said that Goebel "was shot a bad shot or a deadener; that he saw them taking him off, and he thought he was shot a bad shot." After Howard denied having such a conversation, Jones was introduced in rebuttal, and, against objection, permitted to detail the same conversation. While this testimony of Jones was properly primary testimony, and should have been introduced in chief, some discretion is necessarily allowed the trial court as to such matters, and this hardly amounts to an abuse of such discretion.

There was testimony tending to show that the accused had been recognized running from the executive building, and at the doorway with a black, stubby moustache. For the defense, the accused and other witnesses testified that he had been smooth-shaven for a year or more before the killing. The Commonwealth was permitted in rebuttal to introduce testimony showing that some months before the murder the accused had possession of a false moustache. This seems to have been perfectly competent rebuttal testimony.

Upon the former appeal it was elaborately argued that, inasmuch as the indictment charged the murder to have been committed by the accused, acting jointly with certain named co-defendants and others unknown to the grand jury, and contained no averment of a conspiracy, no testimony should have been permitted, the object of which was to show the existence of a conspiracy, and no testimony as to the acts or declarations of the supposed co-conspirators. It was perhaps natural, when counsel relied with such confidence upon the absolute incompetency of the testimony objected to, that they should not have presented any instruction as to the effect of such testimony if considered admissible, and upon the former appeal the question of how far, and under what circumstances, the acts and declaration of co-conspirators were admissible against the accused was not presented in argument or considered by the court. Upon the second trial, however, an instruction was offered by the accused and refused that he could not be convicted upon evidence of what other persons did, but must be convicted, if at all, only upon proof of his own acts and conduct, which must be proved beyond a

reasonable doubt; and it is argued here that if, as was the fact, a "great mass of testimony of acts and conversations of persons other than the accused is permitted to go to the jury and be considered by them on the conspiracy theory, then the jury should have been instructed as to the purpose of such testimony, and how far and under what conditions it could be considered by them against the accused;" that, in the language used in Robertson's Ky. Crim. Law, section 109: "If, after the acts and declarations are admitted in evidence, the testimony to establish the conspiracy is not conclusive, 'the question as to the existence of such conspiracy, at the time of the acts and declarations, should be submitted to the jury under appropriate instructions,' and the question of whether the parties actually did confederate in a common purpose, and whether the acts and declarations offered in evidence were actually done in furtherance of that design, is for the determination of the jury."

Oldham v. Bentley, 6 B. Mon., 481, is cited in support of this proposition, where it was said: "It is objected that the court improperly refused to tell the jury that the admission of one of the defendants in the absence of the other was not evidence against both. But as there had been previous evidence conducing to prove a combination, the evidence objected to was properly left to the jury, with instructions that unless they believed from other evidence that the defendants had combined for the purpose of effecting the purpose as alleged, this evidence should have no effect as proof except against the defendant who made the admission."

Also Sandusky v. McGee, 7 J. J. M., 266, and Goings v. State, 46 Ohio St., 467, the latter case being the only adjudged case in support of the admission of testimony as to the acts and declarations of co-conspirators upon the trial of an indictment where conspiracy is not charged, in which case there is a clear recognition of the principle contended for.

While the instruction which was in fact asked upon this subject was not framed in accordance with the rule in this State, the fact remains that an instruction was asked directly upon this subject, and the court should have given the whole law of the case. And while, upon the former appeal, the question of an instruction upon this point was not presented or considered, and the only questions considered upon the instructions were as to the propriety of those which were in fact given, we find the doctrine now presented was distinctly recognized in the opinion. Said the court upon the former appeal, considering testimony as to the acts and declarations of others, who were either co-defendants or supposed to be co-conspirators: "Of course the testimony of neither of these witnesses has any bearing upon the guilt or innocence of the defendant, Howard, unless the Commonwealth, by other testimony, establishes a guilty connection between the defendant and Youtsey, and shows to the satisfaction of the jury either that he fired the fatal shot, or was present and aided and encouraged Youtsey or another to do so." (Howard v. Commonwealth, 22 Ky. Law Rep., 1850.)

And again: "And on the trial of one of several defendants jointly indicted for an offense, the declaration of a co-defendant made in the absence of the defendant on trial in furtherance of the common purpose is admissible, when a prima facie case of conspiracy has been made out. To authorize the admission of such evidence an express averment in the indictment of the fact of a conspiracy is not necessary. (Goings v. State, 46 O. St., 467.)

"But to make the declaration competent it must have been in furtherance of the prosecution of the common object, or constituted a part of the *res gestæ* of some act done for that purpose." (1 Taylor's Ev., page 542, section 630; *ibid.*, page 1850.)

And again: "It seems to us that these declarations of Youtsey come within the rule laid down in these authorities, and are competent evidence to go to the jury. But it must not be forgotten that the defendant's guilt, as principal or accessory, can only be finally established by evidence of his own acts." (Wright's Criminal Conspiracies, 69 and 71; Stephens' Digest of Criminal Law, article 39; *ibid.*, page 1851.)

Under these principles, it follows that while the particular instructions asked upon this subject should not have been given, the law should have been stated to the jury. If a conspiracy had been alleged in the indictment, it would undoubtedly have been necessary to instruct the jury as to the extent and the circumstances under which evidence of the acts and declarations of co-conspirators were to be received against the accused. Such an instruction is universally required and given in all cases where conspiracy is charged. Where, as in this case, a conspiracy is not charged, but nevertheless the Commonwealth is permitted to introduce evidence that a conspiracy existed; that the accused was a member of it, and that various persons who are claimed to be co-conspirators did acts and made declarations in furtherance of the purpose of such conspiracy, it follows inevitably that the jury should be told, in effect, how far and under what circumstances they could consider evidence of the acts and doings of the co-conspirators as evidence against the defendant on trial. Some such instruction should have been given as was given in the Powers case (18 Ky. Law Rep., 1837): "If the jury believe from the evidence beyond a reasonable doubt that a conspiracy was formed between the defendant and \* \* \* Henry Youtsey, \* \* \* or either or any of them, or with others to the jury unknown, acting in concert with them, or either of them, to kill William Goebel, then after the formation of said conspiracy, if any, every act and declaration of each of the conspirators done or said in furtherance of the common design before the consummation thereof, became the act or declaration of all engaged in the conspiracy."

It is, therefore, not necessary to consider whether this court has power to review its own decision upon a second appeal. The rule that the law as declared on the first appeal is the controlling principle of the case on the second appeal is recognized, whether such rule be regarded as an application of the doctrine of *res judicata* or of *stare decisis*, or simply what is called in Van Fleet on Former Adjudication a rule "of expediency, which is not to be lightly disregarded." There is considerable conflict of authority upon this rule, but as said by Mr. Aiken in the article on appeals, in 2 Encycl. of Pleading and Prac., page 381: "The principle is sharply limited to decisions on a prior appeal on points necessary to a determination of the cause. On matters not essential, or questions incidental or not considered, the court is not conclusively bound on the second appeal."

On the former appeal of this case the question was as to the errors complained of. The questions were whether the errors complained of were reversible. It was held that certain of those errors were reversible, and the judgment was reversed. Other matters complained of were held not to be

error. This question was not presented or considered, but the legal doctrine applicable was considered and announced, and should have been followed by the circuit court. Considerable argument is devoted to the proposition that the law presumes the accused to be a person of at least ordinary good character; that this presumption continues throughout the case, and is evidence in favor of the accused, and that an instruction should have been given upon this subject. As an abstract proposition of law, there is no doubt of the correctness of the proposition, which is supported by innumerable authorities. Whether it should be given in an instruction to the jury is another question. The only authorities cited upon the proposition that an instruction upon this point must be given are cases in the Federal court (*McKnight v. United States*, 97 Fed. Rep., 210; *Mullen v. United States*, 106 Fed. Rep., 394), and in a case from Texas (*Stephen v. State*, 20 Tex. App., 255), in which last-named case it was held that as counsel for the State improperly discussed the character of the defendant, which was not put in issue, the court should have given the jury a special charge upon the subject of good character, in order to prevent, as far as possible, any prejudice to the defendant by reason thereof. As to the cases in the Federal courts, in one of which the case was reversed because of comments by the district attorney similar to those condemned in the Texas case, it must be remembered that the Federal courts follow the English practice as to charging the jury. The judges comment at length upon the testimony, and advise the jury specifically as to the weight and credit which should be given to particular parts of it; while it might be eminently proper, under that system of charging the jury, to say to them that the accused was presumed to be a person of at least ordinarily good character, and that this presumption continues throughout the trial of the case, such a procedure is unheard of under our system, and its adoption by this court would necessitate the reversal of nearly every Commonwealth case. A contrary procedure seems to be well established, and we do not think the refusal of the trial court to instruct as requested was error.

For the reasons given the judgment is reversed and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent herewith.

Judge Guffy concurs in the reversal for the sole reason that the court did not give the instruction indicated in the opinion, but holds that no other error was committed by the court to the prejudice of the appellant.

Whole court sitting, Judges Paynter, White and Hobson dissenting.

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KLOSTERMAN, & CO. V. CHESAPEAKE & OHIO RY. CO., & CO.

(Filed December 17, 1902.)

1. Railroads—Damages—Statutes of limitation—This action was brought to recover damages for injuries to property from the operation of a double track of a railroad on a street near appellants' houses. In defense appellee claims that as its railroad was constructed more than five years before the institution of the action, the right of recovery was barred by the statute of limitation. Held—That a railroad is a permanent structure, and when its construction in the streets of a city is authorized by legislative and municipal authority, all damages naturally resulting from the proper operation

of the road can then be ascertained and determined, and the cause of action therefor is barred by limitation after five years from the time the action might first have been instituted. In this case the authority was expressly limited by municipal authority to a single track, and it can not by construction be enlarged, for this would be to violate the plain terms of the instrument. The limitation of five years does not protect appellees from liability for injury done appellants, as their road was not constructed under proper municipal authority.

2. Measure of damages—The damage for which appellants are entitled to recover is for constructing and maintaining two instead of one track. Whatever damages appellants sustained by reason of the construction and operation of two tracks, which they would not have sustained by the construction and prudent operation of one track, is the amount of damages appellants are entitled to recover.

Harvey Myers for appellants.

Simrall & Galvin and C. P. Chenault for C. & O. Ry. Co.

J. W. Bryan and E. W. Hines for L. & N. R. R. Co.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Paynter.

The former opinion of this court, delivered herein by Judge Hobson, is as follows: "Frank A. Klosterman died on February 10, 1892, the owner of certain real estate in Covington, Ky.; appellants are his widow and children, six of the latter being infants; they filed this suit December 5, 1895, against the Chesapeake & Ohio Ry. Co., the Covington & Cincinnati Elevated Railroad and Transfer and Bridge Co. and the Louisville & Nashville R. R. Co. to recover damages in the sum of \$7,000 for alleged injuries to the real estate received by them from the decedent, the widow being executrix of his will and guardian of his children, and as such joined also in the suit. Issue was joined upon the petition, and on final hearing the court gave the jury a peremptory instruction to find for the appellees.

"Appellant's property is situated at the corner of Lewis and Craig streets; it has on it two brick houses, one is a three-story brick building situated on the corner and fronting on both streets, the first story is used as a storeroom for mercantile purposes, the second and third as a residence; the other is a two-story dwelling fronting on Craig street; there is a small area or yard between the two houses. The railroad tracks complained of run diagonally across Craig and Lewis streets at their intersection; the nearest rail is six and one-half feet from the gutter curb; inside of the gutter curb is a sidewalk six feet wide; both the buildings extend out to the sidewalk so that at the corner the three-story brick house is only about fourteen feet from the nearest rail of the railroad track or about eleven and one-half feet from the side of the cars when passing. Craig and Lewis streets are each thirty feet wide, including the sidewalk on either side. The railroad at this point is a double track and is used almost constantly day and night. Before the railroad was built the property rented for \$42 a month, now it brings scarcely enough to pay taxes and insurance. The trains operated are many of them heavy freights, which jar and shake the houses to such an extent as to alarm the occupants and wake them at night. A large quantity of cinders and smoke is thrown into and upon the property, sometimes filling the front

rooms with smoke and to such an extent that it is impracticable to keep the front windows open at all. Large quantities of cinders fall upon the roof and yard, burning the paint off the roof, causing it to rot and unfitting the yard for such uses as the yard of a residence is designed for. The wall of the two-story building is settled, the noise, vibration and discomfort from smoke and cinders is such that only an undesirable class of tenants will rent the property for a residence, and the storeroom is not desirable for a business place.

"The tracks take up substantially the intersection of the streets with the exception of six feet on each side, so as in a great degree to interfere with the ingress or egress of wagons and teams, from the fact that trains are passing so often day and night. There is no doubt under the evidence that the property is desirably located, and was valuable before the construction of the railroad, and that by reason of its construction has been largely unfitted for the purposes for which it was intended, and greatly depreciated in value. The railroad was constructed precisely as it is now in the year 1889, and the action not having been filed within five years thereafter, the appellees interpose the plea of limitation, and it was on this ground that the court below gave the jury peremptory instruction to find for appellees.

"In *L. & N. R. R. Co. v. Orr*, 91 Ky., 109, this court held that a railroad must be regarded as a permanent structure, and when its construction in the streets of a city is authorized by legislative and municipal authority, all damages naturally resulting from the proper operation of the road can then be ascertained and determined, and the cause of action therefor is barred by limitation after five years from the time the action might first have been instituted. This case has been followed in so many subsequent causes that the question is not now an open one, but we are not inclined to extend the rule beyond the limits thus laid down or to apply it to a case where the construction of the railroad in the street is not authorized by legislative and municipal authority.

"As has been held by this court in several cases and is recognized in section 243 of our present Constitution, the injury to property in cases of this character is substantially a taking of private property for public use, and where this taking has not been done under proper authority of law it should stand as to limitation on the same plane as any other taking of real estate. The structure being permanent, the action is not for a trespass upon the property in which damages within the preceding five years may be recovered, but the question to be determined is: What will be a fair compensation to the owner of the property for the depreciation of the value of his property by the servitude that is thus placed upon it? When the construction of the railroad is authorized by law, all persons must take notice of this, and there are sound reasons of public policy for not extending the bar of limitation to those cases where the construction is not by authority of law, and the citizen can not well understand his rights. It remains, therefore, to determine whether the tracks in question were constructed under proper legislative and municipal authority. On August 27, 1851, the council of the city of Covington granted to the Covington & Lexington railroad permission to lay its road in Washington street. The Covington & Lexington railroad was afterwards succeeded by the Kentucky Central railroad, and on October 23, 1885



the city council granted to it, its successors or assigns, permission to extend its track from its terminus to a point on or near the Ohio river, and 'the right of way for a single track over such streets and alleys' as might be best for said company to use. This grant was in terms limited to 'the right of way for a single track.' On December 17, 1887, the Kentucky Central railroad sold and assigned to the Covington & Cincinnati Elevated Railroad and Transfer and Bridge Co. all of its rights, privileges and franchises under and by virtue of these ordinances, and it is insisted that it was justified in constructing the double track in controversy under this authority. But the original ordinance made in 1851 granted a right of way only on Washington street, and the ordinance of October 22, 1885, in express words granted only a right of way for a single track. Where the authority is expressly limited to a single track it can not by construction be enlarged, for this would be to violate the plain terms of the instrument. Unless, therefore, there was some other authority for building this double track, the case does not fall within the rule laid down in *L. & N. R. R. Co. v. Orr*, above referred to.

Appellees also rely on certain provisions of the charter of the bridge company and certain actions of the municipal authorities of Covington. These will now be considered: The bridge company was incorporated by an act approved April 4, 1884, under the name of the Covington & Cincinnati Pier Bridge Co. By an act approved February 9, 1886, the name of the corporation was changed to the Covington & Cincinnati Elevated Railroad and Transfer and Bridge Co. This act also contains the following provision (1 Acts, 1885-1886, 840): 'Said corporation is hereby authorized and empowered to construct, maintain and operate railroad tracks, with necessary turnouts and sidings upon the said bridge and the approach thereto.' (Section 3.)

"The said corporation shall also have power to construct a railway track, with necessary turnouts and sidings upon, over, along or across any public streets, roads, alleys, avenues, or through or over any blocks or ground between such streets, for the purpose of making connection with the depots or railway tracks of any railroad in the city of Covington within such territorial limits as the city council of said city shall prescribe.' (Section 4.)

"The said company shall construct and maintain tracks connecting its bridge with the Kentucky Central railroad in such manner as to enable other railroads to connect their lines of railway with said tracks approaching said bridge. Connections made by any other railroad with such connecting tracks shall be so made as to admit other roads to connect therewith, and any railroad now existing, or to be hereafter constructed, within the city of Covington shall have the right to connect its railway with said connecting tracks, and shall have the right to use the same for the purpose of and to cross said bridge with its locomotives and cars upon the payment of toll and upon the terms in this act expressed.' (Section 8.)

"The said company shall not have the power to acquire more than one right of way from any depot in Covington to its bridge, and shall obtain no permit or privilege from the city council of Covington for such right of way without first having given at least one week's notice of its intention to make application therefor, which notice shall be in writing and be served

on the city clerk of said city, and said corporation shall also cause said notice to be published in some newspaper circulating in Covington at least seven days before the making of such application.' (Section 10.)

"The corporation was also authorized by section 6 of the charter to acquire, either by purchase or assignment, such right of way as any other company then possessed or held over or across any streets or blocks of ground in Covington. The only purchase it made was from the Kentucky Central railroad as above stated, and as this was only a right of way for a single track, authority to construct and maintain the double tracks in question must depend upon a compliance on its part with the provisions above quoted from its charter. It was only authorized by the charter to construct its track within such territorial limits as the city council of the city should prescribe. (Section 4.) It had no power to acquire more than one right of way from any depot to its bridge, and could obtain no permit or privilege from the council without first giving a week's notice, by service on the clerk and publication in a newspaper circulating in the city. (Section 10.)

"The record shows that at a meeting of the council, on April 22, 1886, the bridge company presented a paper, informing the council that it had located the approaches to its bridge from a certain square, running thence northwardly to the Ohio river, and requesting the council to approve the selection, the paper stating that due notice of the application had been given to the city clerk, and by publication as required by law. The council thereupon referred the matter to its committee on railroads and bridges, to report by ordinance or otherwise, when the company presented more specific location of their route. This, so far as the record shows, was never done, and no action was ever taken by the council on the application. The record also shows that at the same meeting of the council, on April 22, 1886, the Kentucky Central railroad reported to the council its location of its right of way, under the ordinance of October 22 1885, along the route now occupied by the tracks in controversy. The record further shows a prolonged struggle between the city authorities and the railroad companies about their rights of way, and on July 29, 1886, a majority and minority report were presented in regard to the granting of the right of way to the bridge company, but no action appears to have been taken on either report.

"After this the Kentucky Central deeded to the bridge company its right of way, and it is hard to escape the conclusion that the bridge company, to avoid the terms sought to be imposed upon it by the city, or for some other reason, ceased to prosecute its application to the council, and undertook to get along under its purchase from the Kentucky Central. At least the presumption must be, as it was only authorized to acquire one right of way, and it did not follow up its application to the council; that this application was abandoned. The purpose of requiring notice to be given of the application was that those interested might resist it before the council, and when this resistance was made with such effect that no action was taken on the application, the only reasonable conclusion is that the corporation made some other arrangement.

"It is also shown in the record that on December 22, 1886, an ordinance was passed allowing the Covington Short Route and Transfer Co. to build a line from Licking river to the Kentucky Central track, and that in the year

1889 several ordinances were passed requiring the erection of safety gates and the keeping of flagmen at different points along the tracks in controversy. It is contended for appellants that the council in doing this only protected the people of the city, and that such ordinances were not grants of right of way, but only police regulation to prevent the trains from running over people. However this may be, we do not think a grant by implication or acquiescence could be properly made by the city council under section 10 of the charter above quoted, for it contemplates that the persons interested shall have notice of the application and an opportunity to resist it. To allow a grant to arise from the acquiescence of the council, without notice to those interested as provided by the statute, would be to defeat its entire purpose. We are, therefore, of opinion that the construction and operation of the double tracks in front of appellants' property was not under regular legislative and municipal authority. While there was authority to construct and operate a single track, a double track, running necessarily so close to the property, was a much more grievous burden, and we do not think the statute of limitation should bar any part of the injury done, for the reason that it is an entirety and not separable. It would mean that after five years the city authorities and the person interested, having acquiesced in the construction of the railroad, can not enjoin its operation or require its removal.

"Appellees, after the expenditures made by them, must be allowed to maintain and operate their road, but if in so doing they take the property of appellants, they must make them a fair compensation for the injury done. The road can not now be treated as an illegal structure or its operation as a nuisance. All we hold is that limitation of five years does not protect appellees from liability for injury done appellants, as their road was not constructed under proper municipal authority."

The opinion so well states the facts in the case, the various legislative enactments, the proceedings of the common council of the city of Covington and the conclusion as to the application of the doctrine of the Orr case, it is incorporated in this opinion. The court recedes only from that part of the opinion where it is said: "We do not think the statute of limitation should bar any part of the injury done, for the reason that it is an entirety and not separable."

Under the doctrine of the Orr case the five-year statute of limitation would have barred the appellants' cause of action had the appellees constructed only a single track because it was done under legislative and municipal authority. The appellees did not have municipal authority to construct the additional track; the mere fact that it was constructed at the same time that the authorized one was could not make it a lawfully-constructed track.

It was as much an additional servitude upon the street and injury to the property of appellants as it would have been had it been constructed anterior or subsequent to the construction of the authorized track. The effect upon the rights of the appellants was just the same whether the authorized track was constructed prior to, at the same time or subsequent to the construction of the authorized one. The time of the construction could not affect in any way the application of the statute of limitation to the rights of appellants. When the authorized track was constructed under the Orr case the five-year statute of limitation began to run; when the unauthorized one was con-

structed and damaged the property of the appellants, it was an unlawful taking of their property and the fifteen-year statute of limitation applied.

As the appellees had the right to maintain one track under legislative and municipal authority, did it forfeit the right to have the five-year statute of limitation apply to appellant's cause of action for injury and damages resulting from its prudent operation? Upon reconsideration we have concluded that it has not lost it. Its unauthorized act could not change the application of the law of limitation to a cause of action existing independent of such act. It could no more do so than the doing of the lawful act could change the application of another statute of limitation to the cause of action growing out of the unauthorized act. The construction of two tracks created an additional servitude upon the narrow street, and the operation of trains over both of them necessarily added to the damages to appellants' property. While the construction and operation of the two tracks makes it more difficult to determine the damage resulting to the appellants than it would if only one had been constructed and operated, still that difficulty which has been created by appellees should not be interposed as a barrier to appellants' right to have redress for their wrongs.

The damage for which they are entitled to recover from appellees is for constructing and maintaining two, instead of one, track. Whatever damages the appellants sustained by reason of the construction and operation of two tracks, which they would not have sustained by the construction and prudent operation of one track, is the amount of damages appellants are entitled to recover. This we believe to be the correct rule for the measurement of the damages they have sustained, and for which their right to recover is not barred by the statute of limitation.

The judgment is reversed for proceedings consistent with this opinion.

Whole court sitting. Judges Burnam, DuRelle and O'Rear dissenting.

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KIESEWETTER v. KRESS, &c.

(Filed December 17, 1902—Not to be reported.)

1. **Mortgages—Bills and notes**—In an action on a note for \$1,000, secured by mortgage on a tract of land, the defense of no consideration was interposed. The burden of proof being upon defendant, the notes will not be cancelled upon a bare suspicion of fraud when the evidence fully shows that a sufficient consideration supports same.

2. **Husband and wife—Homestead—Wills**—Where the husband and wife united in the execution of a mortgage and afterwards the husband died, leaving a will, by which he devised his estate to his wife for life, subject to the payment of his debts and the remainder to his two children, the widow will be considered as having relinquished her dower right only and having failed to renounce the provisions of the will, is not entitled to claim homestead in her own right, but her failure to renounce the provisions of the will could not affect the rights of the unmarried infant children to a homestead. The testator may dispose of his homestead by will without prejudice to his creditors, but not to affect the rights of his unmarried infant children.

3. **Decedent's estates—Interest**—Failure of a creditor of a decedent's estate to demand payment of the personal representative within one year, as re-

quired by section 3884, Kentucky Statutes, is not entitled to any interest until after judgment.

Byrne & Reed for appellant.

R. C. Simmons and H. C. Thelssen for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge O'Rear.

Michael Kress, on October 9, 1884, executed to appellant, his step daughter, the following note: "Two years after my death I bind my estate and personal representatives to pay to Catherine Kiewewetter, or order, \$1,000, for value received. This note secured by mortgage on real estate in Kenton county, Ky., and this note not to bear interest until my death, and thereafter at the rate of 6 per cent. until paid."

To secure the note above mentioned the maker, Michael Kress, and his wife, Amelia Kress (appellee herein), executed and delivered to appellant a mortgage, conveying to her a tract of 12 97-100 acres of land in Kenton county. Amelia Kress was the second wife of Michael. Michael Kress died August 17, 1893, and his executrix qualified under his will probated August 26, 1893. The widow continued to live with her two infant children upon this land for nearly two years, when she married Cornelius and removed with her children to her husband's home. This suit was filed October 2, 1897, seeking the enforcement of the lien and the satisfaction of the note above named. The defenses were:

1st. That appellant had not demanded payment of the note verified by affidavit of the claimant as required by law, within one year after the death of the testator, or within one year after the maturity of the note.

2d. That the property mentioned was the homestead of the testator, and that he devised it as such to his widow and infant children.

3d. That the note sued on by appellant was without consideration.

To the first defense it was replied that there was no personal estate out of which the appellant's debt could have been paid, and that it was useless to have made the demand. The necessary purging affidavit was tendered with the amended petition. As to the second and third defenses it was replied that appellant had been the owner of the land before the execution of the mortgage, and that the mortgage really represented its purchase money, and, therefore, there could be no claim to homestead in the land as against it, and that of course was also a sufficient consideration. The rejoinder denied that appellant had ever been the owner of the land, but stated that Michael Kress, being involved in liability to appellee Amelia, who was not then his wife, and for the purpose of defeating her claim, fraudulently transferred the title to the property to appellant in 1879, but in trust, and that appellant took the title in trust, agreeing to reconvey it upon demand, and that the reconveyance was in satisfaction of this agreement. This was all traversed, except it was admitted that Michael Kress had conveyed the property to appellant in 1879, and that she continued to hold the title until it was reconveyed to him in 1884.

The proof in the record shows (and the certificate of the clerk to the transcript is that the record is complete) that appellant loaned to Michael Kress \$1,000 about 1879, with which to finish paying for the land in question,

and that he conveyed the title to appellant to secure her in this loan. The evidence on this question is by appellant and by three other witnesses, who testified that Michael Kress in effect so admitted to them. So far as appellant's testimony is concerned as to the transactions of the decedent, it was incompetent, and although there appear to have been no exceptions filed to the depositions, and at least none acted upon by the trial court, we will not consider her evidence in determining this question. Upon a plea of no consideration the burden is upon the defense. The writing under our statute purports a prima facie consideration. In addition to this is the testimony of the witnesses above named as to the admissions made by the decedent in his lifetime. There is absolutely no evidence in the record to the contrary. At the utmost the circumstances attending the transactions are such as to create a suspicion of appellant's claim. These circumstances are: Michael Kress is shown to have been a small farmer, a laborer in a mill, of limited means, hard working and economical. Appellant claims to have had, and to have earned by her labor, the \$1,000 in question. There is no other evidence than hers as to her financial circumstances. Michael Kress, during the lifetime of his first wife, took appellee, Amelia Frederick, from an orphan home when she was aged fourteen and put her to work as a menial. She continued to live in his family until after the death of his wife, which occurred when Amelia was about eighteen. It may be gathered from the record that Michael seduced Amelia, and after the birth of the child forced her to leave his home. A short while before this, a few months, he made the deed to appellant. Directly after the birth of this child, Amelia began a prosecution against Michael Kress under the bastardy statute. This was settled before trial by the marriage of Michael and Amelia. Sometime after this marriage Michael Kress procured appellant to reconvey the property to him upon the condition that he execute to her the note and the mortgage sued upon, which was done.

Although some of the circumstances are enough to well arouse one's suspicions that the transaction by which the land was conveyed by Kress to appellant was merely a device by Michael Kress to defeat Amelia's demand against him, yet there is no positive evidence to this effect, nor is there any contradicting the testimony offered for appellant as to the transaction of loaning the money. It will not do to decide a case contrary to all the testimony, merely because some circumstances tend to arouse a suspicion as to the truthfulness of the evidence. A well-founded suspicion will cause a close and critical scrutiny of the evidence tending to establish the fact in doubt; but when such scrutiny is had, and still the mind can lay hold of nothing in the record sufficient to overcome the evidence, the suspicion must yield to the testimony. In fact every word of appellant's evidence may be true, and yet the circumstances named exist as shown. We conclude that the court erred in denying appellant judgment upon her note. The mortgage sued on, given to secure the note, purports to be between Michael Kress, of Kenton county, Kentucky, of the first part, and Catherine Kiewewetter, of Cincinnati, O., of the second part. It recites the indebtedness of Kress to Kiewewetter, and gives a lien upon the real estate to secure its payment when due.

The concluding paragraph is as follows: "In witness whereof the said

Michael Kress and Amelia Kress, his wife, who hereby releases and relinquishes all right of dower in the within premises, hereunto set their hands this 9th day of October in the year 1884." Michael Kress and his wife, Amelia Kress, signed and acknowledged the instrument.

We are of opinion that Amelia Kress relinquished dower only in this land, and is not precluded by the mortgage from now claiming her homestead exemption. We hold, under the evidence, that the conveyance to appellant in 1879 was in effect and intent a mortgage only, and, therefore, appellant can not claim to have been the vendor of Kress in the reconveyance of the land, nor can she claim that her debt is older than Kress' title. It is not. Kress acquired title long before appellant claims to have loaned him the money. Decedent, Michael Kress, had the right to convey his homestead by deed or will. (*Myers' Gd'n v. Myers' Adm'r*, 89 Ky., 442; *Pendergest v. Heekin*, 94 Ky., 381; *Schnabel v. Schnabel's Ex'x*, 22 Ky. Law Rep., 234.) He did convey it by will as follows (omitting parts unimportant to this decision):

"1st. I desire all my just debts and funeral expenses to be paid as soon as possible after my decease.

"2d. I give and bequeath to my beloved wife, Amelia Kress, all my real estate and all personal property that I may have, for her natural life, and at her death to be the property of her two children, John Kress and Julius Kress, to be share and share alike of everything that she may have.

"3d. I hereby nominate and appoint my wife, Amelia Kress, to be executrix of this my last will, and ask that no bond be required of her, and that no appraisement be made of my estate, and that my wife be the guardian of my infant children."

The widow not having renounced the will, as she was by statute permitted to do, is held to have accepted under its provisions, and as the will under which she holds first requires the payment of her testator's debts she holds his property subject to such payment. The will creates a trust against the property, and it will be charged with the payment of the debts of the testator. (*Watson v. Christian*, 12 Bush, 525; *Taylor v. Loller's Ex'or*, 8 Ky. Law Rep., 773.) It must follow that the right of the widow to the property of the testator is subordinate to the right of his creditors and the payment of their debts. But as to the children of the testator the cause is not so free from difficulty. In *Myers v. Myers*, 89 Ky., 442, the testator had devised a lot to his wife for life, and the remainder to his daughter. In a contest between the daughter, who was an infant, and the creditors of the testator, it is held that although the widow had not renounced the provisions of the will, "the failure of the widow to exercise an election not to take under a will of such owner can not prejudice his infant children." The infant devisee was adjudged to be entitled to the lot, which was worth less than a thousand dollars, to the exclusion of the creditors. In the later case of *Hazelett v. Farthing*, 94 Ky., 421, the testator devised all of his property to his widow, children and another, omitting one of his children. It does not clearly appear from the opinion whether the court intended to decide, or that the court did decide, that the widow's failure to renounce the provisions of the will was binding upon the infant children of the testator as an election to take under the will instead of under the statute, giving the right

of occupancy of the homestead to the unmarried infant children in conjunction with the widow. The court quotes approvingly from an unreported case found in 5 Ky. Law Rep., 580; *Elmore v. Elmore's Adm'r*, where it was held that the widow having accepted the provisions of the will, she had no right of homestead, and if she had none the children in such state of case had none. But in the case of *Hazelett v. Farthing* the court held that the question of homestead did not arise, but that the disinherited child was entitled to a portion of the property in question solely by virtue of having inherited an interest from one of her brothers named in the will and who had since died. We can not regard *Hazelett v. Farthing* as authority upon the point now under discussion. In *Schnabel v. Schnabel's Ex'or*, 22 Ky. Law Rep., 234, the testator having only a homestead, that is, land occupied by him and his family, worth not exceeding \$1,000, made the following will:

"1st. I desire all of my just debts and funeral expenses paid.

"2d. I will and bequeath to my beloved wife, Francis Schnabel, all of my property, real, personal and mixed, to do with as she pleases."

The widow did not renounce the provisions of the will, but qualified as executrix. The testator left three unmarried infant children. The question was as to the liability of this land to the payment of the testator's debts. The court took into consideration all of the cases heretofore before this court, and came to the conclusion in the majority opinion that the widow's interest was subject to sale for the debts of the testator, but that the infants' interests were not. It was there said: "Being infants, they could not renounce the provisions of the will, and are not estopped by their failure to do so. Their mother's acceptance of the will's provisions operated to give her a fee simple, but subject to the children's right of joint occupancy with her under the statute until they should become of age. Under the terms of this will the widow's interest was subject to the payment of her husband's debts, but that can not affect the children's right to the joint enjoyment of the entire homestead for the entire period allowed by the statute."

The case last cited and *Myers v. Myers*, supra, seem to embody the governing principles applicable to the one at bar. In the *Myers* case it was held that where the testator had devised his homestead to his widow for life, and the remainder to his infant child, the failure of the widow to renounce the provisions of the will did not affect the rights of the infant child. The court did not rest the right of the child in that case upon the provisions of the will. In the *Schnabel* case, where the testator devised his homestead to his widow absolutely, but subject to the payment of his debts, it was held that the failure of the widow to renounce the provisions of the will, thereby electing to take under it, could not affect the rights of the infants. The substance of these decisions and others cited is that the testator may dispose of his homestead by will without prejudice to his creditors, but not to affect the rights of his unmarried infant children. But if he devises it to his widow, or to his widow and infant children subject to his debts, the widow, by electing to take under the will, will take her interest subject to the debts of the testator, because she had power and right to elect whether she would take the property subject to that burden or whether she would hold under the statute. On the other hand the infant children, having had conferred upon them by statute the right to a joint occupancy with the widow of their



deceased parent's homestead during their unmarried minority, and having no power of election whether they will claim under the statute or the will of the ancestor, can not be concluded by the act of the widow, but their right fixed by statute is not affected either by the widow's act or the testator's. The appellant did not present her claim, verified as required by statute, and demand of the executrix its payment until more than one year after the executrix's qualification. The personal representative relies on this section of the Kentucky Statutes:

"Section 8334. No interest accruing after his death shall be allowed or paid on any claim against the decedent's estate unless the claim be verified and authenticated as required by law and demanded of the executor, administrator or curator within one year after his appointment."

Appellant having failed to comply with the terms of the statute, there is no escape from its penalty. She can not recover any interest accruing after the death of the testator and before judgment. From this it follows that the judgment of the circuit court dismissing appellant's petition must be reversed, and is remanded with directions to enter a judgment in favor of appellant for the amount of her note, with interest from the date of the judgment, and that the title and right of appellee, Amelia Kress, be sold in satisfaction thereof, and that the property be sold subject to the right of the infants, John and Julius Kress, to keep said premises as a homestead during their unmarried minority, and for such other necessary proceedings as may not be inconsistent herewith.

Opinion delivered herein June 3, 1902 (24 Ky. Law Rep., 405), is withdrawn.

The whole court sitting.

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McGILL v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed December 17, 1902.)

Railroads—Damages—Compromise—Estoppel—Appellant instituted this action to recover damages for injuries received by him from gross negligence of appellee while engaged in switching cars, but alleged that he did not claim, for loss of time for a definite period after the injuries, nor for a drug bill, amounting in all to \$210.25, which had been paid him by appellee, but that he claimed damages for mental and physical suffering undergone as the result of said injuries. Appellee filed a receipt for said sum, which purported to be in full settlement of all claims for damages resulting from said injuries, and pleaded said settlement in bar of this action. Appellant, in his reply, alleged that the amount paid him was intended and agreed to be only for loss of time and his drug bill, and that he could not read, but it was read to him as a settlement only for said claims, and that he signed same through fraud and misrepresentation of appellee. The lower court sustained a demurrer to the reply. Held—That as the allegations of the petition for the purposes of the demurrer must be taken as true, appellant has stated a cause of action for which he may recover if the proof sustains his allegations, as he does not make any claim for loss of time or the drug bill, but admits payment for these items. The rule which requires the repayment or tender of the amount received on a compromise does not apply as the claim presented is for different items of damage from those alleged by

appellant. On the trial the jury should be told that if they believe from the evidence that the \$210.25 was paid in settlement of all of plaintiff's demands against the defendant, that they must find for the defendant in this action, although they might believe that the receipt was obtained by misrepresentation or fraud.

Chas. Carroll and Carroll & Carroll for appellant.

Helm, Bruce & Helm for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Chief Justice Guffy.

The appellant instituted this action against the appellee seeking to recover judgment for injuries received by him while in the employ of the defendant, caused by the gross negligence, as he alleges, of the defendant. A description of the injuries received and of the negligence of defendant are sufficiently stated. He prayed judgment for \$10,000. In addition to other averments in the petition we find the following: "Plaintiff says that for his loss of time between the date of his injury, to wit, the 2d day of June, 1900, and the — day of October, 1900, he was paid by said defendant the sum of \$900, and defendant paid him the sum of \$10 upon his drug bill, and he says for his loss of time between the 2d day of June, 1900, and the — day of October, 1900, he claims in this action nothing from said defendant. He says for a period of about eighteen weeks, beginning about the — day of October, and up to the — day of March, 1901, he worked for said defendant as a switchman and coupler of cars, but after the 14th day of March, 1901, his condition was such by reason of the injuries he had received as hereinbefore stated that he was compelled to quit work for said defendant, and since that time, by reason of said injury, he has been wholly unable to work, and is permanently incapacitated from labor."

The answer may be taken as a complete traverse of any negligence upon the part of defendant as well as the injuries of plaintiff. It also pleads contributory negligence. In the second paragraph of the answer it is stated in substance that defendant believes that plaintiff did receive some slight injuries while working for it on the 2d day of June, 1900, but that the same were received in consequence of the negligence of the plaintiff, and on the 14th day of October, 1900, the plaintiff made claim against the defendant for damages on account of said injuries, and thereupon, in order to compromise, settle and adjust the matter, defendant paid to McGill the sum of \$210.25 in full compromise and settlement of all claims and demands of every character whatsoever which he had against defendant, its officers, agents and employees, on account of the injuries received or sustained by him in person or property on or about June 2, 1900, and that plaintiff for said sum executed and delivered to it in a full acquittance, discharge and receipt on account of any loss or damage or injury he may have sustained to person or property on account of said injuries, and that the injuries for which it paid him the sum of \$210.25 are the same, and none other, than the injuries set forth in his petition, and it files herewith, marked "Exhibit Voucher 7," a copy of the agreement and settlement and receipt signed by the plaintiff, acknowledging full satisfaction thereof on account of his alleged injuries, the original of which will, if demanded, be produced on the trial of this case, and defendant

pleads the same as a complete bar to plaintiff's action herein. The material part of the receipt reads as follows: "1900, October 14, received of the Louisville & Nashville Railroad Co., two hundred and ten dollars and twenty-five cents (\$210.25) in full compromise settlement and adjustment of all claims and demands of every character whatsoever which I have against said company, its officers, agents and employes on account of injuries to my person and damage to and loss of property sustained by me on or about June 2, 1900, while employed by said company in Louisville, Ky., and on account of any other injuries sustained by or damage to me at any other time and place on every other account whatsoever. Witness my hand at Louisville this October 15, 1900. It is understood and agreed that the consideration herein expressed is the sole and the only consideration of this settlement."

The reply of plaintiff denies contributory negligence, and in response to the answer, so far as the receipt aforesaid is pleaded, the reply reads as follows: "Plaintiff denies that on the 14th day of October, 1900, he made claim against defendant for damages on account of said injuries, or that thereupon, or at any time, in order to compromise, settle or adjust the matter, defendant paid to him the sum of two hundred and ten dollars and twenty-five cents (\$210.25) or any sum, in full or any compromise of all or any claims or demands of any character whatsoever, except as in the petition stated he had against defendant, its officers, agents or employes, on account of the injuries received by him in person or property on or about June 2, 1900, while in the employ of defendant, and plaintiff denies that for the sum of two hundred and ten dollars and twenty-five cents (\$210.25), or any sum paid by defendant to him, he then or there, or at any time, executed or delivered, or intended to execute or deliver, to defendant a full acquittance, discharge or receipt on account of any loss or damage or injury he may have sustained to person or property on account of the injuries received by him on June 2, 1900, while in defendant's employ, except as in petition and as hereinafter stated, and he denies that the \$210.25, or any part thereof, paid him by defendant was paid for the injuries set forth and alleged in petition, or for any part of them. Plaintiff denies the right of defendant to plead the alleged receipt, a copy of which is filed with the answer, as a complete bar to his action.

"3d. Plaintiff for further reply says that on or about October 14 1900, he did receive from defendant the sum of \$210.25, but this sum was paid by defendant and received by him in payment of his loss of time up to that date, occasioned by said injury, and for part of his drug bill contracted in treating said injury as in petition stated. Plaintiff says in his petition he stated amount as \$210, but supposes that is a mistake, and now says the amount was \$210.25. Plaintiff says he received said sum only in payment of his loss of time and drug bill as aforesaid, and it was represented to him by the defendant that said sum was paid for that purpose, and plaintiff did not, in consideration of said \$210.25, or any part of it, agree to release defendant of liability for any personal injury received by him, or for loss of time except as hereinbefore and in petition stated. Plaintiff says at or about the time mentioned in answer he did sign and deliver to defendant a receipt. He says at said time he was unable to read said receipt, and it was read to him, and represented to him by defendant to be a receipt acknowledging pay-

ment of \$200.25 in payment of his loss of time up to that date, and for \$10 of his drug bill, and so believing he signed it, and he did not then or at any time intend to sign any paper acknowledging payment in full of his claim against defendant growing out of said injury, or releasing it from all liability by reason of same, and he did not know of the existence of said paper until it was referred to in answer, and he says that if he signed said paper, or one of similar character, his signature was obtained to it in ignorance of its contents, and under the belief that he was signing a paper acknowledging a payment for his loss of time and drug bill, as heretofore stated, and said signature was obtained by the false and fraudulent representations of defendant that said paper was an acknowledgment of the receipt of \$210.25 as payment for his loss of time up to the date of signing, and for part of his drug bill, and for no other purpose, and said paper should not be considered for any other purpose. Wherefore, plaintiff prays as in his petition."

The court sustained a demurrer to the reply of plaintiff, and plaintiff failing to plead further, the petition was dismissed, hence this appeal. It is earnestly contended for appellee that the cases of *Louisville & Nashville R. R. Co. v. McElroy*, 100 Ky., —, and *Home Benefit Society v. Muehl*, 22 Ky. Law Rep., 1878, conclusively settle that the judgment of the circuit court must be affirmed, while the reverse is the contention of appellant, and it is his contention that the opinion of the Supreme Court in the case of *Union Pacific R. R. Co. v. Harris*, 158 U. S., 831, and some Massachusetts Supreme Court decisions sustained the contention of appellant. The Kentucky cases relied on determine or adjudge that a party who has signed an agreement in a compromise for personal injury can not disregard that settlement and sue on the original cause of action, and when the settlement is pleaded simply attempt to escape its binding effect by pleading fraud or misrepresentation in the procurement of the settlement or execution of the paper. In order to escape the effect of the executed agreement and be allowed to prosecute his original cause of action he must restore the money or property received from the defendant, or make a tender thereof. This is the doctrine clearly announced in the cases supra, and we rigidly adhere to that doctrine without regard to the decisions of other courts, and it may be conceded that they are not all in accord with the decisions of this court. But the question here presented is whether the case at bar comes within the rule of the *McElroy* case or the insurance case. Both in the *McElroy* and in the one referred to in 22 Ky. Law Rep., 1878, it was admitted by the plaintiffs in their reply that they had agreed to accept a certain sum of money in settlement of their entire claim. In other words, the injury claimed by *McElroy* was by him settled and receipted for, and in the other case it was admitted that the plaintiff had accepted a named sum of money in settlement of her insurance policy, but each of them sought to avoid the effect of the settlement and receipt upon the ground that the same was obtained by fraud, falsehood, or from them while not in a condition to know and understand their rights. This court held that they could not be allowed to do so. That in order to be allowed to prosecute their original cause of action they must restore to the opposite parties the money they had received or tender to them the same. This is a just rule. If the original cause of action is to be litigated the parties must be placed in the position they were before the alleged fraudulent transaction

occurred. The case at bar presents a different state of facts from the two cases above referred to.

It is true that the paper filed by the defendant purports to be a compromise and full settlement of all claims growing out of the injury to plaintiff mentioned in the petition, as well as other claims he might have against the defendant or any of its agents, servants, etc. His reply admits signing the document, but it also alleges the fact to be that it was only read to him, and that such was the agreement that it only paid him for the loss of time which he suffered as the result of the injury complained of and the payment of part of the drug bill expended. He also avers he could not read the document, and that he signed it under those circumstances of only settling so much. He can not recover in this case for loss of time between the date of injury and the signing of the receipt for the loss of time or drugs brought without complying with the principles announced in the two cases heretofore referred to, namely, by restoring the money. But he is not seeking to recover anything for the loss of time nor for his drug bill.

The averments of the reply must upon demurrer be taken as true, hence it must be taken as true that he could not read the receipt, and that the transaction was as he stated it in his reply, and it can hardly be denied that if his statement is true that the settlement did not necessarily include the mental and physical suffering he had undergone as the result of the injuries complained of, nor would it necessarily and absolutely, if his statements were true, preclude a recovery for a permanent impairment of his ability to labor. If A held a demand against B for the price of a house and lot, and also for rent of same antedating the purchase, and if A in collecting the rent was induced by false representations of B to sign a receipt, which also included the purchase price of the house and lot, would it be said that A must restore the rent money before he could be allowed to prosecute his claim for the purchase money? We think not. Upon the return of this case the jury should be told, if it comes to a jury trial, that if they believe from the evidence that the \$210.25 was paid in settlement of all of plaintiff's demands against the defendant, that they must find for the defendant in this action, although they might believe that the receipt was obtained by misrepresentation or fraud.

Judgment reversed, with directions to overrule the demurrer to the reply and cause remanded for proceedings consistent with this opinion.

Whole court sitting.

Judges Burnam, DuRelle and O'Rear dissenting.

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COLEMAN, &c. v. O'LEARY'S EX'OR, &c.

(Filed December 17, 1908.)

1. Wills—Masses—This action involves the construction of particular clauses of testator's will. By clauses 4 and 13 the testator directed that designated sums should be paid for masses for the repose of the soul of the testator and his relatives, who are designated by the terms of the will. In the 4th clause the person to whom this devise is to be paid, and in the 13th clause the church where the masses are to be given are designated. Held—That the devise for masses is unobjectionable and will be enforced by

the court. The 11th clause, which bequeaths to the Catholic bishop of Louisville \$3,000, to be invested, and the income applied in rewards of merit to pupils in the parochial poor schools in Louisville, creates a trust. A definite trustee is selected; the class to be benefited is plainly expressed; the intention is unmistakable; the bequest can be readily carried out by the named trustee under the supervision of the court if necessary, and the object plainly declared is a charitable one within the meaning of the statute, being in aid of "schools of learning." The devise in the 12th clause of \$8,000 to the bishop of Cork, to be applied to any charitable uses, and so as to do the most good, is too indefinite, and will not be enforced. Clause 22 of the will gives and bequeaths to the order of the Society of Jesus, known as the "Jesuit Order," one hundred acres of land. The Society of Jesus is no legally incorporated body, and there is no trustee created who can be made subject to the control of the court and compelled to execute the provisions of the trust. Held—That the court will not enforce this bequest by supplying a trustee, as the charity is not to an identified or ascertainable object, and is, therefore, invalid.

2. Construction of statutes—Statute of Elizabeth—Doctrine of cypres—Clause 20 of the will directs that the remainder of the estate, after payment of the specified legacies and bequests, be invested and placed in trust with the bishop of the Catholic diocese of Louisville, and three others to be chosen by him, for the establishment of a home for poor Catholic men as soon as the proceeds of the estate may justify it. The construction of this clause involves a construction of the General Statutes, page 242, which was in force at the death of the testator. This statute was a re-enactment of Revised Statutes, chapter 14, page 235. It also involves the question as to whether the statute of 43 Elizabeth was adopted in this State, recognizing to its full extent the doctrine of cypres, and if so to what extent has that doctrine been changed. Held—That the statute of Elizabeth was recognized in this State prior to the passage of the statute of 1852. The doctrine of cypres was limited by judicial construction prior to the statute of 1852. The aim of this statute for upholding charities is to make such as it enumerates available whenever so defined as to be judicially identified and applied. The court is satisfied that a construction can fairly be given to this clause of the will sufficiently definite to enable the trustee to carry out, and the court to control and enforce, the testator's charitable purpose. In order that the court may be able to exercise the powers given by this statute, directing the management of the trust and settling who shall be the beneficiaries thereof, the will must be construed as requiring the establishment of the home in Louisville because the trustee is the bishop of the diocese of Louisville; the trust is reposed in him in his official capacity, and he has no power beyond this diocese. On the same principle it would seem to follow that the beneficiaries must be selected from that diocese which includes the State of Kentucky.

J. W. S. Clements and D. W. Sanders for appellants.

P. B. & U. W. Muir and S. J. Boldrick for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge DuRelle.

This appeal is to determine the validity of six clauses of the last will and testament of John B. O'Leary, a respected citizen and resident of Jefferson county. The will was a holograph. Certain of its provisions were held by the county judge to have been cancelled and revoked. With the exception of

the cancelled clauses it was admitted to probate. Appellant, Thomas F. Coleman, suing for himself and for the heirs-at-law of John D. O'Leary, as a class, filed his bill, praying that the will be adjudged void as a whole; that the devises contained in each of the six clauses mentioned be declared void; that the estate be adjudged to be undevise estate, which descends to the heirs-at-law, and for a settlement and distribution of the estate. As alternative relief the bill prayed, in the event any or all the trusts provided in the disputed clauses should be held valid, that the trustees be required to carry out the same.

An answer was filed, and a demurrer to the answer was carried back to the petition and sustained. The question before us, therefore, is as to the sufficiency of the petition attacking the validity of the contested clauses. These clauses are as follows:

"Clause 4. I give and bequeath to the Rt. Rev. James M. Hayes, S. J., Chicago, Ill., the sum of \$3,000 for masses for the repose of the souls of my mother and my aunts, Ann and Ellen, and my own.

"Clause 11. I give and bequeath to the Rt. Rev. Roman Catholic Bishop (for the time being), of Louisville, the sum of \$3,000, to be invested and the income of which to be applied in rewards of merit to pupils in the parochial poor schools in Louisville.

"Clause 12. I give and bequeath to the Rt. Rev. Roman Catholic Bishop (for the time being), of Cork, Ireland, the sum of \$3,000, to be applied to any charitable uses, and so as to do most good in his judgment.

"Clause 13. I direct my executor to expend the sum of \$1,000 for masses for the repose of my soul and those of my mother and aunts, to be said at the Cathedral, Louisville.

"Clause 20. All the remainder of my estate, after the payment of the specified legacies and bequests, I wish to be invested and placed in trust with the Rt. Rev. Bishop of the Catholic diocese of Louisville, and three others to be chosen by him, for the establishment of a home for poor Catholic men as soon as the proceeds of my estate may justify it.

"Clause 22. I give and bequeath to the Order of the Society of Jesus, known as the 'Jesuit Order,' one hundred acres of land, at or near my place 'Doneralle,' in Jefferson and Bullitt counties, for the purpose of education or religion, they to have the privilege of selection on any lands on the west side of the Louisville & Nashville railroad right of way."

The questions, therefore, to be determined by this court involve simply the validity of these clauses. These questions are to be determined not under the present statute, which as amended was approved May 12, 1893, and became a law October 10, 1893 (Kentucky Statutes, section 317, et seq.), but as the testator died on May 14, 1893, must be determined by the statute in force at that time (General Statutes, page 242), which is a re-enactment of Revised Statutes, chapter 14, page 235. (*Crawford v. Thomas*, 21 Ky. Law Rep., 1100).

We shall first consider the clauses directing expenditures for masses for the repose of the souls of the testator and certain named relatives, being clauses 4 and 13 of the will. These clauses undoubtedly express, definite and distinctly, the intention of the testator. Indeed the very certainty of the beneficiaries under these clauses is made the ground of attack, for there is

no suggestion in this court either that they are void because of being indefinite, or as being bequests for superstitious uses, but the ground urged is that, being gifts to named persons for the benefit of the souls of the testator and of designated persons, these devises are not charities at all, but private trusts, and, therefore, void as contravening the doctrine of perpetuities.

The trustee in the fourth clause, who is also one of the heirs-at-law of testator, has filed an answer, stating want of knowledge as to whether any of the devises in the will is void for uncertainty, or any other reason, but averring that if any of the devises shall be held void he is willing that the amounts received by him be credited on his interest in decedent's estate. The attack upon these mass clauses is based especially upon the case of *Festorazzi v. St. Joseph's Church*, 104 Ala., 337; citing also *Holland v. Alcock*, 16 N. E., 305 (N. Y.); *Schwartz's Will*, N. Y. S., 134; *McEnry's Estate*, N. Y. S., 307; *McHugh v. McCole*, 12 N. W., 681 (Wis). In the *Festorazzi* case, which is reported also in 25 L. R. A., 360, a devise exactly similar to those under consideration was held to be a trust, but not a charitable use; and, being a mere private trust, to be invalid for want of a living beneficiary. The New York cases upon this subject are in hopeless confusion. The Wisconsin case cited seems, in part at least, to be based on a local statute.

We shall not attempt to go into an extended discussion of the authorities upon this question. In England, although the Statute of Elizabeth in its enumeration of charities has no mention of churches except in regard to their repair, it has uniformly been held that gifts for the maintenance or promotion of public worship were valid as charitable uses, unless contrary to the established religion. Under the statute of 23 Henry VI, chapter 10, declaring void all "uses and intents to have orbits perpetually, or the continual services of a priest forever," etc., gifts for the saying of masses and prayers for the testator's soul or the souls of others were, until the repeal of that statute, held to be superstitious uses and void. (Perry on Trusts, sections 701-2.)

In this country no such doctrine as the English doctrine as to superstitious uses has ever prevailed. As judges we have nothing to do with creeds or their orthodoxy. In the courts all denominations stand upon the same footing, and are to be treated alike. As said by Mr. Perry (section 715): "In this country, where all religious denominations, doctrines and forms of worship are tolerated—or rather protected—so long as the public peace is not disturbed, there can be, in the law, no such thing as a superstitious use."

No such doctrine is invoked on behalf of appellants. The validity of the bequests is to be tested by the same principles that would be applied to a devise in aid of the religious observances of any other denomination. The mass, according to Webster's International Dictionary, is "the sacrifice in the sacrament of the Eucharist, or the consecration and oblation of the Host." It is, as we understand it, a public service—a public act of worship—by which, according to the tenets of the Roman Catholic Church, the priest who celebrates it "helps the living and obtains rest for the dead." As said by the court in *Hoeffer v. Cloghan*, 171 Ill., 462: "It is intended as a repetition of the sacrifice on the cross, and it is the chief and central act of worship



in the Roman Catholic Church. It is a public and external form of worship, a ceremonial which constitutes a visible action. It may be said for any special purpose, but from a liturgical point of view, every mass is practically the same. The Roman Catholic Church believes that Christians who leave this world without having sufficiently expiated their sins are obliged to suffer a temporary penalty in the other, and among the special purposes for which masses may be said is the remission of this penalty. A bequest for such special purpose merely adds a particular remembrance to the mass, and does not, in our opinion, change the character of the religious service and render it a mere private benefit. And while the testator may have a belief that it will benefit his soul or the souls of others doing penance for their sins, it is also a benefit to all others who may attend or participate in it. An act of public worship would certainly not be deprived of that character because it was also a special memorial of some person, or because special prayers should be included in the service for particular persons."

A gift, in other respects proper, for the establishment of a church would not, in our judgment, be avoided by a provision that the church should be called by the name of the testator, or that a tablet or a memorial window should be erected therein bearing his name. Nor do we see any reason why the application of the fund to the designated purpose may not be enforced by the courts upon the application of the heir. We are of opinion, therefore, that the fourth and thirteenth clauses of the will are not objectionable, and that the judgment of the chancellor as to them was correct. The cases upon this subject may be found collated in an excellent note to the case of *Moran v. Moran*, 4 Am. & Eng. Dec. in Eq., 55.

The next clause for consideration is clause 11, by which a trustee is selected and a trust created, the income whereof is to be applied in rewards of merit to poor pupils in the parochial schools of Louisville. A definite trustee is selected. The class to be benefited is plainly expressed; the intention is unmistakable; the bequest can be readily carried out by the named trustee, under the supervision of the court if necessary, and the object, plainly declared, is, in our judgment, a charitable one within the meaning of the statute, being in aid of "schools of learning." A similar bequest, providing for prizes for essays upon medical subjects, was sustained in *Almsey v. Jones*, 17 R. I., 270. As to this clause the judgment of the chancellor is affirmed. The bequest in the 12th clause to the Bishop of Cork, to be applied to any charitable uses, and so as to do the most good, in his judgment, is practically identical in language with the bequest which was held invalid in the case of *Spalding v. St. Joseph's Industrial School*, 21 Ky. Law Rep., 1107.

The point is made by counsel who was appointed attorney to defend for the Society of Jesus and the Bishop of Cork upon the entry of the warning order, that their case is not before this court because, although he filed demurrers for each defendant to the petition and the chancellor declared these devices good, the judgment of July 11, 1901, neither overrules nor sustains either one of these demurrers, but only carries back to the petition the demurrers of the plaintiff to the answers filed by Bishop McCloskey and his associates and James M. Hayes. But inasmuch as the judgment dismissed absolutely the petition of the plaintiff, and seems to intend that the petition is dismissed as to all the defendants, we have considered the

case as if all the parties named as appellees were before the court, and we are of opinion that the chancellor's ruling as to this clause was erroneous.

We shall next consider the 22d clause, bequeathing to the Order of the Society of Jesus, known as the "Jesuit Order," 100 acres of land at or near the testator's place, "Doneraille," in Jefferson and Bullitt counties, for the purposes of education or religion, they to have the privilege of selection on any lands on the west side of the Louisville & Nashville railroad right of way. The Society of Jesus is a religious order founded by Ignatius Loyola. It is understood to be composed of missionary and teaching priests of the Roman Catholic faith. As we understand it, there is no legally incorporated body, but the priests are bound only by their vows of poverty, chastity and obedience, and, after a second novitiate, by a fourth vow requiring them to go wherever the Pope may send them for missionary duty. They are governed by a general, and the society has been established in the United States for many years, but this record does not disclose the headquarters of the society or the names of any of its officers. It would seem, therefore, that there is no trustee created by this bequest who can be made subject to the control of the court and compelled to execute the provisions of the trust. The lack of a trustee, however, would be immaterial under our statute, and the trust would not be permitted to fail because an "inadequate, illegal or inappropriate" mode of execution had been prescribed, provided the charity were to "an identified or ascertainable object" which could be judicially determined, and thereby effectuate the declared intention of the donor. Is there such an object in this case? Can the court, unable to bring the Society of Jesus before it, appoint a trustee and select for his execution a religious, or educational object which will effectuate the intention of the donor, "and not arbitrarily and in the dark, presuming on his motives or wishes, declare an object for him?" We do not think so. Whatever educational or religious purpose the chancellor or his trustee or this court might select would be open to the objection that it was not the declared intention of the testator, and that it was possibly an object of which he would not have approved. To effectuate a charitable use in this State it is necessary that the courts should be able to control the trustee, and, if necessary, upon the application of the decedent's heirs at law, revise his action. Should we attempt to do so in this case we should not be acting judicially. As said by Judge Robertson, in *Moore v. Moore*, 4 Dana, 866, the court "does not act judicially when it applies his bounty to a specific object of charity, selected by itself merely because he had dedicated it to charity generally, or to a specified purpose which can not be effectuated, for the court can not know or decide that he would have seen willing that it should be applied to the object to which the judge, in the plenitude of his unregulated discretion and peculiar benevolence, has been fit to decree its appropriation, whereby he, and not the donor, in effect and at last, creates the charity." We are of opinion that the bequest in the clause under consideration is clearly within the rule laid down in the *Spalding* case and is invalid.

We come now to the consideration of the residuary clause, being clause 20: "All the remainder of my estate, after the payment of the specified legacies and bequests, I wish to be invested and placed in trust with the Rt. Rev. Bishop of the Catholic diocese of Louisville, and three others to be chosen,

by him, for the establishment of a home for poor Catholic men, as soon as the proceeds of my estate may justify it."

This clause also is attacked upon the ground that it is too indefinite to be executed, and counsel upon both sides have argued it with great zeal and learning and not altogether without temper. There is no objection to the trustee selected, and we see no valid objection to the power granted him to select his colleagues. The sole question is whether the object for which this bequest is made is sufficiently definite to be enforced. Upon this question the argument has taken such a range as to render necessary a consideration of the history of the statute in force at the date of the testator's death: The statute of 43 Elizabeth (chapter 4) came to us by virtue of the ordinance of Virginia of 1776 (9 Hening's Statutes at Large, page 127, which is printed in 1 Morehead & Brown, page 612), providing: "That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James I, and which are of a general nature, not local to that kingdom, \* \* \* shall be the rule of decision, and shall be considered as in full force until the same shall be altered by the legislative power of this colony."

That ordinance was, by the Constitution of 1792, as re-enacted in the Constitution of 1799 (article 6, section 8) adopted as the law of Kentucky by a provision that "all laws which, on the 1st day of June, 1792, were in force in the State of Virginia, and which are of a general nature, and not local to that State, and repugnant to this Constitution, nor to the laws which have been enacted by the legislature of this Commonwealth, shall be in force within this State until they shall be altered or repealed by the general assembly." (Hunt v. Warwick's Heirs, Hardin, 62.)

It is an interesting fact that in November, 1792, a few months after the adoption by Kentucky of this ordinance, it was repealed by Virginia, which accounts in some measure for the difference between the rulings upon charities in Virginia from those which prevail in Kentucky.

The question has been elaborately argued how far the Statute of Elizabeth (to be found in 1 Morehead & Brown, page 308) was adopted as the law of this State, appellee contending that only the preamble was thereby adopted, because the ten enacting clauses of the act are necessarily local to England, and were, therefore, never adopted by either Virginia or Kentucky. On behalf of appellant it is contended that while the mode of procedure prescribed by the statute by the appointment of commissioners under the great seal of England, or the seal of the county palatine of Lancaster, as the case might require, was local to England, and not adopted by either Virginia or Kentucky, yet a corrective process by the court of chancery itself, without the intervention of commissioners, was obtained in virtue of the statute and as an outgrowth of it by the English chancellor, and to the extent it was judicial was adopted by the constitutional adoption of the Virginia ordinance, and asserted and exercised by the Kentucky courts. An examination of the authorities convinces us of the correctness of appellant's contention. It is undoubtedly true that after the adoption of the statute in England the courts asserted and exercised wider powers in the correction of abuses of charitable trusts, and did so directly, and not through the intervention of the commissioners provided by the statute. And so it was natural

that when the Kentucky courts came to consider the application of the statute thus adopted to Kentucky charities, they should adopt with it the outgrowth of power derived from the chancellor's personal exercise of the royal prerogative, to the extent that it had been exercised in England, because it had come to be there exercised in form at least judicially. And it was natural that the Kentucky courts should at first have regarded all the powers which had grown out of the concurrent exercise and subsequent confusion of the judicial and prerogative power as not local to England, and should have sought to localize them in this State. And so we find Judge Nicholas, in *Glass v. Wilhite*, 2 Dana, 177, asserting in the broadest terms not only that the statute was in force in Kentucky, but the existence of the English cypres doctrine to its fullest extent. Said Judge Nicholas: "Notwithstanding the attention of counsel had been invited to the question whether the statute 48 Elizabeth of charitable uses was in force here, it was not contended, on the argument, that it was not. Our own reflections have not led to any plausible suggestion why it should not be considered as in force. It has never been repealed, nor is there anything in it of so peculiar and local a character as to exclude it from adoption, under the rule embracing all English statutes of a general character, prior to 4th James I. It is treated as in force, and has been acted on in several of the other States.

The establishing of the fact that it is still in force relieves us from the necessity of investigating the very vexed question as to the true extent of chancery power and jurisdiction over charitable uses, independent of that statute. It also relieves us from an investigation of the question whether, according to the principles of the common law, there is here a defect or want of cestui que trusts, to take the use according to the apparent intent of the covenant of association, or whether the uses themselves are of too indefinite and uncertain a character to be enforced, independent of that statute, for, according to a construction of two hundred years, and which has been acted on in numberless cases under that statute, neither of those circumstances will invalidate the trust, provided it be a charitable use. Where the objects of the charity and the mode of its application are pointed out, but not with sufficient distinctness or certainty to be specifically and accurately enforced, the court will, under its cypres doctrine, give it effect as near the general intent as may be, and even where there is no specific mode or object pointed out, and in some cases where the object falls or ceases to exist, the court will, in respect of the general charitable purpose, devise a mode itself for giving it effect and employing the charitable funds, supply an original want of trustees, or, if necessary, displace old and create new ones."

Almost immediately thereafter, in *Moore v. Moore*, 4 Dana, 354, Chief Justice Robertson greatly limited the doctrine laid down in the *Glass* and *Wilhite* case, still asserting, however, the cypres doctrine as a judicial doctrine to a limited extent. In the *Curling* case, 8 Dana, 38, it was held that a devise for the "benefit of a public seminary" was "not, as at common law, void. The statute makes it valid according to the British doctrine. And if it can be judicially executed it is good according to the Kentucky doctrine also." And so Judge Robertson held that the testator intended his bounty for the seminary of his county, and that "even if the Trigg seminary could not

claim the bounty as a matter of clear and exclusive right, nevertheless we are of the opinion that the application of the fund to that seminary would effectuate the declared purpose of the testator more certainly and appropriately than any application that could be made of it to any other seminary of learning."

The statute is clearly here recognized, not as merely giving a definition of charities, or a list by which gifts supposed to be charitable might be tested, but as giving to the courts and judiciary of Kentucky certain remedial and corrective powers which would not be possessed by them in the absence of the statute. So, in the much-criticised opinion of Judge Breck, in *Attorney-General v. Wallace*, 7 B. Mon., 612, an exceedingly loose devise was held to give the testator's "trustworthy friends," his trustees power, under the statute of Elizabeth, to select as beneficiaries of the will certain established benevolent and charitable institutions then in existence. The validity of the clause and the propriety of the proceeding by the attorney-general as well are sustained expressly under the statute of Elizabeth and the power of the court to enforce the trust by a scheme is asserted. In 1859 the statute now under consideration was adopted. It took the preamble of the former statute with some described changes, added to the list a few charitable objects, notably churches, which, as Mr. Perry says, had been "by analogy deemed within its spirit or intendment," and added also the words "or for any other charitable or humane purpose," which can hardly be construed to do more than include the charitable purposes which had already been deemed within the spirit and intendment of the old act, and provided that all grants, etc., for such purposes should be valid, except as thereafter restricted. It provided also: "No charity shall be defeated for the want of a trustee or other person in whom the title may vest, but courts of equity may uphold the same by appointing trustees, if there be none, or by taking control of the fund or property and directing its management and settling who is the beneficiary thereof."

Now if there is a difference between this statute and the former one, which was held by the Kentucky decisions to be in force here, what effect did it have and what was its purpose? Was it intended to or did it broaden the scope of the old statute as is contended by counsel for the Society of Jesus and the Bishop of Cork? We can not think so. That statute, even in Kentucky, and even after the great opinion of Judge Robertson in the Moore case, which undertook to confine the English cypres doctrine within the limits of strictly judicial powers, had received construction which could not have suggested to the legislative mind any necessity for broadening the scope of the act. If there was need of legislation it was in the other direction. Such trusts shall be valid says the statute. How valid? Then the statute proceeds to point out the modes in which they may be validated: First, a trustee may be supplied, if necessary, in whom the title may vest; or the court may take control of the fund or property. The court may direct the management of the property, and may settle who is the beneficiary. Is there anything in this, fairly construed, that indicates an intent to empower the courts to give definition to trusts which the grantors failed to define, to furnish an intent when none is expressed, to direct the management of a fund devoted to an unascertainable object, or to settle who is

the beneficiary when the testator left no clew? That statute was intended not to enlarge, but to define the powers of the court.

As illustrative of this intent we find incorporated in the 3d section the mortmain statute of 1814, limiting the amount of landed estate which may be held by any church or society of Christians.

We do not for a moment suppose this enactment was intended as a hostile attack upon charitable uses, or as looking toward such a crusade against them as took place in the time of Henry VIII, but that it was intended to limit, to define and to set boundaries to the powers of the courts we have no manner of doubt from an examination of the statute itself, and this construction was given to it by perhaps the greatest of our judges in the only opinion of this court, in which the effect and object of the Kentucky statute appear to have been considered and adjudged. The same great judge had, in the Moore case, undertaken to limit the application of the cypres doctrine by the chancellor. The doctrine then announced had not been rigidly adhered to. In *Attorney-General v. Wallace*, 7 Dana, 190, and in the *Curling* case, 8 Dana, 38, the results of the opinions by Judge Breck and by Judge Robertson himself are not supported by the doctrine announced in the Moore case, though the intent of the testators was declared to exist in such form as to make that doctrine applicable. But in *Cromie's Heirs v. Louisville Orphans' Home*, 3 Bush, 373, the effect of the Kentucky statute was considered. Said the court through Judge Robertson: "While the statute of Elizabeth concerning charities was constructively abolished in Kentucky (Revised Statutes, volume 1, page 77), it was in American phase substantially re-enacted. (Ibid, page 235 ) And thus, though the ultra-judicial cypres doctrines which royal prerogative attached as excrecences to the statute of Elizabeth had, by its repeal, been cut off as tumors, the aim of our own statute for upholding charities is to make such as it enumerates available whenever so defined as to be judicially identified and applied."

The English statute was re-enacted, but "in American phase." Charities could still be created according to American doctrine. The outgrowth of the English statute was not to exist here, and the aim of our own statute was compactly and definitely expressed. It was a conservative enactment. It did not put charitable uses upon the same plane as private trusts. They were not void as against the statutes as to perpetuities. They were not to be defeated for want of a trustee. They were not required to be so definite as to be valid as private trusts. But the "American phase" of the statute of charitable uses did require a reasonable certainty, for it required the charitable objects to be so defined as to be judicially identified. The courts were no longer to exercise the prerogative of changing or making wills, and the judge refers approvingly to the repudiation of the cypres doctrine in New York, and to the strictly judicial application of charities in that State. He believed, and said so in the opinion, that the object of the repeal of the British statute "was to substitute a system more congenial with our institutions, and by a legislative endorsement of the doctrine suggested in *Moore v. Moore*, supra, to eliminate the cypres doctrine of England." We find nothing in the statute to indicate that it was intended as an enabling act, as the statute of Elizabeth was. It does not undertake to enlarge the power

of the chancellor in any way. It gives no power to enforce an indefinite gift. It provides that a trust shall not fail for want of a trustee, but it does not empower the courts to create a *cestui que trust*. The court will, under the statute, settle who are the beneficiaries of a trust, if one is created, but it must settle them from the words of the gift; they must be judicially ascertained. It is not doubted that the individual beneficiaries of the bounty need not be named. That would render the gift a mere private use, and subject to the rule against perpetuities. And while the donee of a power may create or cause to spring a private use, limited in duration by the law against perpetuities, such is not the law as to charitable uses which are perpetuities. The donor must select his charity. He may delegate power to select the individual recipients of his bounty, but a gift to charity in general is too vague to be enforced. (*Spalding v. St. Joseph's Industrial School*, 21 Ky. Law Rep., 1107.) A charitable use which is relieved from the operation of that rule must be so definitely expressed that the courts can judicially, and with reasonable certainty, apply the gift to that object.

We may notice here the very interesting argument of appellants' counsel as to the difference between the statute of Elizabeth and the Kentucky statute. In the older statute these words are used, "for relief of aged, impotent and poor people," while our statute reads "for the relief or benefit of aged, or impotent and poor people;" from which it is argued that while the older statute might have permitted a charity for the poor though not helpless, or for the aged, though not poor, our statute does not permit a charitable use for the benefit of the rich, though old or impotent, or for the poor, unless they were old or impotent. But we think the distinction sought to be made lies only in the language used, and does not exist in the meaning of the two statutes. In the old statute, as in the new, the poor and the aged, for whose relief charitable uses were permitted, were the poor and the aged who needed charity, and under neither statute would a charity for sturdy beggars or elderly millionaires be properly sustained. And so we think it is with such language when used in a gift to be applied under either statute. The "poor" will be construed to mean not the poor who are abundantly able to provide for themselves, but the poor who need assistance, and "aged" to mean such aged people as are properly objects of charity.

Nor do we think that the devise in question is objectionable as a sectarian charity or as a devise to provide for hospitality rather than charity. This court has never recognized it as an objection to a charitable use that its bounty was confined to members of one race or one religion. Nor, on the other hand, do we think that the word "poor" as used in this devise can be properly construed as indicating a merely hospitable purpose. The purpose of this devise was, in our judgment, charitable. The sole question is whether it was definite enough to be enforced. Tested by this statute, is the bequest too vague and indefinite to be sustained? It is suggested for appellees that in order that the court may be able to exercise the powers given by section 2 of the act (Revised Statutes, page 236), directing the management of the trust and settling who shall be the beneficiaries thereof the will must be construed as requiring the establishment of the home in Louisville, because the trustee is the bishop of the diocese of Louisville, the trust is reposed in him in his official capacity, and he has no power beyond his dio-

case. On the same principle it would seem to follow that the beneficiaries must be selected from that diocese, which, as we understand, includes the State of Kentucky. If the devise can be sustained, it must be upon such a construction, and that is the interpretation we must give it in order to make it sustainable.

On the other hand, these objections are urged to the validity of the devise: First, that it does not name a charitable object under our statute which requires that the poor who may be beneficiaries of a charitable use must also be aged or impotent, an objection already considered; second, because no power is given to any one to select the object of the charity; third, because no place or district or country is named in which the home is to be established, and no place or district or class is reasonably defined from which the beneficiaries are to be selected; and, fourth, because no one is given power to make such selections. Assuming the object of the devise to be sufficiently definite, we have little difficulty with the second objection.

A trustee is named, the appointment of three associates is provided for, and the fund is devoted "for the establishment of a home for poor Catholic men as soon as the proceeds of my estate may justify it." And if the will furnishes a guide to the purpose of the testator, the trustee and his associates have authority to act in the selection of a site for the home, and in its establishment and management, under the control and direction of the chancellor. But it is objected that there is nothing in the will which places any limitation of time or place or circumstance upon the establishment of the home, or any limitation of district or boundary or class which will enable us to judicially ascertain or identify the objects of the testator's bounty. With considerable hesitation, and after much consideration, the court has reached the conclusion that a construction can fairly be given to this clause of the will sufficiently definite to enable the trustee to carry out, and the court to control and enforce, the testator's charitable purpose.

The trustee selected to receive the trust fund is not selected as a person, but as an official of the church. He is the Rt. Rev. Bishop of the Catholic diocese of Louisville. As such he has under his immediate dominion not only such matters as are strictly ecclesiastical, but to a great extent the charities of the church. Whether he still exercises the powers of a corporation sole this record does not disclose, but he undoubtedly exercises supervision over the recognized charities of the Roman Catholic Church in his diocese. And while there is a recognized distinction between a gift to create a charitable institution, without naming its scope or location or designating, territorially or otherwise, the class from which the beneficiaries are to be selected, such as appellants claim the gift in question is, and a gift for a purpose recognized as charitable under the statute to an established and organized institution, having defined and stated aims and purposes, which, by virtue of the selection of that institution, can be written in the terms of the gift, it may be that there is a just analogy between gifts of the latter class and a gift for a recognized charitable purpose to a church official in his official capacity, having jurisdiction as such over the charitable institutions of like character within a defined territory and managed under regulations and upon conditions which may be considered as adopted by the donor by the selection of such official, and thereby written into the terms of his gift. It



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may not be too great a stretch of the court's powers of interpretation to presume that the donor made the gift upon terms in harmony with the purposes of kindred organizations in that ecclesiastical jurisdiction, and for the benefit of such similar objects of charity as are provided for in that district.

Giving this construction to the clause in question, that the home was intended to be established in Louisville, and that the beneficiaries were to be selected from Catholic poor men in that diocese, it follows that the trust is such as the chancellor can control and enforce, and, if necessary, settle who are the beneficiaries thereof. It follows, therefore, that the judgment of the chancellor as to this clause was not erroneous. The paragraphs of the answer which plead knowledge on the part of the appellants of the administration under the will are good, to the extent that in so far as the appellants have knowingly permitted the executors and the trustees under the void clauses to proceed with the execution of the will as if valid, and to expend the fund for the benefit of the supposed objects of charity, no recovery can be had, nor, if investments have been made in execution of the supposed purposes of the void clauses, can recovery be had for the loss, if any, occasioned by such re-investment.

In the particulars indicated in the opinion the action of the chancellor in carrying back and sustaining the demurrer to the petition was erroneous. The demurrer should have been sustained in part as indicated herein. If appellants can show a refusal to recognize their visitatorial right, or if any abuse of the trust or misapplication of the fund can be shown, the court can enforce such right. In this respect the petition seems to be defective, and on the return of the case leave may be given to amend.

For the reasons given, and to the extent indicated, the judgment is reversed and cause remanded, with directions to set aside the judgment dismissing the petition, and for further proceedings consistent herewith.

Whole court sitting.

Judge Paynter dissents from so much of the opinion as holds the bequest to the Jesuit Order void.

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RICHMOND AND LANCASTER TURNPIKE ROAD CO. v. MADISON COUNTY FISCAL COURT.

(Filed December 17, 1902.)

Condemnation of turnpikes—Constitutional law—In this action to condemn a turnpike the circuit court, from the evidence, fixed \$16,000 as the value of said pike, which is a dividend paying road, and is what it would cost to produce the turnpike road in the condition it was in when the county took possession of same. Held—That the basis of compensation assumed by the court was incorrect. Under section 242 of the Constitution, when private property is taken for public use the owner must be placed in as good a situation financially as he was before it was taken. In this case the proof showing that the stock had for many years sold at par, and paid a dividend of from 6 to 9 per cent., its market value was \$20,000, and judgment should be rendered in favor of appellant for that amount.

J. A. Sullivan for appellant.

J. Tevis Cobb for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hobson.

This was a proceeding to condemn the Richmond and Lancaster Turnpike Road, under the act of March 17, 1896 (Kentucky Statutes, section 4748b), and the only question in the case is, what is a fair and just compensation to the owners for the property? In the circuit court, by consent of parties, it was transferred to equity and heard by the court on both the law and facts as an equity action. The court fixed the value of the property at \$16,000, and gave judgment for this amount, with interest from August 4, 1897, the date when the county took possession of the road, under an agreement that the value of the property and franchises should be determined by law, and that interest should be paid from this date on the amount finally fixed as the value of the property. It is insisted by appellee that under the rule established by this court, the evidence being conflicting, the chancellor's judgment can not be disturbed on the facts. There is great force in this contention if he proceeded upon the proper basis in determining the value of the property, but if he proceeded on the wrong basis, little weight can be attached to his finding, for the reason that if he had adopted the right basis he might have reached a very different conclusion. His judgment is in these words: "This cause came on and was heard by the court, and being sufficiently advised, is of the opinion that the basis of valuation of the property taken in this cause, as it was a dividend-paying road, is what it would cost to produce the turnpike road in the condition it was in on August 4 1897, and the court, therefore, adjudges that the Richmond and Lancaster Turnpike Road Co. recover of the Madison County Fiscal Court the sum of sixteen thousand dollars (\$16,000), with interest thereon from August 4, 1897, until paid."

By section 242 of the Constitution it is provided: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by them, which compensation shall be paid before such taking, or paid or secured at the election of such corporation or individual, before such injury or destruction."

Construing the constitutional provision on this subject in *Henderson & Nashville R. R. Co. v. Dickerson*, 56 Ky., 178, this court said: "The Constitution declares that no man's property shall be taken or applied to public use without just compensation being previously made to him. And according to the construction given to this provision in the cases of *Sutton's Heirs v. City of Louisville*, 5 Dana, 28, and *Rice v. Danville, & Co., Turnpike Co.*, 7 Dana, 81, the compensation secured to the owner is the actual value in money of the property taken from him, which can not be diminished by any speculative advantage he may derive from its appropriation to the public use."

Again, on page 179, the court said: "The Constitution secures to the owner of the land just compensation for his property before he can be deprived of it. Its value to him, considering its relative position to his

other lands and the other circumstances which may diminish or enhance their value, can alone afford him a just compensation for its loss.

In *Robb v. Maysville, & Co., Turnpike Co.*, 60 Ky., 117, this decision was approved. In that case the owner offered to prove what the land sought to be condemned was worth to him. The trial court excluded the evidence and this was held error. The court said the owner was not authorized to fix a fanciful estimate of the value of the property and make that the criterion of his recovery, but that the inquiry was "what would be its value to him, situated as it is, if he were not the owner of it, but owned the adjacent property under the circumstances as they now exist?"

Again, in *Asher v. L. & N. R. R. Co.*, 87 Ky., 391, the court said: "The owner must be placed in the same condition, in a pecuniary point of view, that he would be if the land was not condemned."

The precise point raised in this case was not involved in either of these cases, but the principle is the same. When private property is taken for public use the owner must be placed in as good a situation financially as he was before it was taken. Otherwise, to the extent that this is not done, his property has simply been confiscated for the use of the public. The question, therefore, is not what it would cost to produce the turnpike road in question in the condition it was in on August 4, 1897, but what was the real value of the property as it stood on that date.

The proof for the appellee showed that it had cost \$20,000 to build the pike, but that it was not in as good condition as new, and that a pike like it could now be built for about \$1,800 a mile. There were twelve miles of the pike, which, at \$1,800 a mile, would amount to \$21,600 and the court seems to have made this evidence the basis of his judgment. On the other hand, it was shown by the appellant that the road, after paying all expenses and appropriating a considerable sum annually for the keeping up of the property, had paid for a number of years dividends averaging 9 per centum annually. During this time the roadbed was improved from the fact that they used a superior quality of metal to what was used originally; there was no complaint at any time that the road was out of order; the company was never indolent, and the pike was regarded as one of the best in the county. There were a number of other pikes that were feeders to it; the geographical condition of the surrounding country was such that a turnpike could not well be built; the road ran through one of the best sections of Madison county, where land was sold high; the travel on the pike was increasing with the population; the stock for a number of years had sold at par or more than that, and was in great demand. The charter of the company was granted before the act of 1856 reserving to the legislature the power to amend laws subsequently passed. The amount of the capital stock in the company was \$20,000. There is some proof that the metal on the pike had worn and was not as thick as originally, still there is no doubt from the evidence that the company could have declared a dividend of 6 per centum annually out of its earnings, and with the remainder, in a few years, had the metal as thick as was desired, and we are by no means sure from the proof that the trouble with this pike was not due to the fact that when the county took charge the company had not made its usual annual repairs, a thing which, in the ordinary course of business, was done in the fall, and after the county took

charge it received no attention for several years, and during that time was used very hard, as it was a free pike. But, however this may be, we are satisfied from the evidence that the property was intrinsically worth \$20,000 on the 4th of August, 1897, for we know of no better way of determining the value of a thing than its actual market price, and this stock had concededly sold for par for a number of years, and was eagerly sought at that price. Beside its roadbed, the company had a right of way thirty feet wide, which was fenced in; it had an established trade; at Silver Creek, a point on the pike, there were two large distilleries; the principal part of the tobacco raised in Madison county was raised in that section, and the road had more travel upon it than any other two pikes in the county.

The statute under which the proceeding was had clearly contemplates that all these matters shall be taken into consideration, and that the actual value of the property shall be awarded to the owners. In section 18 it provides: "It shall be the duty of said commissioners to view the road to be taken, and require the owner or owners thereof to produce the books or other evidences, the receipts and expenditures on the road, or part of the road, to be sold, amount of net earnings for said turnpike road company for each year for the past six years, and they shall hear any other evidence conducing to show the value of the property sought to be taken, and shall award to the owner or owners thereof the actual value of the property taken in said county."

There is testimony on behalf of the county to the effect that if all the other pikes had been made free and this one had remained in the hands of the owners as a toll road it would have been much less valuable than formerly. On the contrary, there is testimony for the company that this would have increased its business, for the reason that there was no other way for the bulk of its trade to get out, and that if the pikes which fed it were made free more persons would have traveled it than when they had to pay toll on these pikes. But this matter is, in our judgment, immaterial, for the reason that the county had voted for free pikes, and it was not contemplated that the people of any section of the county should pay taxes to make the other pikes in the county free and still have to pay toll on the pike they used. It is also immaterial that the county might have built a pike for \$1,800 a mile. It did not propose to build such a pike. It proposed to take appellant's pike, and when it did so, it must pay appellant the real value of the property at the time of the taking. Any other rule would permit spoliation of private property when taken for public use. The act provides that the proceeding under it shall be the same as under the act for the condemnation of private property by railroads, and precisely the same principle must be adopted here as would be if a railroad company had condemned this turnpike and right of way for a railway. The private property of the citizen is sacred, but his private interest must give way to the public good when the thing itself is required for the public use. He must in such case part with his property for the public good, but under the Constitution, when he does so part with it, he must be made whole, and a pecuniary consideration must be paid to him of such amount that he will be as well off pecuniarily after the taking as he was before. We are, therefore, of the opinion that the circuit court erred in the basis he adopted for fixing the

value of the property, and that upon the proper basis its value should be fixed at \$20,000.

Judgment reversed and cause remanded, with directions to enter a judgment in favor of appellant for \$20,000, with interest from August 4, 1897.

Whole court sitting except Judge Burnam.

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HUMPHREY, &c. v. POTTER, &c.

(Filed December 17, 1902—Not to be reported.)

Conveyances—Fee simple—A by his deed, conveyed two tracts of land to B, his son, in fee simple, in consideration that B would support A and his wife and pay their funeral expenses after death, and provided further that after the death of B the property should vest in the other children of A. Within a short time after this conveyance was made B reconveyed the land to A in fee simple. Creditors of A subjected said land to sale for their debts, after which this suit was instituted by the children of A, claiming said land under the deed made to B, with remainder to them. They contend that the purchasers of the land acquired an interest in same only during the life of B. Held—That by the terms of the deed to B the estate in fee simple passed to B, and the subsequent clause giving the estate in remainder to the children of A was ineffectual, and the purchasers obtained a fee simple title to the land.

W. A. Barry and J. D. Irwin for appellants.

J. P. O'Meara for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Burnam.

On the 6th of April, 1892, George Potter and wife executed the following conveyance to their son, M. T. Potter: "This deed of conveyance made and entered into this the 6th day of April, 1892, by and between George Potter and Sarah Potter, his wife, parties of the first part, and M. T. Potter, party of the second part, all of the county of Hardin and State of Kentucky, witnesseth: The parties of the first part, for and in consideration of love and affection they have for their son, Michael T. Potter, and for the further consideration that the party of the second part agrees to and binds himself to take care of, to feed and clothe the parties of the second part as long as they may live, and after their death, party of the second part binds himself to pay all necessary funeral expenses. The parties of the first part has deeded this day the farm on which they now live, containing seventy-one and three-fourth acres, being the same land deeded by C. G. Wintersmith to George Potter, and dated January 27, 1858, and recorded in deed book 12, page 84; also another tract of land, containing thirteen acres, deeded the 25th day of February, 1892, by Felix G. Humphrey and wife to George Potter, to have and to hold to said second party, his heirs and assigns forever; and after the death of the said second party the land hereby conveyed shall go to the children of M. T. Potter by his first wife and to no one else. Witness our hands the day and year first above written.

"GEORGE POTTER,

"SARAH POTTER."

On the 13th day of May, 1892, just one month after the execution of the deed by George Potter and wife to him, M. T. Potter and his wife re-conveyed the land to George Potter. The deed is as follows: "This deed made and entered into this the 13th day of May, 1892, by and between M. T. Potter and Margaret Potter, his wife, parties of the first part, and George Potter, party of the second part all of the above-named of the county of Hardin and State of Kentucky, witnesseth: That said party of the first part, for and on account of the party of the second part, having deeded and conveyed to the party of the first part the tracts of land on which the party of the second part now lives, containing about seventy-one and three-fourth acres, and also thirteen acres adjoining said tract, which was conveyed to the said party of the second part by deed from F. G. Humphreys, dated February 26, 1892, the above-named deed which the aforesaid parties of the second part made and dated April 6, 1892, requiring and binding the herein named party of the first part to support and care for as well as bear all expenses, even burial of the parties of the second part, and the deed not otherwise, according to the will and wishes of the party of the first part, for these reasons and these accounts the parties of the first part rescind, deed and convey back to the party of the second part the above-named tracts of land, not reserving any part of it, but hereby giving all his claim back to the party of the second part, to have and to hold the same, together with all the appurtenances thereunto belonging unto the parties of the second part, their heirs and assigns forever."

Shortly after the execution of the last deed George Potter died intestate, and these two tracts of land were sold under a judgment of the Hardin Circuit Court to satisfy his debts, and the defendants, Felix Humphreys and G. E. Berry, became the purchasers thereof, which sales were confirmed and deeds made to the purchaser by the master commissioner of the Hardin Circuit Court pursuant to the judgment thereof. On the 12th of May, 1899, the appellees, children of M. T. Potter, by his first wife, instituted this suit, in which they allege that they are the owners of the fee simple title to both tracts of land by virtue of the deed executed on the 6th day of April, 1892, by their grandfather, George Potter, to their father, M. T. Potter, and that the defendants only acquired by their purchases at the decretal sale made under the judgment of the Hardin Circuit Court the life interest of their father, M. T. Potter; that they are committing waste by cutting trees from the land, and ask that they be enjoined from so doing and for damages for wastes already committed.

The defendants in their answer relied upon the facts hereinbefore recited. It was adjudged by the trial court that the plaintiffs were the owners in fee of both tracts of land, subject to the life estate of M. T. Potter, and defendants were enjoined from cutting any timber except such as was necessary to keep up the place, and we are asked upon this appeal to determine what interest M. T. Potter took under the deed from his father. In the granting clause of the deed from George Potter to his son, M. T. Potter, there is no limitation on the estate granted. It conveys the full fee simple title. The words are then added that after the death of the second party the land shall go to the appellees. In other words, after vesting the grantee with a fee-simple title, the grantor adds words which change this fee into a life

estate. In numerous recent decisions by this court it has been held that wills and deeds with similar provisions convey the fee-simple title to the original grantee. In *Barth v. Barth*, 18 Ky. Law Rep., 1840, the clause of the will under consideration was as follows: "I devise and bequeath to my wife, Sarah Ann Barth, all my property, real and personal, and chooses in action of every description of which I am the owner, or to which I may be entitled at the time of my decease; also all my insurance on my life, absolutely and forever, with power to sell or dispose of as she deems proper, and all the property of whatever kind or description which remains at her death to be equally divided among my three sons, John C., Philip and Charles Barth, each to receive and share alike." It was held that the widow took the fee.

In *Ray v. Spears*, 22 Ky. Law Rep., 1854, the conveyance was to the grantee in fee, but in the habendum clause it was provided that if the grantee should die without any child or children, that the land or proceeds should go back to the grantors and his heirs. In that case it was held that the grantee took a fee-simple title. In *Clay v. Chenault*, 21 Ky. Law Rep., 1855, the testator devised 275 acres of land to his sons, Waller and Anderson Chenault, reserving the right by codicil to require his sons, if they sold the land, to reinvest the proceeds in other land as he might direct. By a codicil he gave them the right to sell and convey this land and make the purchaser a good title, but provided that the proceeds arising from the sale should be invested in other lands, and that if they should die without children surviving, that such proceeds were to revert to his estate. Waller Chenault died without making any disposition of said land, and it was held in a suit by the heirs of Anderson Chenault that he took the fee-simple title, and the land passed under his will and not that of his father. In the case of *Cox v. Anderson's Adm'r*, ante, 721, decided at the present term of this court, testator devised in fee to his wife, Sally Ann Gibbs, all of his property, real and personal, but provided that at her death \$1,000 of the property so devised should go to the Mt. Zion Church. It was held that she took the fee in the entire property. Following the reasoning in these cases, we are of the opinion that M. T. Potter, under the deed from his father, was vested with the fee-simple title, and that appellees took no interest thereunder, and that his subsequent deed to his father reconveyed the fee to him, and that it was subject to the claims of creditors.

For the reasons indicated the judgment is reversed and cause remanded for proceedings not inconsistent herewith.

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LOUISVILLE PUBLIC WAREHOUSE CO. v. JAMES.

(Filed December 17, 1902—Not to be reported.)

Warranty—Measure of damages—Evidence—In this action to recover damages for breach of warranty in the sale of a tract of land, where a strip of land was taken by the city under a superior title for a street, it was competent to show that the particular strip had a peculiar value of its own because of its adaptability for building purposes. In such action it is not competent to show the value of the land fourteen years after the conveyance for the purpose of claiming that the diminished value, as indicated by the

assessment of a later date, was due to ouster of the part recovered. The assessor's judgment as to the value of the lot before and after the opening of the street was admissible, and the reasons upon which he based his judgment in making the reduction were likewise admissible, but the assessment lists were not competent evidence. The same evidence would be competent in fixing the damages for the taking in this case as would have been competent in an action for condemnation by the city, therefore, it was proper to admit evidence as to the value of the strip of land for whatever purpose it might have been used.

Helm, Bruce & Helm for appellant.

Wm. Furlong and John Roberts for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge O'Rear.

This is the third appeal of this case. The opinions on the former appeals may be found in 21 Ky. Law Rep., 1727, and 23 Ky. Law Rep., 1216. The action is upon a covenant of warranty for damages for its breach, because of the easement or right of the city to extend a street over a portion of the land conveyed and warranted, existing at the time of the conveyance. The matters alleged as error by appellant and complained of on this appeal are as follows: There was some proof to the effect that the strip of land taken was fronting on the street and was worth more than similar land at the rear of the lot which did not front on the street. This was one of the points discussed on the first appeal. However, on this trial it does not appear that the right to recover was made to depend particularly upon this fact, but that it developed incidentally in the course of the evidence that the strip of land was worth more because of its location, and because of the surface conditions at that point. We are of opinion that it was competent to show that the particular strip taken under the superior outstanding title by the city had a peculiar value of its own because of its adaptability for certain purposes, as, for example, for building purposes. This was shown, and this was the principal effect of the evidence objected to.

The second ground alleged as error is that the consequential damages to the remaining tract of land, caused by the city's establishing the graded street when opened in such manner as to make a deep cut in front of appellee's lot, was one that was not an incident, it is claimed, to the city's right to take and occupy this strip for its street. On the last appeal we held just to the contrary to this contention, and the circuit court followed that ruling.

In a suit upon a warranty, where a part of the property is taken under superior title, it is not competent to show the value of the land fourteen years after the conveyance for the purpose of claiming that the diminished value, as indicated by the assessment of a later date, was due to ouster of the part recovered. In this case the city assessor testified that he had examined the property carefully and critically after the opening of the street, and as the result of such examination he had reduced the assessment valuation by something over \$1,100. We are of opinion that it was not relevant nor proper to have admitted the assessment rolls as evidence in this case, but the assessor's judgment as to the value of the lot before and after the opening of the street was admissible, and the reasons upon which he based his



Judgment in making the reduction were likewise admissible. The fact that the assessment lists were used in the case do not appear to the court to have been material or prejudicial, because at the utmost they merely show that the assessor had acted upon the same line as he had testified upon.

On the last appeal we held that the same evidence would be competent in fixing the damages for the taking in this case as would have been competent in an action for condemnation by the city, therefore, it was proper to admit evidence as to the value of the strip of land in question for whatever purpose it might have been used.

Perceiving no error in the record prejudicial to appellant, the judgment must be affirmed.

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CONTINENTAL TOBACCO CO. v. KNOOP.

(Filed December 17, 1902—Not to be reported.)

Master and servant—Negligence—Defective machinery—This action was instituted by appellee to recover damages for injuries sustained from the fall of an elevator while in the employ of appellant. The proof showed that the cause of the elevator falling was the slipping of the wire cable from its socket. A verdict and judgment for \$4,000 in favor of appellee resulted, from which this appeal is prosecuted. Held—That the court properly refused to give a peremptory instruction to find for defendant, and as appellee was seriously and permanently injured the verdict was not excessive. It was the business of the appellant to furnish its employees for their use an elevator in a reasonably safe condition, and if one of its employees was injured because of such failure a cause of action would arise therefor.

Joyes, Jarvis & Swope for appellant.

Kohn, Baird & Spindle for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Paynter.

The appellee, while an employe of the appellant, was seriously and permanently injured by the falling of its elevator from the third floor to the cellar of its tobacco factory. The appellee and two other workmen were hoisting a hogshead of tobacco from the cellar to the third floor, when the wire cable to which the elevator was suspended slipped from its socket.

There is some conflict in the testimony as to what caused the elevator to fall, but there was sufficient evidence tending to prove that it was the result of the defective condition of the elevator to authorize the submission of the case to the jury. In fact the evidence of the plaintiff tends to show that it was an old elevator, and was frequently found to be out of order. The appellee had no supervision of the elevator, and it was not a part of his duties to examine into the condition of the elevator, with a view of discovering any defects in it. He did not have the same opportunity as the master to ascertain the defects, if any existed. It was the business of the appellant to furnish its employees for their use an elevator in a reasonably safe condition, and if one of its employes was injured because of such failure, a cause of action would arise therefor. Whether the appellant performed its duty

by furnishing that character of elevator was a question for the jury. Likewise it was a question for the jury to determine whether the appellee was injured in consequence of a breach of such duty. We are of the opinion that the court properly refused to give the jury a peremptory instruction to find for the appellant. (*Wilson v. Williams*, 23 Ky. Law Rep., 567.) We must decline to disturb the verdict on the ground that it is excessive. The testimony shows that the appellee's leg was broken in two places; that his back was seriously injured; that he received a great shock; that he has been unable to work since that time. He was injured in the early part of February, and he was unable to perform any labor in the October following.

There is no escape from the conclusion that he was permanently and seriously injured.

In addition to other grounds, the appellant relies upon the following: First, that the appellee has received about \$400 by way of compromise, and no part of which had been repaid or tendered to the appellant before the institution of this action; second, the error of the court in instructing the jury. The appellant pleaded accord and satisfaction. It averred that it had paid the appellee his weekly wages and doctor bills, etc., from the time of his injury until some time in the following September; that it was to take the appellee back into its service when he became able to work; that it had offered to and was willing to do so; that upon these terms the appellee's claim against it was compromised and settled. The appellee denied that such a compromise was made, or that he ever agreed to accept the money and other benefits in compromise and settlement of his claim. Testimony was offered touching this issue, and the court told the jury that if they believed that such a compromise was made to find for the defendant. The jury returned a verdict of \$4,000 against the appellant, and of course found against it on this issue. In fact there was little conflict in the testimony upon it, and we are of the opinion that the jury properly found that no such compromise had been made; besides, a fair deduction from the testimony of the witness for the appellant would not have justified the jury in reaching a different conclusion.

It is insisted that the jury should have been instructed that the efforts to effect a compromise were not to be taken by the jury to be an admission of negligence or liability on the defendant's part. The appellee did not endeavor to show that the appellant had admitted negligence or liability, but sought to recover by proving the circumstances and conditions under which he received his injuries. The appellant sought to establish its defense of accord and satisfaction. The court was not called upon to instruct the jury as to the weight which should be given the evidence which the appellant introduced, but to submit one of the appellant's defenses, to wit, accord and satisfaction. It was not incumbent upon the appellee to return the money which he had received for wages and medical bills in order to maintain his action. The doctrine of the *McElroy* case, 18 Ky. Law Rep., 790, and kindred cases do not apply to the facts of this case. In that case it was admitted that the money was received in compromise and settlement of his claim for injuries, but the plaintiff endeavors to avoid the effect of the compromise upon the ground that it had been obtained by fraud. In such a case an action could not be maintained without first tendering or refunding the

money received on the compromise. The difference between the McElroy case and this one is shown in the case of McGill v. Louisville & Nashville R. R. Co., ante, 1244, recently decided by this court.

The judgment is affirmed.

KING, &c. v. TILFORD, &c.

(Filed December 17, 1902—Not to be reported.)

Appeals—Appellants, as members of the Board of Aldermen of Louisville, instituted proceedings to impeach appellees as members of the Board of Public Safety. Appellees instituted an action to enjoin the appellants from prosecuting said impeachment proceedings. The injunction was made perpetual, and this appeal is prosecuted. At the time the case was submitted the terms of office of all parties had expired. Held—That the appeal should be dismissed. A reversal would accomplish nothing, and an affirmance would not benefit appellees.

Barnett, Miller & Barnett, H. L. Stone, H. H. Herr and L. S. Leopold for appellants.

Humphrey & Davie, O'Neal & Pryor, Phelps & Thum, A. G. Caruth and Pirtle & Trabue for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge White.

The appellees were members of the Board of Public Safety of the city of Louisville, and the appellants were the Board of Aldermen of the city of Louisville in the year 1896, the Board of Safety having been appointed in 1893, and the aldermen were elected in November, 1891.

In 1896 there was instituted by two members of the Board of Councilmen of the city, proceedings to impeach the appellees as members of the Board of Public Safety before the appellants, sitting as a court to try the impeachment proceedings. Appellants assumed to have jurisdiction to try the impeachment proceeding notwithstanding the appellees' objection. To prevent the trial by appellants of the charges against appellees this action for injunction was brought by appellees. On trial in the court below the injunction was made perpetual, and this appeal was prosecuted, the record being filed December 8, 1896. The case was submitted with leave in May, 1898. By the charter governing cities of the first class the term of office of the Board of Aldermen is two years, and of Board of Public Safety four years. So that when this case was submitted for our consideration the terms of office of all the parties hereto, both appellants and appellees, had expired by operation of law. There was, therefore, at the date of submission, and now, no real controversy between these parties. The judgment of this court on this appeal would amount to nothing. A reversal would accomplish nothing, and an affirmance would not benefit appellees. Where, pending an appeal, an event occurs which makes a determination of the question unnecessary, or which would of necessity render the judgment that might be pronounced ineffectual, the appeal should be dismissed. (Cyc., volume 3, page 188, and cases cited; 159 U. S., 651, and cases cited.) This rule seems to be well nigh universal.

There being now no real controversy between these parties, and nothing but the moot question of law presented, we decline to consider it, but will dismiss the appeal, without awarding costs to or against either party.

Appeal dismissed.

Whole court sitting, Chief Justice Guffy dissenting.

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CUMBERLAND TELEPHONE AND TELEGRAPH CO. v. HENDON.

(Filed January 7, 1903.)

1. Damages—Discontinuing telephone service—Appellee brought this action to recover damages for discontinuing telephone service in his office for about fourteen hours, resulting from the mistake of the bookkeeper in posting appellee as not having paid his subscription. No special damage was claimed. Held—That the measure of damages, in the absence of proof of special loss, is the amount paid for the service for the time during which it is refused.

2. Instructions—The court should have instructed the jury to find for the plaintiff the amount paid by him for the service for the time his phone was discontinued, taking for the basis the amount paid by the month and allowing for the time lost such part thereof as they deem right.

Fairleigh, Straus & Eagles for appellant.

Pryor & Sapinsky and O'Neal & O'Neal for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Hobson.

Appellee Hendon is a physician living in Louisville; he was a patron of the appellant, the Cumberland Telephone and Telegraph Co., and had one of its instruments in his office. Appellant discontinued the telephone from 8 o'clock p. m. of October 28, 1900, to 8.45 a. m. the next morning, or something less than eighteen hours, and this action was brought to recover damages therefor. The reason the telephone was disconnected was that the bookkeeper made a mistake in posting the amount paid. His book did not show that Hendon had paid for the month of September, although he had in fact paid. On October 23d a notice was sent to him that his phone was discontinued for this reason; and he having paid no attention to the notice, twenty four hours afterwards the connection at the office was severed, although the instrument was not removed. When he got home at 6 o'clock that evening and found that he had been cut off he tried to phone to the office, but failed to get them. The next morning he went down; the mistake was at once corrected, and the instrument was no longer discontinued. The proof showed that he had not only paid for September, but had also paid in advance for October, November and December. It also showed that one person who needed the doctor for his wife that night, being unable to reach him by phone, walked to his office and waked him up. It also shows that three other persons who wished to talk with him were unable to reach him on the phone, and that when one of them asked at the office what was the matter, the assistant manager answered that his phone had been discontinued for nonpayment of rent. It is not shown that he suffered any

pecuniary loss by the suspension of the service, although it would seem that he was considerably annoyed about it. On these facts the jury found for him a verdict for \$200, on which the court entered judgment.

The court instructed the jury that they should find for the plaintiff at least nominal damages, and if they believed from the evidence he suffered inconvenience by reason of his telephone service being discontinued, then they should further find for him such sum as would fairly and reasonably compensate him for the inconvenience so sustained. There was nothing in the case to warrant an instruction on punitive damages, and the court properly refused to instruct the jury on this subject. The plaintiff had, by contract, acquired the right to a certain service, and this contract being broken, the measure of damages is compensation for the breach, as in other cases of broken obligations. The case is entirely different from those where there is a physical trespass, as in the case of the expulsion of a passenger from a train, where there is not only a breach of contract, but an actual tort.

The proper measure of damages to compensate for the breach of the contract is a matter of some difficulty, and we have been referred to no authorities directly in point. Where the contract is to deliver a specific message and is broken, the measure of damage has been often adjudicated, and we see no reason why the same principles should not apply to the case before us, for the contract here was in substance an undertaking to convey all messages the subscriber might wish to send, or others might wish to send to him over appellant's line within the time paid for by him. In the absence of proof of special damage for the failure to carry a message the recovery would be limited to the amount paid for the service which was not furnished. Mere inconvenience or annoyance can not be recovered for except in peculiar cases. (25 Amer. & Eng. Ency. of Law, 855-863; *Chapman v. Western Union Telegraph Co.*, 90 Ky., 265.) Where there is a contract not for a specific message, but for the carriage of all messages within a certain time, the refusal to carry any messages for a certain part of the time is a breach of contract not different in character from the neglect to carry a specific message, and the measure of damages, in the absence of any proof of specific loss, is the amount paid for the service for the time during which it is refused. In case of special damage this in addition may be recovered under proper averments. (*Robinson v. Western Union Tel. Co.*)

Under the evidence the court should have instructed the jury to find for the plaintiff the amount paid by him for the service for the time his phone was discontinued, taking for the basis the amount paid by the month and allowing for the time lost such part thereof as they deemed right.

Judgment reversed and cause remanded for further proceedings consistent herewith.

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

## KENTUCKY COURT OF APPEALS.

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LOUISVILLE & NASHVILLE R. R. CO. v. FRAZEE.

SAME v. FRAZEE, &c.

SAME v. SAME.

(Filed January 7, 1903—Not to be reported.)

1. Railroads—Damages for loss of live stock in transportation—Continuance—Evidence—Appellees brought this action against appellant to recover damages for the value of four horses burned while being transported from Frankfort, Ky., to Memphis, Tenn. Appellant took the depositions of sundry witnesses, who were turfmen of years of experience and actual acquaintance with the value of such stock, but the court sustained exceptions to said depositions, and appellant then made a motion for a continuance of the case, when it was agreed that the depositions should be read as the statements of absent witnesses, but on the trial the court excluded all their testimony of facts showing that their judgment as to the value of these horses was entitled to weight by reason of their experience as turfmen. Held—That this was prejudicial error. The court erred in allowing plaintiffs to read to the jury from his private catalogue the history of Charade, the sire of one of the horses. The witness might state the facts in regard to the history of Charade, so far as they were personally known to him, or he might prove these facts by the testimony of other witnesses who had personal knowledge on the subject, but he could not read to the jury a newspaper article or other publication reciting the facts. Books of pedigree are admitted under the statute, but mere private publications of the history of horses stand on entirely different ground as it was hearsay evidence.

2. Measure of damages—Agreed valuation—The valuations of the horses fixed by the railroad company in its bill of lading does not limit the recovery to the amounts therein stated, as it is apparent there was in fact no agreed valuation, as this is a printed form and the amounts are all printed <sup>up</sup> it. A carrier can not limit his responsibility for negligence by stipula-

tions that he shall not be liable beyond a certain amount for the loss of the property.

Ira Jullan and Edward W. Hines for appellant.

Jas Andrew Scott and John W. Ray for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hobson.

Appellees shipped over appellant's road four horses in a car from Frankfort, Ky., consigned to Memphis, Tenn. When the car reached Russellville, Ky., and was standing in the yard there, it caught fire, and by reason of this the horses were destroyed, or very much damaged. This suit was brought to recover damages for the injury to the horses. The suit was brought very shortly before the term at which it was tried, and after filing its answer the defendant took the depositions of a number of witnesses on its behalf. The court sustained exceptions to these depositions, it seems, on the ground that they were taken during a term of court. The defendant then filed affidavit for a continuance, and on the hearing of the motion it was agreed by the plaintiffs that the depositions might be read as the testimony of the absent witnesses. But on the trial, when the depositions were offered in evidence, the court only allowed certain parts of the depositions to be read, and of this the defendant now complains.

The plaintiff insisted that the horses were blooded stock, and very valuable by reason of their pedigree as well as their intrinsic merits. The depositions taken by the defendant were given by turfmen of years' experience and actual acquaintance with the value of such stock. The value of their testimony depended almost wholly upon their means of knowledge. The court excluded all their testimony of facts showing that their judgment as to the value of these horses was entitled to weight by reason of their experience as turfmen. This was error, and it was very prejudicial. To obtain a trial at that term the plaintiffs had consented that the depositions might be read. The statements of the witnesses, showing the weight to which their judgment was entitled, were of the utmost importance, for without this the jury may have given the testimony very little consideration, as the testimony of a witness on this subject, unless he is shown to be an expert, is of little value.

The plaintiffs were also allowed to read to the jury from his private catalogue the history of Charade, the sire of one of the horses. This was error. The witness might state the facts in regard to the history of Charade, so far as they were personally known to him, or he might prove these facts by the testimony of other witnesses who had personal knowledge on the subject, but he could not read to the jury a newspaper article or other publication reciting the facts. Books of pedigree are admitted under the statute, but mere private publications of the history of horses stand on entirely different ground, and are subject to all the objections to hearsay evidence. As the value of a horse depends upon his pedigree, this incompetent evidence was prejudicial to the defendant.

By the bill of lading sued on it was stipulated as follows: "This contract entered into at the above time and place between the Louisville & Nashville

R. R. Co., hereinafter called the carrier, and L. D. Frazee, hereinafter called the shipper, witnesseth, That the carrier will carry live stock at the rate established by it therefor, or, where certain risks, duties and liabilities are assumed by the shipper, as hereinafter specified, will carry such live stock at greatly reduced rates, and (if shipped in car-load quantities) will furnish the shipper or his agent free transportation on the train with said live stock.

"In the present instance the shipper elects to avail himself of the said reduced rate (if shipped in car-load quantities) free passage for himself or his agent on the train with said live stock, and has delivered on the cars of the carrier the following-described live stock, to wit: Consignee, destination, etc.: L. D. Frazee, Memphis, Tenn. Description of stock; four horses; one attendant.

"The carrier agrees to transport said live stock to destination if on said carrier's line of railroad, otherwise to the place where said live stock is to be received by the next connecting carrier for transportation to or towards destination, and the carrier guarantees that the freight rate thereon from point of shipment to destination shall not exceed the reduced rate of \$60 per car.

"In consideration of all which the shipper hereby agrees to assume the risks, duties and liabilities hereinafter specified, and that the transportation shall be upon the following conditions, which are admitted and accepted by said shipper as just and reasonable, viz.: \* \* \* Should damage occur for which the said carrier may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for a stallion or jack, \$150; for a horse or mule, \$75; mare and colt together, \$100; cow and calf together, \$85; domestic horned animals, \$30 each; calves, hogs or sheep, \$5 each; chickens, ducks and guinea fowl, \$1 per dozen; geese, \$2 per dozen, and turkeys, \$3 per dozen; other animals \$5 each, which amounts it is agreed are as much as such animals as are herein agreed to be transported are reasonably worth."

It is earnestly argued for the appellant that there can be no recovery beyond the amounts thus specified as the value of the horses, and we are referred to a number of decisions holding that where there is an agreed valuation of property to be shipped at a reduced rate no recovery can be had beyond the valuation so fixed. But this contract fairly construed does not bring the case within the rule thus declared, and no opinion is intimated or expressed as to the soundness of that rule. It is apparent here that there was in fact no agreed valuation of the property made, as this is a printed form and the amounts are all printed in it. It has often been held in this State that a carrier can not limit his responsibility for negligence by stipulations that he shall not be liable beyond a certain amount for the loss of the property. We are urged to re-examine the subject and overrule the previous cases. This we are not inclined to do. The rule declared by the court has been made a part of the organic law of the State (section 196 of the Constitution), and the provisions of the Constitution are not to be frittered away, but must be fairly construed with a view to effect its purposes. (*Orndorf v. Adams Express Co.*, 66 Ky., 196; *L. & N. R. R. Co. v. Hedger*, 72 Ky., 650; *Rhodes v. L. & N. R. R. Co.*, 72 Ky., 691; *L. & N.*



R. R. Co. v. Owens, 93 Ky., 201; Vaughman v. L. E. & St. L. R. R. Co., 94 Ky., 150; Adams Express Co. v. HooeIng, 88 Ky., 373; Cincinnati, &c., R. R. Co. v. Graves, 9 Ky. Law Rep., 535; Illinois Central R. R. Co. v. Radford, 23 Ky. Law Rep., 886; Ohio & Miss. R. R. Co. v. Tabor, 98 Ky., 103.)

The question is not presented as to what would be the rule if the shipper practiced a fraud on the carrier and deceived him as to the value of the goods, or intentionally undervalued his goods where the carrier's charges were graduated according to the value of the property in order to get the lower rate.

Judgment reversed and cause remanded for a new trial and further proceedings consistent herewith.

#### TOWNSEND, &c. v. WILSON, &c.

(Filed January 7, 1903.)

1. Fraudulent conveyances—A, by his will, devised to B \$1,000 on the condition that if he should die without children the legacy should pass to other heirs of A. B died without children and the other heirs of A brought suit and recovered judgment against the executrix for the amount of said legacy, and had a return of no property found, after which this action was instituted to set aside a conveyance made by B to C and her two children, on the ground that the deed was voluntary and void against the judgment debt. By the terms of the deed the property was conveyed to the two children, and if either died under twenty-one years of age without issue, the interest of the one so dying passed to the survivor; and if both died under twenty one, and without issue, the property passed to their mother, C. Held—That under section 1907, Kentucky Statutes, said conveyance was void as to said debt, and the conveyance was properly set aside and the property subjected to the payment of the legacy.

2. Decedent's estate—Evidence—C, who had a contingent interest in the estate, was incompetent to testify as to a transaction with B, showing that the conveyance was not voluntary, but made for a valuable consideration.

Butler T. Southgate for appellants.

John B. James and Breckinridge & Shelby for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hobson.

Isaac Wilson died in 1863, and by his will devised to John N. Wilson \$1,000 on the condition that if he should die without children the legacy should then pass to the other heirs of Isaac Wilson. John N. Wilson died without children in 1896. The residuary legatees of Isaac Wilson obtained a judgment against John N. Wilson's executrix for the amount of the legacy, and upon that judgment an execution was issued and returned "no property found." They then instituted this action to set aside as fraudulent as against them a deed made by John N. Wilson in the year 1889 for the property in controversy upon the recited consideration of love and affection to appellants, Jennie F. Townsend and her two children, Elizabeth and John W. Townsend, on the ground that the conveyance was voluntary and, there-

more, void against their judgment debt. By the terms of the deed the property was conveyed to the two children, and if either died under twenty-one years of age without issue the interest of the one so dying passed to the survivor, and if both died under twenty-one, and without issue, the property passed to their mother, Jennie F. Townsend.

The defendants pleaded in substance that the deed was not fraudulent in fact, and that John N. Wilson, after he made the deed, had other property subject to execution more than sufficient to pay his debts. The court sustained a demurrer to this plea. While there is some conflict in the authorities, the rule in this State has been from the beginning that if a party be indebted at the time of a voluntary conveyance it is presumed to be fraudulent as to his existing debts, regardless of the amount of the debts, the intentions or circumstances of the party conveying or the amount of property conveyed. (*Hanson v. Buckner*, 34 Ky., 251.) This rule has been crystallized in our present statute, which provides: "Every gift, conveyance, assignment, transfer or change made by a debtor of or upon any of his estate without valuable consideration therefor shall be void as to all his then existing liabilities." (Kentucky Statutes, section 1907.)

As to existing liabilities, by the express terms of the statute, every conveyance by a debtor of any of his estate is void. The purpose of the statute is to place the property of the debtor, which is thus conveyed away, in precisely the same situation as to his existing debts as if the conveyance had not been made. As to these debts the conveyance is a nullity. (*Enders v. Williams*, 58 Ky., 350; *Slater v. Sherman*, 68 Ky., 206; *Yankey v. Sweeney*, 85 Ky., 62.)

The court, therefore, properly sustained the demurrer to this part of the answer. The defendants also pleaded that the deed was not made in consideration of love and affection, but for a valuable consideration, and in support of this plea the mother, Jennie Townsend, was introduced as a witness, but the court sustained exceptions to her testimony in so far as she stated transactions between her and the decedent, J. N. Wilson, on the ground that she was testifying for herself. She was a party defendant to the action, and in the event that her two children died in infancy, and without issue, took the property in fee under the deed in controversy. She had, therefore, a vested interest in the property, although it was defeasible upon the children, or either of them, surviving their majority or leaving issue. But although her interest might thus be defeated, she had a certain interest in the property, and was thus testifying for herself. While there are cases in other States allowing the testimony of a party in interest as to a transaction with a decedent where the controversy is wholly with strangers, little weight can be given to such decisions, for the question must depend upon the language of the statute, and our statute is different from that in many other States. It provides, subject to certain exceptions that need not be noticed, that "no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done, or omitted to be done, by \* \* \* one \* \* \* who is dead when the testimony is offered to be given." (Civil Code, section 606.)

As we have said, Mrs. Townsend was testifying for herself; she testified concerning a transaction with J. M. Wilson, who was dead when the testi-

mony was offered to be given. The original statute allowing parties to testify for themselves read very differently. (See original General Statutes.) The purpose of the change appears to have been not only to exclude the testimony of a party as to a transaction with a decedent "in actions or special proceedings with the executor, administrator," etc., as provided in the original statute, but in all actions where the person with whom the transaction occurred is dead and can not be introduced to contradict the testimony of the interested party. Thus in *Harpending v. Wiley*, 80 Ky., 452, where a transaction had taken place with an agent who was dead at the time of the trial, it was held that the defendant could not testify for himself as to the transaction with the agent, although his estate was in nowise concerned. (*Maxie v. Bethel*, 23 Ky. Law Rep., 1085.) So also in *Hurry v. Kline*, 93 Ky., 358, the defendant was not allowed to testify as to what took place between him and the obligee in the note, where the suit was by the assignee, although the estate of the assignor was not liable upon the assignment. In *Turner v. Mitchell*, 22 Ky. Law Rep., 1784, the plaintiff sought to recover upon the ground that one of several sureties in the note had first taken an assignment of the note to himself, and then assigned one-half of it to the plaintiff. The surety was dead at the time of the trial, and it was held that the plaintiff could not testify as against a co-surety to the transaction between him and the dead man. The same rule was recognized in *Haggins v. Arnett*, 23 Ky. Law Rep., 809; *Manhattan Life Insurance Co. v. Beard*, 23 Ky. Law Rep., 1747.

Aside from the statute the parties in interest can not testify at all. The legislature in changing the rule and allowing them to testify as to their acts and doings has seen fit to except, among other things, transactions with deceased persons, for the reason that if such testimony of a party in interest were allowed, it would place his adversary at great disadvantage because of the difficulty in meeting it after the death of the person with whom the transaction was had, and, besides, the temptation to perjury and undue advantage would be given one of the litigants.

The circuit court, therefore, properly excluded the evidence referred to, and as without this there was nothing to impeach the recitals of the deed, properly subjected the land to the debt.

Judgment affirmed.

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LOUISVILLE RAILWAY CO. v. FRENCH, BY, &c.

(Filed January 8, 1903—Not to be reported.)

Street railways — Negligence — Instructions—Appellee, by next friend, brought this action to recover damages of appellant for personal injuries received from a collision with a trolley car, alleging that the car struck him at a footway crossing at the intersection of Ormsby avenue and Eighteenth street. A trial resulted in a verdict and judgment for appellee, from which this appeal is prosecuted, urging as error the failure of the court to instruct the jury that if the injury did not occur at the crossing a less degree of care was required of the motorman, and that if the collision did not occur on the crossing no recovery could be had under the pleadings. Held—That the failure to give such instruction was not error, and as there was evidence to support the allegations of the petition a recovery was properly had. In

operating dangerous machinery at a high rate of speed over the streets of a great city the appellant is bound to know that men, women and children have an equal right to its use and will be upon it, and it is its duty to be constantly on the lookout and to take all reasonable precautions to avoid injuring them, and this duty obtains not only at the footway crossings, but at every other point of a public street, and one of these precautions is to give notice of their approach by the customary signals, and when necessary to avoid injury to other persons to slow up and, if necessary, stop their car. This duty, under the circumstances, is no more than ordinary care.

2. Verdict not contrary to evidence.—The verdict is not flagrantly against the evidence.

Fairleigh, Straus & Eagles for appellant.

B. H. Young and M. W. Ripy for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Chief Justice Burnam.

One of the defendant's trolley cars struck the plaintiff, a boy nine years of age, at the intersection of Ormsby avenue and Eighteenth street, in the city of Louisville, inflicting severe injuries, and this suit was brought by his next friend for damages. A jury trial resulted in a verdict for the plaintiff, and defendants have appealed. They assign three reasons why the judgment of the lower court should be reversed: First, that the trial court erred in not instructing the jury that if the collision did not occur at the footway crossing of Eighteenth street and Ormsby avenue, but between the intersection of the streets, plaintiff could not recover under the pleadings in the case. And that as there was testimony that the collision did not take place immediately on the crossing, but after the car had passed beyond it, the jury should have been instructed that a less degree of care was required on the part of the agents of defendant in charge of the car to avoid collision with foot travelers than at footway crossings.

The plaintiff, in his petition, alleges that whilst he was going along Ormsby avenue and crossing Eighteenth street, a trolley car belonging to the defendant, running at a high rate of speed, without giving any signal or warning of its approach, ran against him, and as the result thereof his back, bladder and kidneys were injured and his health permanently impaired. The answer was a traverse, and a plea of contributory negligence. As is usual in such cases, the testimony was quite conflicting. The mother of the plaintiff testified that he was hurt exactly at the crossing of Ormsby and Eighteenth streets; that the car was running at a high rate of speed, and did not ring the bell or give any signal of its approach; that plaintiff had stopped on the crossing to await the passage of a milk wagon, going in the opposite direction to the trolley car; and that as it passed he started across the street and was struck by the car. Mrs. Bedinger, a witness for appellee, testifies that she saw plaintiff standing on the crossing waiting for the wagon to get out of his way; and that as soon as it did so he started across; that just at this moment the defendant's car passed at a high rate of speed, without ringing the bell, or giving any other signal of its approach, and struck the plaintiff just as he came from behind the wagon.

On the other hand, a number of persons, who were introduced as wit-

nesses for the defendant, testified in substance that when the trolley approached the crossing the bell was sounded, and the speed of the car diminished; and that about thirty feet beyond the crossing the car met a wagon coming into the city; and that as the front end of the car got to the back end of the wagon plaintiff ran out from behind the wagon against the side of the car; that they did not see him until he came from behind the wagon, too late to have stopped the car. The trial court instructed the jury substantially that it was the duty of the motorman in charge of the car to lessen its speed as it approached the intersection of Eighteenth and Ormsby avenue, and to have given notice of its approach by the usual signals, and to have had the car under his control, and to have kept a lookout ahead to avoid injuring any person using the street or crossing at that point, and if the jury believed that he failed to discharge these duties and to exercise ordinary care to prevent injury to persons using the crossing, and plaintiff was injured by reason of such failure, that they should find for him, provided they also believed from the evidence that the plaintiff at the time was not himself guilty of negligence, which helped to bring about the injury, and but for which he would not have been injured. If, on the other hand, they believe that the motorman discharged the duties indicated, and exercised ordinary care to prevent injury to persons using the crossing, that they should find for the defendant. The petition proceeds upon the theory that the collision occurred upon the footway crossing, and there is testimony to support this contention. The instructions of the court are drawn in conformity with the averments of the petition. And whilst there is testimony conducing to show that the actual collision was a short distance from the footway crossing, it was the intersection of the two streets, and this slight divergence between the averments of the petition and the testimony as to the actual point of collision is, in our opinion, wholly immaterial. The defendant in operating dangerous machinery at a high rate of speed over the streets of a great city is bound to know that men, women and children have an equal right to its use, and will be upon it; and it is defendant's duty to be constantly on the lookout, and to take all reasonable precautions to avoid injuring them, and this duty obtains not only at the footway crossings, but at every other point of a public street, and one of these precautions is to give notice of their approach by the customary signals, and when necessary to avoid injury to other persons to slow up, and, if necessary, stop their car. This duty, under the circumstances, is no more than ordinary care. The instructions given by the trial court conform substantially to this view of the law, and which has been frequently announced by this court, and by the ablest text-writers on this subject. In our opinion the trial court did not err in failing to give the instruction asked by the defendant on this point.

The third ground of complaint is that the finding of the jury is flagrantly against the weight of evidence. The question of negligence is one of fact, and our duty is performed when we see that there is sufficient evidence to support the verdict. The jury under our system are the sole judges of the weight and credibility of the testimony. If it be true that the defendant failed to give notice of their approach to the footway crossing by the customary signals, and put it out of their power to stop the car by the high

rate of speed at which they were going, after they saw, or could by the exercise of ordinary care have seen, the danger of the plaintiff, they were guilty of negligence. There was sufficient proof on this point, if the jury gave credit to it, to justify their verdict.

Judgment affirmed.

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SHANNON v. PADGETT.

(Filed January 8, 1903—Not to be reported.)

Alex. Lackey and A. J. Garred for appellant.

H. C. Sullivan and Stewart & Stewart for appellee.

Appeal from Lawrence Circuit Court.

Chief Justice Burnam delivered the following response to motion to dismiss appeal:

The motion to dismiss the appeal in this case, on the ground that appellant has satisfied the judgment appealed from, must be overruled, first, because such ~~judgment~~ *satisfaction* does not preclude him from prosecuting the appeal; and, second, because the notice of the motion required by rule 13 was not accompanying the motion.

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GLOVER, &c. v. CHECK, &c.

(Filed January 9, 1908—Not to be reported.)

Personal representative—Compensation—The testator died leaving an estate valued at about \$200,000, the most of which was invested in shares of valuable stock, was distributed to the beneficiaries in kind, and only \$52,797.09 came to the hands of the executors to be applied in the payment of debts and legacies. The lower court made an allowance to the executors of \$10,000 for their services, insisting that under section 3883, Kentucky Statutes, the compensation should have been limited to 5 per cent. on the amount received and distributed by them, which would amount to only \$2,639.85. Held—That in view of the fact that the executors rendered special services beneficial to the estate, the allowance to them should be fixed at \$5,000 under the statute.

Helm, Bruce & Helm and Caruth, Chatterson & Blitz for appellants.

Albert S. Brandles for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Burnam.

R. R. Glover, a citizen of Louisville, died in January, 1900, the owner of about seventy-five separate parcels of real estate located in the city of Louisville, worth in the aggregate about \$100,000, and a personal estate which was appraised at about \$200,000, of which \$168,700 were invested in 1,687 shares of the stock of the National Casket Co.; \$7,100 in seventy-five shares of the Louisville Cotton Oil Co.; \$5,000 in ten bonds of the National Casket Co., and the balance of the personalty, consisting of other stocks, cash on hand, notes, etc. After making a number of special bequests, which aggregated about \$40,000, decedent devised the residue of his estate, after

the payment of his debts, to his three surviving children, and appointed his son-in-law, W. T. C. Cross, and his business associate, G. W. Check, his executors, both of whom qualified and jointly administered upon the estate. The surviving widow, who was the second wife of decedent, renounced the provisions of the will, and asked that dower be allotted to her, but her claim to dower was subsequently adjusted by turning over to her two hundred and fifty shares of the National Casket Co. stock, \$5,000 in National Casket Co. bonds, and seventy-five shares in the Louisville Cotton Oil Co., and by the payment to her of \$1,574 in cash, and the transfer to her of certain real estate owned by the decedent, all of which property aggregated about \$62,000. There came to the hands of the executors \$52,797.09, a part of which arose from the sale of real estate, and a part from mortgages executed by them upon real estate, and which they paid out in the extinguishment of the various special devises and debts of decedent, leaving personal estate of decedent amounting to about \$152,000, which was invested in securities, the great bulk in the stock of the National Casket Co. Shortly after their qualification as executors they instituted this suit in the Jefferson Circuit Court, asking a settlement of their accounts, and that they be allowed reasonable compensation for their services and for the services of their attorneys. The case was referred to the master commissioner, who allowed the executors \$3,000 for attorneys' fees, and fixed their allowance at \$10,000. The devisees filed exceptions to so much of this report as allowed the executors any sum in excess of \$2,639.85, 5 per cent. commission upon the funds actually received and disbursed by them, which were overruled and the report confirmed, and the devisees have appealed. Section 3883 of the Kentucky Statutes provides: "The allowance to executors, administrators and curators shall not exceed 5 per cent. of all the amounts received and distributed: Provided, That upon proof heard in open court, upon proper notice to the parties in interest, the court may make allowance when the executor, administrator or curator has, in the proper discharge of his duties in attending to, administering and settling the estate in his hands, been required to perform extraordinary services. But such allowance shall not exceed a fair compensation for the time occupied, and expenses incurred in protecting, attending to, collecting and settling such estates and 5 per cent. on all amounts received and distributed."

In *Renick's Ex'or v. Renick, & Co.*, 92 Ky., 336, the personal estate consisted of \$64,570.37, and a large tract of land worth in the aggregate of about \$250,000. A bitter and protracted litigation grew up over the probate of the will, which was finally decided in favor of the propounders, and which was greatly due to the energy, sagacity and influence of the executor, to whom the commissioner allowed \$10,000. But this court, upon appeal, held that he was only entitled to a commission of 5 per cent. upon the amount actually collected and paid out under the statute as it then existed. Probably owing to the hardship of this case the legislature enacted section 3883 of the statute quoted supra. The only effect of the amendment to the statute is to authorize the court to make an additional allowance in excess of 5 per cent. to a personal representative, who has, in the proper discharge of his duties in settling the estate in his hands, been required to perform extraordinary services, and even then, such additional allowance is limited to a fair com-

pensation for the time occupied and expenses incurred in protecting, attending to, collecting and settling such estate. There is nothing in the amendment which changes the rule announced in *Renick v. Renick*, and many other cases, that a personal representative is not entitled to commissions upon the value of lands, bonds, stocks, notes, etc., which they were not authorized to sell and reduce to cash, but which went in kind to the devisees or heirs at law. (*Garr's Ex'or v. Roy*, 20 Ky. Law Rep., 1697.) But in *Reed v. Reed*, 23 Ky. Law Rep., 2186, it was held that, in addition to a commission of 5 per cent. upon actual cash passing through their hands, the executors were entitled to a reasonable allowance for services in caring for and distributing the estate devised in kind, and for services in attending to litigation in which the estate was involved. It appears that, in addition to rendering valuable services in adjusting the claim of the surviving widow for dower, the executors discovered nineteen lots, valued at \$9,500, which belonged to the estate of decedent, which had not been appraised, and also gave considerable attention to the real estate which passed under the will to the residuary devisees, and also succeeded in effecting a provident settlement of a considerable claim asserted against the estate by the Methodist Church. And we are, therefore, of the opinion that they are entitled to an allowance in addition to the usual commission of 5 per cent. upon the money which actually passed through their hands, and that they should be allowed \$5,000 in gross for their services.

For reasons indicated the judgment is reversed and cause remanded, with instructions to reduce the allowance to the executors from \$10,000 to \$5,000, and for further proceedings consistent with this opinion.

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VANDYKE v. MEMPHIS, NEW ORLEANS & CINCINNATI PACKET CO.

(Filed January 9, 1903—Not to be reported.)

1. Negligence—Evidence—In this action by a roustabout to recover damages of the owners of steamboat for negligence in permitting a trap door to remain open through which plaintiff fell, sustaining serious injuries, the defendants were permitted to introduce in evidence a record kept by the shipping clerk to prove that the name of plaintiff was not among the list of roustabouts. Held—That said evidence was improperly admitted as the proof failed to show that it was properly kept, besides books of this kind are usually admitted only as affirmative evidence and not to establish a negative proposition.

2. Master and servant—Fellow servants—Instructions—The court below instructed the jury to the effect that they could find for plaintiff only in case the injury resulted from the negligence of agents or officers of defendant superior in authority to plaintiff. Held—That said instruction was erroneous and prejudicial as there was no question of fellow servants in the case. A master employing a servant impliedly engages with him that the place in which he is to work shall be reasonably safe and he must exercise ordinary care to keep it safe. The servant has a right to look to the master for the discharge of this duty, and it is immaterial to whom the master may entrust the discharge of the duty which the law imposes upon him. He can not delegate it to a servant so as to exempt himself from liability for injuries caused to another servant by its omission, but is responsible to the servant.



who is injured from a want of proper care in the person to whom the duty is delegated without regard to the rank or title of the agent entrusted with its performance.

Matt O'Doherty and J. J. Fitzgerald for appellant.

Harris & Marshall for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hobson.

On Monday, February 27, 1899, appellant, Charles Vandyke, entered into the employment of appellee as a roustabout on its steamer, Buckeye State, then at Louisville on its way down the Ohio river. Between 3 and 4 o'clock on the afternoon of the next day, while engaged in loading the boat with baled hay at Grand View, Ind., he fell in an open hatchway, sustaining injuries, to recover for which he instituted this suit. The proof introduced for him on the trial tended to show that he was thirty-eight years of age, and, before he was injured, a stout and healthy man; that after the injury he was unable to work, and his power to labor was substantially destroyed. The jury found a verdict for the defendant, and the plaintiff appeals.

On the trial Charles McKenzie was introduced by the plaintiff as a witness, and testified that he was one of the deck hands, and just behind the plaintiff at the time he was injured by falling into the hatchway. He described the circumstances of the injury and corroborated plaintiff's testimony. The defendant then introduced the captain of the boat, and asked him if McKenzie was on the boat on that trip. He answered that he hardly thought he was. The defendant then introduced the record of the boat kept by the shipping clerk, who was not introduced as a witness, and showed by it that McKenzie's name did not appear in the list of roustabouts kept by him on that trip. The clerk who was introduced was not present when the second clerk took the names, but testified that the latter tried to get them all. He also stated that some times these roustabouts took different names. This proof failed to show that the record was correctly kept, and it should not have been admitted. On the contrary, it tended strongly to show that though the second clerk tried to get all the names, he might not have done so. There is another objection to this evidence. Books of this kind are usually admitted only as affirmative evidence, and not to establish a negative proposition. Thus it has been held that the time book of the employer kept in tabular form, in which the days the hands worked were set down, was not admissible in evidence to show that the plaintiff did not work on certain days. (*Lawhorn v. Carter*, 74 Ky., 7; *Morse v. Potter*, 4 Gray, 292; *Mattocks v. Lyman*, 46 Am Dec., 138.)

At the conclusion of the evidence the plaintiff moved the court to instruct the jury as follows: "The court instructs the jury that the law made it the duty of the defendant and of its agents and servants, charged by it with the care and supervision of its steambont, to observe ordinary care, to have and maintain the decks and hatchways thereof upon and around which plaintiff was working, when injured, in a condition reasonably safe for the use of the plaintiff and the defendant's other employes in the discharge of their duties, and if the jury shall believe from the evidence that the defendant, or any of its said agents, failed to observe such care, and that by rea-

son of such failure upon their part plaintiff received the injury by him alleged, then the jury should find for the plaintiff, unless they shall believe from the evidence; that plaintiff by negligence on his part, if any, so far contributed to his injury that but for it he would not have been injured."

The court refused to so instruct the jury, and in lieu of the instruction asked instructed the jury as follows: "The court instructs the jury that unless they believe from the evidence that the accident causing the injuries complained of to this plaintiff was due to or caused by the negligence of the defendant company, or its agents or officers superior in authority to the plaintiff, the law is for the defendant, and the jury should so find. If the jury believe from the evidence that the accident was caused by the negligence of fellow servants of plaintiff, that is, by servants or employes of the defendant company on the same level of employment with the plaintiff, or not superior in authority or rank to him, then the law is for the defendant, and the jury should so find."

"The court instructs the jury that if they believe from the evidence that the injuries to the plaintiff were caused by the negligence of employes or servants or agents of the defendant company superior in authority, grade or rank, as servants to the plaintiff, the law is for the plaintiff, and the jury should so find, unless the jury shall also believe from the evidence that the plaintiff himself was also guilty of negligence which contributed to the causing of said accident, and but for which negligence on his part, if any such there was, the accident would not have occurred, in which latter event the law is for the defendant, and the jury should so find."

This was error. There was no question of fellow servants in the case. A master employing a servant impliedly engages with him that the place in which he is to work shall be reasonably safe, and he must exercise ordinary care to keep it safe. The servant has a right to look to the master for the discharge of this duty, and it is immaterial to whom the master may entrust the discharge of the duty which the law imposes upon him. He can not delegate it to a servant so as to exempt himself from liability for injuries caused to another servant by its omission, but is responsible to the servant who is injured from a want of proper care in the person to whom the duty is delegated without regard to the rank or title of the agent entrusted with its performance. (*Union Pacific Co. v. Snyder*, 153 U. S., 689; *Northern Pacific Co. v. Herbert*, 116 U. S., 642; *Huff v. Railroad Co.*, 100 U. S., 213; *Flike v. Railroad Co.*, 53 N. Y., 549; *Shearman & Redfield on Negligence*, section 204.)

There was testimony that a man named Joseph Mack was entrusted with the business of looking after the opening and closing of the hatches, and the jury may have concluded that the negligence, if any, in leaving the hatch open was his, and that he was not a servant of the company superior in authority to the plaintiff. The mate was shown to be at the other end of the boat, and no other officer was about the hatch, so the form of the instruction was misleading and prejudicial to the plaintiff.

As the case must be tried again, we will not discuss the facts. We see no other error in the rulings of the court, but for the reasons indicated the judgment is reversed and the cause remanded, with directions to grant appellant a new trial.

**1286 RELIANCE TEXTILE & DYE WORKS V. MITCHELL.**

**THOME, &c. v. ALLEN.**

(Filed January 13, 1903—Not to be reported.)

Albert Brandies and Lieber & Lincoln for appellants.

Jas. T. S. Baker and John Roberts for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Burnam.

In the opinion delivered in this case it was erroneously assumed that the \$3,000 of securities held by the trust company were turned over to the assignee of Clark Thome, when in fact they were delivered to Clark Thome in person before his assignment to Lincoln. It follows that so much of the opinion as directed that the assignee pay into court sufficient funds from the trust estate to pay off the indebtedness due Mrs. Allen was error, and the opinion is modified in this respect. Appellee is entitled to a personal judgment against Clark Thome and to file her claim against the trust funds in the hands of the assignee like any other creditor. If any of the securities surrendered to Clark Thome by the trust company came to the hands of the assignee and can be identified, appellee is entitled to have them first appropriated to her judgment.

**RELIANCE TEXTILE AND DYE WORKS v. MITCHELL.**

(Filed January 13, 1903—Not to be reported.)

1. Appeals—New trial—This action was instituted by appellee to recover damages from appellant for personal injuries received by her from hot water thrown on her from a pipe onto a lot where she and some other children were playing, inflicting painful and permanent injuries. The first trial resulted in a verdict for appellee for \$100, which was set aside on motion of appellee. The second trial resulted in a verdict for \$2,000 in favor of appellee. This verdict was set aside on motion of appellant and a new trial granted. The third trial resulted in a verdict in favor of appellee for \$1,500. On this appeal it is insisted that the lower court erred in setting aside the verdict for \$100, and granting a new trial. Held—That this court is less inclined to disturb the action of the lower court in granting a new trial than in refusing one, and the lower court did not abuse its discretion in granting either of the new trials.

2. Measure of damages—On the first trial the court directed the jury to find for her such a sum in money as will be an adequate and fair compensation for her suffering of body and mind, resulting directly from said injury. Held—That this was erroneous. The plaintiff was not only entitled to compensation for her physical and mental suffering, but also compensation for the distorted and weakened condition in which she was left, by the injury reducing her power to earn money.

3. Contributory negligence—The child was too young to be charged with contributory negligence.

J. W. Bryan for appellant.

F. J. Hanlon and B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

Appellee, Myrtle Mitchell, a little girl four years old, was badly burned by hot water thrown from a pipe leading out from appellant's factory to an adjoining lot where she and some other children were playing, and were accustomed to play. Her injury was a serious one, resulting in deformity, which will be permanent. The skin was entirely taken off, leaving the muscles bare, and she suffered intensely. She required considerable medical treatment, and it was some time before she recovered. It was charged that her injury was due to negligence of appellant. This was denied by it. On the first trial of the case the jury found for the plaintiff, and assessed the damages at \$100. On her motion the court granted a new trial. At the next trial the jury again found for her, and assessed the damages at \$2,000. On motion of appellant the court set aside this verdict, and again granted a new trial. At the third trial of the case the jury found for the plaintiff, and assessed the damages at \$1,500. The court refused to disturb this verdict. Bills of exception were filed, giving the proceedings at all of the trials. It is urged for appellant that the court erred in setting aside the first verdict for \$100. This is the first and most important question to be determined on the appeal.

This court is less inclined to disturb the action of the circuit judge in granting a new trial than in refusing one, for the reason that the new trial simply gives the parties another hearing without finally settling their rights, and there are many things within the knowledge of the judge who presides at the trial which he may have reason to believe prevented a fair trial, although nothing of it may appear from the bill of exceptions. The law has wisely vested in the circuit judge a judicial discretion on this subject, and on the whole case we are not inclined to disturb the action of the circuit judge in granting either of the new trials referred to.

In defining the measure of damages to be awarded the plaintiff the court directed the jury on the first trial to find for her "such a sum in money as will be an adequate and fair compensation for her suffering of body and mind, resulting directly from said injury." This was erroneous, and may have produced the small verdict rendered by the jury. The plaintiff was not only entitled to compensation for her physical and mental suffering, but also compensation for the distorted and weakened condition in which she was left by the injury, reducing her power to earn money. In *Shearman & Redfield on Negligence*, section 758, the rule is thus stated: "In an action for negligent injury to the person of the plaintiff he may recover the expense of his cure, the value of the time lost by him during his disabilities and a fair compensation for the physical and mental suffering caused by the injury, as well as for any permanent reduction of his power to earn money." (To the same effect see 8 Amer. & Eng. Ency. of Law, 2d edition, 643, 651.)

As the measure of damages was not properly given to the jury, and the verdict was so disproportionately small in comparison with the injury as to show that they manifestly misunderstood the true measure of damages, the court did not err in setting the verdict aside and granting a new trial.

We see no error to the prejudice of the appellant on the third trial of the case. The child was too small to be charged with contributory negligence

(South Covington, &c., R. R. Co. v. Herrklotz, 104 Ky., 400); and in fact there is nothing in the evidence showing any want of proper care on her part. The instructions asked by appellant were in substance given in the instructions of the court. On the whole record we see nothing to the prejudice of the substantial rights of appellant.

Judgment affirmed.

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BOREING v. BOREING.

(Filed January 18, 1903.)

Divorce and alimony—Residence—Attorneys' fees—Appellant and appellee were married in 1889 and lived together as man and wife until 1893, when appellant left her husband's home and supported herself by teaching school and doing clerical work in different States of the Union, and in 1901 returned to this State and instituted an action for divorce on the ground of five years' separation; also for maintenance, alimony and her attorneys' fees. The lower court gave her judgment for a divorce from the bonds of matrimony and attorneys' fees, but denied her claim for alimony, from which she has appealed. It is insisted that she could not maintain the action, as she was not a resident of the State, and, besides, she was entitled to no alimony. Held—That the residence of the husband being in this State, it will be presumed that her residence was here; besides, the proof shows she was absent from the State temporarily while earning means for her support, as she was possessed of no property. The evidence shows that while he was never guilty of physical violence towards the appellant, he treated her constantly with cold indifference and neglect; that he was habitually rude to her lady visitors, and that his conduct greatly humiliated and depressed her. While he never stinted her in money matters, nor did she ever lack, by reason of his fault, anything to make her physically comfortable, his conduct towards her was so rude, cold and negligent as to make it apparent that she had lost his love and affection. A woman as gentle, faithful and loyal, as the record shows appellant to have been, is entitled to something more from her husband than food, raiment and shelter, and that to such a woman, living as the wife of appellee, under the conditions shown by the record, was intolerable, and appellant had the right to leave the fireside of appellee, when she found that she had lost his love and realized that she was his wife in name only. Considering the estate of appellee, the social standing of both himself and his wife, his ample fortune and his general financial ability, there should be awarded the wife such an amount as will, if invested with reasonable prudence, produce an income sufficient to support her comfortably, and which will not be disproportionate to appellee's fortune. The record does not show with sufficient clearness the wealth of appellee, and upon return to the court below the case should be referred to a commissioner, who should hear evidence and report to the court a lump sum to be allowed appellant as alimony. Appellant should be allowed as attorneys' fees \$750 additional, \$500 for their services in this court and \$250 for their services in the court below.

W. S. Pryor and W. R. Ramsey for appellant.

T. L. Edelen, Chas. R. Brock, Tinsley & Faulkner and Hazelwood & Parker for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Barker.

The appellee, Vincent Boreing, and the appellant, Sarah R. Boreing, were married in Laurel county, Kentucky, in 1889, and lived together as man and wife until 1893, when appellant left appellee's home, and has lived separate and apart from him, without cohabitation, ever since.

After leaving appellee, appellant departed from the State of Kentucky, and spent the greater part of the time, intervening between said date and the time when this action was instituted, in various parts of the United States, teaching school and doing clerical work in order to support herself. She finally returned to this State, and on the 23d day of February, 1901, instituted this action against her husband, praying for a divorce from the bonds of wedlock with him, upon the ground of their having lived separate and apart, without cohabitation, for five consecutive years next before the institution of the action. She further alleges in her petition, among other things, that she was without any estate or income; was out of employment or means of support, and that the appellee, her husband, was the owner of a large estate, from which he derived, together with his avocations, a large annual income, and she prays for alimony, maintenance and costs, including reasonable counsel fees. Upon the trial of the case below, the chancellor divorced appellant from appellee a vinculo matrimonii, but refused to award her either maintenance or alimony, from which latter part of the decree she is in this court on appeal.

We think the allegations of the petition are sufficient to warrant both the claims for divorce and alimony; but if there be any weight to the contention that it was necessary, in order to maintain her claim for alimony, that she should have alleged that the separation was without her fault, it is clear that appellee's specific allegation in his answer, that the separation was without his fault, cured such defect.

We do not think that appellant lost her residence in Kentucky by the fact that, in order to maintain herself, she left the State; she was still the wife of appellee, and his residence was her residence, and continued to be so during all of the time that she was absent. The separation commenced in Kentucky, and if it be necessary, in order to obtain a divorce on the grounds relied upon in this action, that her home should have been in Kentucky during the five years specified, we think that the facts in this case show that appellant had the necessary residence here. The appellant was not competent to testify in this case, and the exception to her deposition was properly sustained.

The record shows a lamentable state of affairs existing between the parties hereto. They are both people of high standing, culture and social position, and it is a matter of deep regret that their marital life should have been so unfortunately disrupted.

Appellant is shown, by all of the evidence in this case, to be a woman of the highest education and refinement, deeply religious in her life, gentle in her manners, and considerate of all with whom she came in contact; when she went to the home of appellee, as his wife, she seemed to have been a happy, bright and cheerful woman; she took up her household duties at

once, and discharged them, during the time that she remained in the house of appellee, faithfully and well. All of the witnesses agree upon this, whether they have deposed for her or for her husband. The household work cast upon her was hard and onerous, and she often performed domestic labor which must have severely taxed both her strength and patience, but this record fails to show that she, at any time, complained of, or repined at, the hardness of her lot.

We are not disposed to impute any blame to appellee for this state of affairs; it may have been (and he is entitled to the presumption in the absence of evidence on that point) that there was great difficulty in obtaining household help in London, and that it was the result of his inability to obtain domestic servants that his wife had to perform the severe duties of which the witnesses speak. Perhaps we could not better illustrate her self-sacrificing fidelity to her husband's interest than by relating that the evidence shows that upon one occasion where there was a political convention being held in London, before which her husband was a candidate for nomination, his wife left the side of her dead mother, where she was watching, in order to superintend and assist in preparing dinner at his home for the entertainment of his political friends. It does not appear that this was done at the request of appellee, and we freely acquit him of any insistence that she should perform this work under these sad circumstances; but the fact does show how loyal she was to him, and how far she would sink her own sorrow in order to further his interest.

The appellee is shown, by the evidence in this case, to be a man of a high order of intellect; that he possesses great energy and financial ability, and that during all of the time that he and appellant lived together he was an exceedingly busy man. He had very large interests in various enterprises; he was a speculator in timber and coal lands in Eastern Kentucky; was president of a bank; director and large stockholder in coke and coal mining companies and other large corporations, and was absent from home a large part of his time. The evidence shows that, while he was never guilty of physical violence towards the appellant, he treated her, constantly, with cold indifference and neglect; that he was habitually rude to her lady visitors, and that his conduct greatly humiliated and depressed her. Appellee would leave home and be gone for several weeks at a time, without having informed his wife of his proposed departure, and upon his return, after such prolonged absence, would greet her with as little warmth of affection as if he had returned from an absence of a few hours only.

We do not believe that appellee ever stinted appellant in money matters, or that she ever lacked, by reason of his fault, anything to make her physically comfortable; but we do believe that his conduct towards her was so rude, cold and negligent as to make it apparent that she had lost his love and affection. A woman, as gentle, faithful and loyal as this record shows appellant to have been, is entitled to something more from her husband than food, raiment and shelter, and that to such a woman, living, as the wife of appellee, under the conditions shown by this record, was intolerable. This court is of opinion that appellant had the right to leave the fireside of appellee, when she found that she had lost his love, and realized that she was his wife in name only.

The evidence in this case shows that appellee himself realized that he had not treated the appellant properly, as he confessed to one of his own witnesses; it shows that appellant is destitute and without any means of support, and we believe that she is entitled to a reasonable alimony. It is not necessary, in order to reach this conclusion, to hold that where the wife is destitute she is entitled to alimony without regard to whether or not the separation was the result of her fault, where the judgment of divorce is based on the five years' statute, although this court, in the case of *Newsome v. Newsome*, 95 Ky., 838, so held. In that case it is said: "But either may sue for and obtain a divorce by simply alleging and proving the fact they have lived apart, without any cohabitation, for five consecutive years, no judicial investigation respecting cause of separation, nor inquiry as to who is in fault, in meaning of the statute, being required in order to determine the right to divorce. It, therefore, seems to us, giving the statute a reasonable construction, the husband is required, in a case like this, to pay costs of each party without inquiring whether the wife is in fault. And as it is well settled an allowance for services of the wife's attorney, when legally authorized, may be taxed as costs, and no complaint is or could be fairly made that the amount is excessive, it was not error to make it. It seems to us equally manifest that provision of the statute denying alimony to the wife, except 'on a divorce obtained by her,' was intended to apply in that class of cases where a divorce obtained by the husband involves fault of the wife, not in cases like this, where, as either may maintain the action, it is not a material or legitimate inquiry, in determining the right, who is in fault."

It seems to us that the case at bar can not be distinguished from the case of *Irwin v. Irwin*, 96 Ky. Reps., 318, where this court, in speaking of the conduct of the husband toward the wife as constituting the basis of her right to a separation from him, say: "There never was any act of violence committed by the husband upon the wife, nor any threats of violence made, but such cruelty may be inflicted upon the wife by exhibitions of want of affection and a disregard of the marital relations as in the results or effect on the wife would exceed in punishment any blow that might be inflicted upon her person. \* \* \* The coldness and indifference on the part of the appellee toward his wife for several years was such as to render her life almost intolerable. And while his conduct can not be said to be inhuman, it bordered on a degree of cruelty that must have tended to destroy her peace of mind, and render her an unhappy woman."

Upon the principle thus announced this court affirmed a judgment divorcing the parties *mensa et thoro*, and awarding the wife maintenance. Under this judgment the parties lived separate and apart for five years, when, without new provocation upon the part of the husband, they were divorced *vinculo matrimonii*, and alimony awarded the wife. (20 Ky. Law Rep., 1761.)

The court in the case cited ratified and approved the wife's leaving her husband for the precise character of mistreatment of which appellant is complaining, and we think her claim is as meritorious as that of the wife in the *Irwin* case.

We are not impressed with the offer of reconciliation made by appellee.



The circumstances and details of this transaction stamp it as an act of strategic diplomacy rather than a proposition of reconciliation flowing from a loving and contrite heart. In regard to the amount of the alimony to be allowed, we think that, considering the estate of appellee, the social standing of both himself and wife, his ample fortune, and his general financial ability, there should be awarded the wife an allowance of such an amount as will, if invested with reasonable prudence, produce an income sufficient to support her comfortably, and which will not be disproportionate to appellee's fortune; the record does not show with sufficient clearness the wealth of appellee, and upon return to the court below the case should be referred to a commissioner, who should hear evidence and report to the court a lump sum to be allowed appellant as alimony, having reference to the principle in regard thereto herein enunciated.

We think the counsel for appellant should be allowed the sum of \$750 additional for their services \$500 for their services in this court and \$250 for their services in the court below, to be taxed as costs.

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

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WADE v. FOSTER.

(Filed January 13, 1908—Not to be reported.)

Assignment for benefit of creditors—Agency—Bills and notes—Fraud—The Fulton Bank made an assignment for the benefit of its creditors to T. Afterwards A. and B., the uncle and brother of the cashier, agreed to take the assets of the bank and assume its liabilities. A. was substituted as assignee, and took charge of the affairs of the bank. W. Bros. were largely indebted to the bank, and a compromise was made with the assignee, by which a large amount of property was transferred to the assignee. N. held a note against W. Bros. for \$8,700, on which R. was bound as surety. He held a mortgage on a part of the property which had been transferred to the assignee, to indemnify him as surety. About \$5,000 of this note had been paid. In order to induce R. to surrender his mortgage lien the assignee agreed to pay the remainder due on the note. Instead of paying off this note the assignee induced N. to assign it to B. without recourse, who paid the amount due on same. B. assigned this note to appellee, who instituted suit on it. Appellee, under our statute, took the note subject to all the defenses which were available against it in the hands of B. Held—That under the arrangement with the Fulton Bank A. and B. became partners in administering the affairs of the bank and assuming its liabilities, at least B. became chargeable with constructive notice of all acts done by his associate as his agent, and that to permit A., as assignee, to take charge of the property covered by the lien of the surety on the promise to pay the debt, and instead of doing so to transfer it to B., would be to sanction the commission of a fraud. Appellee occupying no better position than his assignor, can not enforce the collection of the note.

Robbins & Thomas and J. W. Cutrer for appellant.

O. S. Tenney and H. C. McKee for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hobson.

On September 27, 1890, the Fulton Bank made a deed of assignment to R. T. Tyler. A. T. Mitchell was the cashier of the bank, and on October 18, 1890, William Mitchell, an uncle of his, and R. A. Mitchell, another nephew, made a written contract with the stockholders of the bank, by which they assumed all the liabilities of the transferring stockholders and assumed their position, the Mitchells to have the assets of the bank and settle with the creditors. Pursuant to this arrangement, which was signed by substantially all the stockholders, as well as by William and R. A. Mitchell, they were placed in possession of the bank's assets, Tyler resigned and R. A. Mitchell was appointed as assignee. Appellees, the Wade Bros., under various firm names, were creditors of the bank for something like \$8,000, and owed it something like \$18,000. They were doing business in Mississippi, and Mitchell filed suit as assignee against them in the circuit court of Coahoma county, Mississippi, and took out various attachments. A compromise was made, which was reduced to writing, by which Wade Bros. conveyed to Mitchell as assignee a large amount of property owned by them in Mississippi.

By the terms of this conveyance it was stipulated that Mitchell, as assignee, was to pay off to the Continental National Bank a note due by Wade Bros. on which J. M. Reid was surety, which was originally given for \$3,700, but on which something over \$5,000 had been paid. To secure Reid as surety on this note a deed of trust had been executed to him by Wade Bros. on a part of the property conveyed to Mitchell sufficient in value to protect him from loss. He refused to surrender this, unless Mitchell assumed and agreed to pay the debt, and so in the compromise the above stipulation was put in the deed, which was duly recorded. Mitchell, as assignee, took possession of the property conveyed to him and then, instead of paying off the note to the Continental Bank as he had agreed to do, procured the bank to assign the note to William Mitchell without recourse, and William Mitchell paid to the bank the balance due on the note. Subsequently William Mitchell assigned the note to appellee, Robert M. Foster, who filed this suit upon it and recovered judgment in the circuit court.

It is insisted for the appellee that the assumption of the debt by R. A. Mitchell, as assignee, did not bind William Mitchell, and that, notwithstanding this, he was at liberty to buy the note from the bank and recover on it against both Wade Bros. and Reid. Foster, as the assignee of William Mitchell, took the note under our statute subject to all the defenses which were available against it in the hands of the assignor. So the only question in the case is, could William Mitchell have maintained the action had he remained the owner of the note?

By the contract made by William and R. A. Mitchell with the stockholders of the Fulton Bank they took the place of the stockholders, becoming liable to the creditors for the payment of their debts, and being entitled to all the surplus assets of the bank after the debts were paid. In this venture William and R. A. Mitchell were partners. R. A. Mitchell, as assignee, represented both himself and his partner, William Mitchell, in the compromise made with Wade Bros. By the terms of this compromise he obtained for the benefit of him and partner the possession of and title to

a large amount of valuable property, which had been pledged for the payment of the note in controversy, and the mortgage executed to secure Reid as surety was released upon the express stipulation that he would pay this note. He held this property as assignee for the benefit of the creditors of the bank, and also for the benefit of himself and his partner, William Mitchell, who in substance were the owners of the assets of the bank, subject to the payment of the debts, and were by the terms of their contract personally liable for the debts if the assets were insufficient to pay them. William Mitchell, therefore, by the compromise, obtained from Wade Bros. a large amount of property, which was held by his partner, R. A. Mitchell, as assignee, for the purpose of discharging the debts, for which he was personally liable. He could not take the benefit of this contract without its burdens. He can not be permitted to apply the property to the discharge of the debts which he owed to the creditors of the Fulton Bank, and at the same time repudiate the terms on which the property was conveyed. He took the benefit of the conveyance. It must be presumed that he had knowledge of its terms, for he was charged with constructive notice of it. He has never repudiated the contract or offered to return the property. On the contrary, he has allowed it to be converted and applied in the liquidation of the debts of the bank. To permit him to keep the benefit of the property and not pay the note to the Continental Bank would be to sanction fraud and sharp practice. R. A. Mitchell, his partner, made the compromise and obtained the property upon the agreement that he would pay this debt. The same R. A. Mitchell, his partner, as his agent, made the arrangement for the note to be transferred by the Continental National Bank to him upon his paying to the bank the balance due on it. In both transactions he was represented by the same agent, R. A. Mitchell, and in equity must be held to have paid the money to the bank in discharge of the note according to the stipulations of the deed.

Judgment reversed and cause remanded, with directions to dismiss the petition.

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WADE, &c. v. BENT.

(Filed January 18, 1903—Not to be reported.)

**Assignment for benefit of creditors—Agency—Fraudulent conveyances—**  
 The Fulton Bank made an assignment for the benefit of its creditors to T. Afterwards A. and B., the uncle and brother of the cashier, agreed to take the assets of the bank and assume its liabilities. A. was substituted as assignee, and took charge of the affairs of the bank. W. Bros. were largely indebted to the bank, and a compromise was made with the assignee, by which a large amount of real estate in Mississippi was transferred to the assignee. A part of the property thus conveyed to the assignee was a tract of land of about 1,400 acres, known as the Little Cypress World, worth about \$14,000, on which was a lien for \$7,400, of purchase money due a railroad company. As a part consideration of the transfer it was agreed that the assignee should pay off this lien debt. Instead of doing this, the assignee agreed with the railroad company that, without any judicial proceeding, it would advertise and sell the land and buy it for \$2,316.22. This was done without any notice to W. Bros., and its bid assigned to B., and he paid the balance of the purchase money.

amounting to \$6,100, and took an assignment of the notes for same. After getting the notes in this way B. assigned them to his daughter, the appellee, who instituted this action to recover the amount thereof. Held—That under the arrangement with the Fulton Bank A. and B. became partners in administering the affairs of the bank and assuming its liabilities, at least B. was chargeable with notice of the trust, and his daughter, as assignee of the notes, occupies no better position than her father. While the deed does not state the agreement to pay the debt of the railroad company, it is proven by parol. The proof shows that A., the assignee, participated in a fraudulent arrangement with the railroad company, by which it obtained title to the land and transferred same and the notes to B., who is affected with such fraud, and his daughter, as assignee, can not enforce the collection of the note.

J. W. Cutrer, Robbins & Thomas and John W. Ray for appellants.

H. C. McKee and O. S. Tenney for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hobson.

The facts in this case are the same as those in the case of E. B. Wade, &O. v. Robert M. Foster, ante, —, this day decided, with the following exceptions: Among other property conveyed by Wade Bros. to R. A. Mitchell, as assignee, in the compromise therein referred to, was a tract of land of about 1,400 acres, known as the Little Cypress World, and of value about \$14,000. There was a lien on this tract for \$7,400 of purchase money due to the Louisville, New Orleans & Texas Railway Co. In the compromise it was agreed that Mitchell, as assignee, would pay this debt to the railway company, although it was not so stipulated in the deed. Instead of paying the debt to the railway company, R. A. Mitchell procured it to sell the land under the terms of the deed, by the laws of Mississippi, and to buy it in for \$3,816.22, and then to assign its bid to William Mitchell, and also to assign to him the notes for the purchase money upon his paying the balance of the notes, \$6,100. The sale was made after posting notice for ten days without judicial proceeding and without Wades knowing anything about it. The railway company wanted its money, and R. A. Mitchell arranged with it to pay the debt in this way, and the assignments were made to William Mitchell without recourse. Thus the title to the property, which really belonged to the assets of the Fulton Bank, was put in the name of William Mitchell in violation of the duty of the assignee to the creditors of the bank as well as the contract made by him with the Wade Bros. The railroad company knew the land was worth much more than the debt, and was unwilling to let it go unless its debt was paid. R. A. Mitchell fixed in advance the amount, \$3,816.22, at which the land was to be bid in, and agreed that the balance of the debt should be paid on the assignment of the notes.

Although the entire consideration of the deed was not correctly stated in it, the real consideration may be shown by parol evidence, and the proof leaves no sort of doubt that it was a part of the consideration of the deed that R. A. Mitchell would assume and pay this debt to the railroad company.

After getting the notes in this way William Mitchell assigned them to his daughter, Mrs. L. M. Bent, who filed this suit to recover on them.

Mrs. Bent stands in her father's shoes, and he could not be allowed to keep the property and repudiate the terms of the compromise under which it was conveyed to his partner, R. A. Mitchell, who also negotiated the transaction with the railroad company. But aside from all this, and independently of the agreement of R. A. Mitchell to pay this debt, William Mitchell has no standing in equity for the enforcement of this note. By the terms of the deed the land was conveyed to R. A. Mitchell, as assignee, subject to the unpaid purchase money. He had notice of the debt, and took the land subject to the lien. He held the land, first, in trust for the payment of the debt, and this trust he was bound honestly to administer in good faith, for the protection of Wade Bros., the makers of the notes. They had a right to demand of him good faith in dealing with the property. In a similar case the Court of Appeals of New York say: "While, as we have said, no strict and technical relation of principal and surety arose between the mortgagor and his grantee from the conveyance subject to either mortgage, an equity did arise which could not be taken from the mortgagor without his consent, and which bears a very close resemblance to the equitable right of the surety, the terms of whose contract have been modified. We can not accurately denominate the grantee a principal debtor, since he owes no debt and is not personally a debtor at all, and yet since the land is the primary fund for the payment of the debt, and so his property stands specifically liable to the extent of its value in exoneration of the bond, it is not inaccurate to say that as grantee, and in respect to the land and to the extent of its value, he stands in the relation of a principal debtor, and to the same extent the grantor had the equities of a surety." (*Murray v. Marshall*, 94 N. Y., 611; *Pomeroy's Equity*, section 1205; *Willard v. Worsham*, 76 Va., 392; *McClure v. Melton*, 18 L. R. A., 723.)

There is no question that the land was worth much more than the amount due upon it, and could have been sold for a surplus after paying the debt. Wade Bros. had a right to demand of R. A. Mitchell, as assignee, when he took the land subject to the lien debt, that he would deal with them fairly, and he can not be permitted in equity to enter into an arrangement with the railroad company by which the land should be bought in by it for a nominal sum, and its bid assigned to William Mitchell and the notes also to be assigned to him upon his paying the amount due the railroad company, for this would be to permit a mere subterfuge to defeat the contract, and William Mitchell can not be allowed to take advantage or profit by the wrong of his partner and representative, R. A. Mitchell. The arrangement made by R. A. Mitchell with the railroad company was not in keeping with that good faith which equity demands of the grantee of a deed for the protection of the grantor under such circumstances, and William Mitchell must be held to have paid and discharged the note to the railroad company, and can not be allowed to set it up against the grantors in the deed.

Judgment reversed and cause remanded, with directions to dismiss the petition.

## COMMONWEALTH, USE, &amp;c. v. STONE, &amp;c.

(Filed January 18, 1908.)

**Sheriffs—Bonds—Sureties—County levy—**The fiscal court of Nicholas county made a levy for county purposes in 1897 of 59 cents, 9 cents in excess of the constitutional limit, and the sheriff having collected \$3,200 under this void levy, this action was instituted against the sureties of the sheriff on his general official bond executed under section 5556, Kentucky Statutes, to recover same. Held—That while the liability of the sheriff for said amount is unquestioned, his sureties are not bound for such illegal levy as their liability is measured by the terms of the bond.

Winfield Buckler and J. H. Minogue for appellants.

Chas. M. Wood and John I. Williamson for appellees.

Appeal from Nicholas Circuit Court.

Opinion of the court by Chief Justice Burnam.

The fiscal court of Nicholas county in 1897 levied a tax of 59 cents on the \$100 for county purposes, 9 cents in excess of the constitutional limit; and the sheriff of the county, S. A. Ratoliff, collected about \$3,200 under this void levy, and this suit was instituted against the sureties upon his general official bond to recover the amount so collected. The only difference between this case and the case of *Whaley, &c. v. Commonwealth, &c.*, 23 Ky. Law Rep., 1292, is that that suit was on the revenue bond required by section 4133 of the Kentucky Statutes, which reads: "We, A. B., sheriff, and C. D. and E. F., his sureties, bind and obligate ourselves, jointly and severally, to the Commonwealth of Kentucky that said A. B., sheriff, shall faithfully perform his duties."

Whilst this is upon what is generally termed the sheriff's general official bond, required by section 5556 of the Kentucky Statutes, and reads as follows: "We, A. B., the principal, and C. D. and E. F., sureties, hereby covenant to and with the Commonwealth of Kentucky that said A. B., of ——— county, shall, by himself and deputies, well and truly discharge all the duties of said office, and pay over to such persons at such times as they may be respectively entitled thereto, all money that may come into his or their hands as sheriff."

In both cases the plaintiff sought to recover of the sureties the same fund and upon the same grounds, and to support their contention substantially the same argument is made and the same authorities relied on in this case as in that. The case is not entirely free from difficulty as respectable authorities have been found to support appellant's contention, but we conclude in the *Whaley* case that the best line of reasoning and the preponderance of the authorities supported the conclusion there reached. As the opinion in that case contains a full statement of the facts and reasons for our conclusion, and the court has determined to stand by the opinion delivered in that case, it is unnecessary to repeat them in detail in this proceeding.

The responsibility of the sureties must be measured by the terms of the bond as made out on strict construction. In *Osenton's Adm'x v. Burnett*, 12 Ky. Law Rep., 610, it was held that where a county court had levied a tax to satisfy a judgment against the county and appointed a collector to

collect it, and required a bond therefor with sureties, that the sureties were not liable for the excess of money collected beyond the satisfaction of the debt named in the order requiring the bond. The court said: "The liability of the securities in an official bond is measured by its terms. The reasonable and fair construction of the terms of this bond is to confine the liability of the sureties to the work required of Burnett in collecting sufficient funds to pay the judgment and cost of proceeding. If the collector in fact collected more than was sufficient for that purpose, or might have done so with reasonable effort, he may be liable to the county, but not so the securities."

There is no question about the liability of the sheriff for the funds collected by him, but the question now to be determined is as the liability of the sureties; and whether there is such a difference in the covenant of the two bonds quoted supra as would make the sureties liable for the illegal act of the principal in the one case and not in the other.

It was held in *Howard v. Commonwealth*, 20 Ky. Law Rep., 1411; *Pulaski County v. Watson*, 21 Ky. Law Rep., 61; *Catron v. Commonwealth*, 21 Ky. Law Rep., 650, and *Adair v. Hancock Deposit Bank*, 21 Ky. Law Rep., 984, that where a sheriff executed the bond required by section 4183, that the sureties thereon were liable not only for the State revenue, but also for the county levy; that all these bonds were intended to cover substantially the same liabilities and were cumulative in character, and so far as we are able to discover, the obligation of the sureties in each of them is substantially the same. As said in *Whaley v. Commonwealth*, "they covenant that their principal shall perform every act which the law required of him as such official to perform; and that if he fails to do that which he is required by law to do in the discharge of his official duty, they will answer for such default. But no act prohibited by the Constitution can ever become a duty."

We, therefore, conclude that the sheriff's liability for the funds sued for is not covered by the undertaking of his sureties in the bond sued on in this proceeding, and no recovery can be had; and that the chancellor properly sustained the demurrer.

Judgment affirmed.

## SECOND NATIONAL BANK OF ASHLAND v. FERGUSON.

(Filed January 13, 1903.)

Contracts—Notaries—Estoppel—Corporations—Appellee was individual bookkeeper for appellant at a salary of \$50 a month for several years previous to July 18, 1893. He was also a notary public, and received the fees for making protests. On that day the bank reduced the salaries of its officers, and by resolution it was provided that the salary of the individual bookkeeper be fixed at the rate of \$600 per annum, and he shall make all protests free. On the next day appellee had a conversation with the president, and told the president: "Whatever you say in the directors goes, and if you say that you will see that I get this I will go to work?" The president said: "That is all right, you were not asking too much, anyhow." The board took no further action in the matter. Appellee drew his salary of \$50 monthly, making no charge for notarial fees and no demand of the money.

He left the service of the bank in February, 1898, and afterwards brought this suit against it to recover \$754.50, the amount of his notarial fees between July 18, 1898, and the time he left the bank. A judgment was rendered in favor of appellee, from which this appeal is prosecuted, insisting that the president had no authority to make the agreement, while appellee rests his right to recover on the ground that a contract by a public officer to receive less for his official services than the charges authorized by law or to discharge his duties gratuitously is contrary to public policy, and void. Held—That appellee had the right to accept a lumping sum, covering both his official fees and his personal services, without contravening public policy, when the sum so accepted is greater than the fees, and the arrangement is fair and fully understood. The claim for fees having been satisfied by the monthly payment of \$50, can not now be sued upon. He who accepts the money of another knowing that it is paid in satisfaction of a claim, will be estopped, after thus remaining in the employment, to demand greater pay for his services.

Hager & Stewart for appellant.

P. K. Malin for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Hobson.

For several years previous to July 18, 1898, appellee was individual bookkeeper for appellant at a salary of \$50 a month. He was also a notary public, and received the fees for making protests. On that day the bank reduced the salary of all its officers, and by a resolution of the directors it was provided that "the salary of the individual bookkeeper be fixed at the rate of \$600 per annum, and he shall make all protests free of charge." Immediately after the adjournment of the board he was notified of its action and went to see them. All of the directors but two had left. These told him in substance that this was the best they could do, and that if he did not want the place at that, they could get some one else for less. He then left, and the next morning early came down to the bank and told the president that he had had a talk with his father, who was also one of the directors, and had a proposition to make to him; that he would come back and work for the salary of \$50 a month, provided the bank would give him \$10 a month for notarial fees. The president said: "You know I can't do anything of that kind; you will have to see the directors about it." Appellant replied: "Whatever you say in the directors goes, and if you say that you will see that I get this I will go to work." The president said: "That is all right; you were not asking too much, anyhow." At the next meeting of the directors appellee asked the president if he had brought the matter before them, and he said no, he had forgotten it. Nothing more was said about the matter, and appellee drew his salary of \$50 monthly, making no charge for notarial fees and no demand of the money. He left the service of the bank in February, 1898, and in September, 1898, filed this suit against it to recover \$754.50, the amount of his notarial fees between July 18, 1898, and the time he left the bank. In the circuit court he recovered judgment, and the bank appeals. The above are the facts as shown by appellee's own testimony. There is little controversy in the proof, the only difference being as to the conversation between him and the president the next morning, the



president stating that he agreed simply to refer the matter to the directors, but we do not regard this as material. Appellee knew very well that the board of directors were the proper authorities to fix the salaries of the officers of the bank. He knew that they had fixed his salary at \$50 a month, including notarial fees, and he also knew that the president of the bank had no authority to make any contract with him not warranted by the action of the board of directors. He does not, therefore, sue for the \$10 a month, or base any claim upon what took place between him and the president of the bank. His counsel rests his right to recover on the ground that a contract by a public officer to receive less for his official services than the charges authorized by law, or to discharge his duties gratuitously, is contrary to public policy, and void, and, therefore, appellee is entitled to recover the legal fees for his services as notary public.

When appellee remained in the bank after the board of directors had, by resolution, fixed his salary and received month after month from it the amount of salary thus fixed by the board, without demanding more or asserting any claim for other compensation for his services, he must be conclusively held to have rendered the services on the terms proposed by the board, and to have accepted those terms. When at the end of each month the \$50 was paid to him it was paid not only in satisfaction of his services as bookkeeper, but also in satisfaction of his services as notary public. His fees as notary public were then earned, and he knew the amount of them. The agreement before hand to commute his fees as notary public, or to assign them to the bank, was not binding on him (*Ohio National Bank v. Hopkins*, 8 App. Cas., D. C., 146), but when after the services had been rendered and the fees earned, he accepted a gross sum in satisfaction of his fees and as compensation for his work as bookkeeper, a different question is presented, for he had a right to assign to the bank or to anybody else his fees for services already rendered. (*Field v. Chipley*, 79 Ky., 260.) The case of *Holt v. Thurman*, 28 Ky. Law Rep., 82, was the case of the assignment of unearned fees or salary. If at the end of any month he had refused to accept the \$50, and had demanded his fees on the ground that his legal fees as notary public were more than \$50, the contract referred to would have been no bar to a recovery of these fees, for the reason that a contract in advance by a public officer to take less than the legal fees for his services can not be enforced. (15 Amer. & Eng. Ency. of Law, 965, 2d edition.) But when he accepted the \$50 each month in full of his services as bookkeeper and also of his fees as notary, he can no more maintain an action for his fees as notary than for his services as bookkeeper, for one has been paid just as truly as the other. The \$50 a month was not paid him alone for his services as bookkeeper. It was paid him in satisfaction not only of these services, but also of his services as notary public, and was accepted by him as such, for he made no demand of anything more until after he left the service of the bank; and before July 18, 1893, his notarial fees were paid along as the work was done, and when after this, they were not paid in this way, he was bound to know that the \$50 was paid in satisfaction of these fees as well as his salary as bookkeeper. The court can not inquire what part of the \$50 was paid on one account or the other, for in this we have nothing to guide us. We can not say the \$50 was paid for appellee's services

as bookkeeper, for that is not the fact. The acceptance of a lumping sum, covering both his official fees and his personal services, contravenes no public policy, when the sum so accepted is greater than the fees, and the arrangement is fair and fully understood.

The claim for fees having been satisfied by the monthly payments of \$50, can not now be sued upon. He who accepts monthly for his services the money of another, knowing that it is paid in satisfaction thereof, will be estopped, after thus remaining in the employment, to demand greater pay for his services. (*Lexington v. Rennick* 105 Ky, 779.) The facts of this case illustrate the justice of this rule, for the bank, acting on the idea that it did not have to pay these notarial fees, failed to collect something like three-fourths of them from its customers, and if appellee is now allowed to recover, a loss will be thrown upon it without remedy. On the undisputed facts shown by the evidence the court should have peremptorily instructed the jury to find for the defendant.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

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HOWARD v. COMMONWEALTH.

(Filed January 18, 1903—Not to be reported.)

1. Criminal law—Malicious shooting and wounding—Evidence—Malice—On the trial of an indictment for malicious shooting and wounding, where the proof shows that the accused shot the witness in a crap game, no direct evidence of malice was required as the jury was authorized to infer malice from the circumstances proven.

2. Appeals—Evidence—The Court of Appeals will not reverse a criminal case for want of sufficient evidence if there is any evidence tending to establish the guilt of the accused.

3. Instructions—An instruction under section 1242, Kentucky Statutes, for shooting and wounding in sudden heat and passion which omitted the word "previous" before "malice" was not prejudicial to appellant.

W. T. Burch for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge Paynter.

The appellant was indicted for malicious shooting at and wounding George Boone with intent to kill him. The jury found him guilty and fixed his punishment at four year's confinement in the penitentiary.

A reversal is sought because, first, the verdict is not sustained by the evidence; second, the court gave instruction No. 2; third, misconduct of the Commonwealth's attorney on the trial of the case.

This court has frequently held that it will not reverse a case for want of sufficient evidence, if there is any evidence tending to establish the guilt of the accused. The injured party testified that he and the appellant at a crap game had a dispute over a small piece of money; he arose from the game and while putting the money in his pocket the appellant shot and wounded him. This evidence, certainly most strongly tended to establish the appel-

lant's guilt. The jury heard the evidence introduced by the appellant, and it was the judge of the weight to be attached to it, as well as that offered by the Commonwealth. It is not the province of this court to determine the question of the weight and credibility of the evidence in a criminal or penal prosecution; it determines alone the question as to whether there is any evidence tending to establish the guilt of the accused.

It is urged that there was no evidence of malice. If the appellant shot Brown under the circumstances detailed by him, the jury was authorized to infer malice. Malice may be inferred by a jury from acts or facts proven in a prosecution for felony as any other fact may be inferred from evidence on the trial of civil cases.

Instruction No. 2 was on the question of shooting and wounding in sudden heat and passion, and is based on section 1242, Kentucky Statutes, which reads as follows: "If any person shall, in a sudden affray, or in sudden heat and passion, without previous malice and not in self defense, shoot at, without wounding, or shoot and wound another person, or wound a person other than the person shot at, with a gun or other instrument, loaded with ball or other hard substance, without killing such person, or shall, in like manner, cut, thrust or stab any other person with a knife, dirk, sword or other deadly weapon, without killing such person, he shall be fined not less than \$50 nor more than \$500, or confined in the jail not less than six months nor more than one year, or both, in the discretion of a jury."

It is contended that it is erroneous because, first, there was no evidence of malice and none from which it might be inferred; second, that the word "previous" was not used in the instruction.

As to the first objection stated it is sufficient to say that the penalty is only imposed when the shooting and wounding is in sudden heat and passion without previous malice. The Commonwealth is not required to prove malice to have this instruction given to the jury, for it is given on a state of facts from which the jury may infer there was no previous malice.

The court omitted from the instruction the word previous. Malicious shooting and wounding is a felony. Shooting and wounding in sudden heat and passion without previous malice is a misdemeanor under the section quoted. It would have been better for the defense had the court omitted "without malice" as well as the word "previous." If the phrase "without previous malice" is omitted, then the jury could have found the defendant guilty of a misdemeanor, instead of a felony, if it believed the shooting was done in sudden heat and passion, though with previous malice. The defendant was not prejudiced by the omission. It is true the Commonwealth's attorney asked an improper question, but the court refused to allow the witness to answer. This is not a cause for reversal.

Judgment affirmed.

Judge Barker not sitting.

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WILSON, &c. v. FLANDERS, &c.

(Filed January 14, 1903.)

Executions—Liens—Pleadings—Appellees, judgment creditors of W., caused executions to be levied on eleven acres of land belonging to him and became

the purchasers at sheriff's sale. Within one year after the sale they gave W. notice of motion for writ of possession as required by section 1689 of Kentucky Statutes. Before the writ was awarded W. offered to file an answer alleging that he was owner of the land, and that previous to the levy of the executions had mortgaged same to M. for \$3,500, which would not be due for twenty years and that by reason thereof appellees acquired only a lien on said land subject to the prior encumbrance as provided by section 1709, Kentucky Statutes. The lower court refused to allow this answer to be filed and awarded the writ of possession to appellees, from which this appeal is prosecuted. Held—That the lower court improperly refused to permit the answer of W. to be filed and erred in awarding a writ of possession as appellees obtained only a lien on the land subject to the prior mortgage, and appellees were not entitled to the writ of possession.

Turner & Hazelrigg for appellants.

G. E. Coons and C. W. Goodpaster for appellees.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Settle.

Appellees, W. B. Flanders and others, judgment creditors of the appellant, Johnson Wilson, caused executions to be levied on eleven acres of land in Bath county of which he was the owner. On April 10, 1899, it was sold by the sheriff, and appellees became the purchaser.

After procuring of the sheriff a deed of conveyance to the land, appellees gave appellants written notice, as provided in section 1689, Kentucky Statutes, that they would on February 23, 1900, enter motion in the Bath Circuit Court for judgment for the possession thereof, which motion appears to have been duly made on the day named in the notice. The executions and sheriff's deed do not appear in the record, but as the motion for possession was made before the end of the year succeeding the execution sale, it may be inferred that the land brought two thirds of its appraised value. By the petition of Johnson Wilson's wife, which was taken as her answer, and filed on the day the motion was entered, she was made a party to the proceedings and claimed to own the land, but a demurrer was filed to the answer at the following term, and properly sustained, as the facts therein alleged failed to show title in her. During the latter term, and before the demurrer to Mrs. Wilson's answer was sustained, appellant, Johnson Wilson, offered to file an answer, and later an amended answer to appellee's motion, in which he set up title in himself to the land, and the existence of a mortgage thereon to one James McCue to secure a \$3,500 note held by him. The court refused to permit either the answer or amendment to be filed, but forthwith rendered judgment giving appellees possession of the land, and requiring appellants to pay the costs. From that judgment appellants prosecute this appeal.

While much is alleged in the answer and amendment by way of conclusion, they do not present the material facts, first, that a bona fide encumbrance in the mortgage to McCue of \$3,500 exists on the land which is of a date antecedent to the levy and sale under appellees' executions; and, second, that the mortgage debt is unpaid. It is true that the answer was not tendered until the term succeeding the motion for the writ of possession was

made, but an affidavit filed by his attorney shows that Wilson's age and feebleness (he was then eighty-one or eighty-two years of age) prevented an earlier offer to file it. So we are of the opinion that the lower court erred in refusing to permit the answer and amendment to be filed.

The mortgage to James McCue was executed December 30, 1893, by appellants, Johnson Wilson and Thomas Johnson, and embraced, in addition to the eleven acres in controversy, several parcels of land in Bath and Montgomery counties owned by them jointly, the consideration being a note of \$3,500 given for money loaned the mortgagors by the mortgagee, which note, by the terms of the mortgage, can not be "collected by law for twenty years." The genuineness of this mortgage appears to have been established by judgment of the Montgomery Circuit Court, where it was attacked upon the ground of fraud in an action instituted by appellees and others, judgment creditors of appellant, and the judgment of the circuit court was thereafter affirmed by this court. (*Johnson v. Johnson*, 29 Ky. Law Rep., 48.)

As already stated, appellees' notice and motion for the writ of possession were based upon section 1699 of the Kentucky Statutes, which provides that "the purchaser of land sold under execution and not redeemed as provided for in this article (that is, within a year from the date of sale), shall have the right, after obtaining a conveyance therefor (sheriff's deed), upon ten days' notice in writing to the defendant in the execution whose lands have been so sold, to enter a motion on the docket of the circuit court of the county where the lands are situated for a judgment for the possession of such lands."

It will be observed that the lands referred to in this section are such as are unencumbered by prior liens when sold under execution, for if encumbered, the purchaser at the execution sale will not be entitled to the possession, but acquires by his purchase a lien as provided by subsection 1 of section 1709, wherein it is expressly declared that "the purchaser at the sale shall acquire a lien on such property for the purchase money, and interest, at the rate of 10 per centum from the day of sale until paid, subject to the prior encumbrances."

Subsection 3 provides that "the defendant in the execution may redeem the property so sold by paying the original encumbrance with legal interest thereon, and by paying the purchaser his purchase money with 10 per centum per annum interest thereon."

The right of redemption here provided for seems to be extended beyond the time fixed by the statute in sales of unencumbered lands under execution, which is one year, and may be exercised by the defendant at any time during the continuance of the original encumbrance, and the lien in favor of the purchaser under execution. The present statute (section 1709) was reenacted from the Revised Statutes (volume 1, article 15, section 1), and is in language substantially the same, and this court, in *Atkins v. Emison*, 10 Bush, 13, in construing that statute, said: "It has been repeatedly held by this court that since the adoption of the Revised Statutes, the purchaser at the sale of real or personal estate upon which there was a bona fide encumbrance by mortgage, etc., acquired only a lien on the property for the purchase money paid by him and 10 per cent. interest, subject to the prior encumbrance. This is in fact the language of the act itself. The defendants

in the execution having failed to redeem the land, the only remedy left the appellant (purchaser) for the collection of his money was in resorting to a court of equity to enforce his lien, and in doing so it was incumbent on him to make all the parties interested defendants to the action. \* \* \*

"The legislature never intended by the act in question to deprive the owner of his title, but, on the contrary, not only permitted him to redeem it, but gave to the purchaser only a lien subordinate to the bona fide encumbrances preceding it, and in the disposition of the property, or its proceeds, under the judgment of a court of equity enforcing these liens, the remnant of the mortgaged estate belongs to the mortgagor. \* \* \*

"This lien for purchase money, made so by the statute, is in effect a junior mortgage, with the exception that when the purchaser acquires this lien by sale under execution it extinguishes the original debt, and the liability on the part of the original execution debtor no longer exists, the debt, or execution having been satisfied, the purchaser must look to the property on which this lien exists by reason of the execution sale for his indemnity, and nowhere else, as he agrees in making the purchase to pay the debt for the lien subject to the prior encumbrance."

We are of opinion, therefore, that appellees are not entitled to the possession of the land sold under their executions, but that they have only a lien thereon subordinate to the mortgage lien of McCue, and although the latter's lien can not be enforced until the expiration of the twenty years' time allowed by the mortgage for the payment of the note named therein, as it is further provided in the statute (subsection 5, section 1709) that "courts of equity shall have control of all encumbered property sold under execution, and the power to make all needful orders for the preservation, and forthcoming of the property, and its issues and profits, to satisfy the encumbrance, and to secure the rights of others," the chancellor under the power thereby conferred may, in an equitable action, with all the parties in interest before the court, grant such orders as will preserve the liens, and protect the rights of the parties, or he may, as provided by section 1691 of the statute supra, in this proceeding, and upon the return of the cause to the lower court, require such pleadings to be filed, and parties brought before the court, as may be necessary to a final equitable judgment in respect to the rights of all the parties interested.

Judgment reversed and cause remanded, with direction to the lower court to permit the answer and amended answer of Johnson Wilson to be filed, and to set aside the order awarding to appellees possession of the land, and for such further proceedings as may not be inconsistent with this opinion.

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ALEXANDER, &c. v. TEBEAU, &c.

(Filed January 14, 1903—Not to be reported.)

**Injunction—Nuisance—Base ball park—** Courts will not enjoin the proposed operation of a base ball park adjoining residence property as base ball is the great American game, and is not per se a nuisance. If it is permitted to become a nuisance the court can then afford ample remedy. The law is well settled in this State that an injunction against a proposed legitimate

business will not be granted simply because it is feared that it may become a nuisance, for the presumption is that it will be conducted in a proper manner. In order to warrant an injunction in such a case it must appear that the operation of the business is necessarily a nuisance. An injunction will be granted to prevent the defendant from closing up or obstructing an alley which belongs to and is appurtenant to a residence.

M. J. Holt for appellants.

Barker & Sullivan and P. B. & Upton W. Muir for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Burnam.

In this action the appellants, Sallie R. Alexander and Geo. H. Alexander, sought to enjoin the appellees, Geo. Tebeau, &c., from opening a base ball park in Louisville, Ky., on Seventh street, between Florence and Kentucky streets. As a cause of action they allege that the appellant, Sallie R. Alexander, owns a dwelling house immediately adjoining the park, and that the appellant, George H. Alexander, is her tenant; that the land on which it is proposed to operate a base ball park was subdivided many years since by its then owners, Margaret Dulaney and W. H. Dulaney, into lots for residence purposes; and that they sold and conveyed the lot on the northeast corner of the block to Albert Willis; that the boundary so conveyed called for Florence Place on the north and an alley ten feet wide running entirely through the block from Seventh to Eighth street on the south; and that she, in 1893, purchased the property from Willis; that her residence fronts on Florence Place and her coal house and stable on the ten-foot alley; that the alley and street are necessary for the use and enjoyment of her property; that the defendants have set posts about ten feet high across the alley preparatory to closing it and will fence in the greater portion thereof; that it is the purpose of the defendant, Tebeau, to conduct on the premises leased by him from W. H. Dulaney, for ten years, games of base ball, both on Sunday and week days, between professional players of the American Association; that the game will draw together a large number of disorderly and noisy characters, who will interfere with the enjoyment and use of their property as a home, and render it unfit for residence purposes, thereby greatly depreciating its pecuniary value, and ask that the defendant be enjoined from opening the ball park and closing the alley. The deeds from W. H. and Margaret Dulaney to Willis and from Willis to appellant are filed with the petition, and both call for the ten-foot alley in the rear of appellant's property. It is also alleged that the alley has since been used as shown on the plat at the time the property was divided for residence purposes.

A general demurrer was sustained to both paragraphs of plaintiff's petition, as amended, and their petition dismissed, and they have appealed. The law is well settled in this State that an injunction against a proposed legitimate business will not be granted simply because it is feared that it may become a nuisance, for the presumption is that it will be conducted in the proper manner. In order to warrant an injunction in such a case it must appear that the operation of the business is necessarily a nuisance. Thus in *Pfingst v. Senn*, 94 Ky., 556, a bill by neighboring residents in Louisville alleged the former use of premises as a pleasure garden, with ten

plus, dancing and band music till early morning; that the noise would keep the neighbors awake, to the detriment of their health and comfort; that crowds of idle and disorderly persons would be attracted and become a nuisance in the street; that this was not due to mismanagement, but inhered in the business, and that defendants proposed to re-open the place. In a well-considered opinion, the judgment of the lower court sustaining a demurrer to the petition was sustained, and this court said: "Among the rights to be enjoyed by a large class of persons in a crowded city is the privilege of attending places of open air amusement such as are sought to be condemned in the petition. Undoubtedly, if the operation of these grounds become a nuisance, the chancellor will, if there be no remedy at law obtainable by complainants, interfere in their behalf."

But the injunction was refused upon the ground that a threatened nuisance would not be enjoined when the thing complained of was not per se a nuisance, and the opinion is fortified by numerous citations from the opinion of this and other courts. It can not be said that the game of base ball is a nuisance per se. On the contrary, it has taken rank as the great American game, more generally patronized perhaps than any other. Of course, if permitted to degenerate into a mere rallying place for drunkards, rowdies, bullies and men of like kidney, both the criminal and civil law would furnish adequate relief to abate such a nuisance, but we can not in advance anticipate such to be the necessary consequence of its inauguration.

The second ground relied on for an injunction is "that defendants have taken steps to close up the ten-foot alley in the rear of plaintiff's property," presents a different question. They have no more right to fence up this alley on which her coal house and stable front than they would have to close Florence Place on which her residence fronts. It was dedicated to the public in the original plat subdividing the property into lots for sale, and the deed by defendant Dulaney, & Co., to their vendor, Willis, calls for it. We are of opinion that in so far as the petition sought to restrain defendants from fencing up or in anywise interfering with plaintiffs' right to the use and enjoyment of this alley that the petition set up a good cause of action, and the demurrer should have been overruled.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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MCALLISTER v. OHIO VALLEY BANKING AND TRUST CO.,  
ASS'EE.

(Filed January 15, 1903.)

Assignment for benefit of creditors—Contingent remainder—Appellant made a deed of assignment to appellee for the benefit of his creditors, in which he set forth a schedule of his property and added these words: "Also all other real and personal estate of every description owned by McAllister." Appellant was the owner of an interest in land contingent on the death of the life tenant, which was not considered by either party as of any value. The trust was settled without considering this property. Subsequently the life tenant died and appellant became the owner of the fee simple title to the land, and the assignee instituted this action, claiming that this property



passed under the deed. Held—That this contingent remainder is a vendible interest under section 21 of Kentucky Statutes, and passed to appellee under the deed of assignment. The question as to whether this interest passed under the deed was a question of law, and in nowise dependent on the belief of either party.

R. D. Vance for appellant.

Yeaman & Yeaman for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Barker.

On the 23d day of February, 1897, the appellant, John H. McAllister, being indebted to various persons, and unable to pay his creditors in full, executed and delivered a general deed of assignment to the Henderson Trust Co., conveying all his property, both real and personal, for the benefit of his creditors.

The Henderson Trust Co. afterwards consolidated with the appellee, Ohio Valley Banking and Trust Co., and the latter company acquired the rights, and undertook to execute all of the duties, of the Henderson Trust Co., necessary to carry into effect said trust.

The deed of trust, the terms of which are involved in this action, contained a schedule of property, both real and personal, specifically named by the assignee as passing under the transfer, and in addition to this schedule were these words: "Also all other real and personal estate of every description owned by said McAllister." In addition to the property specifically mentioned in said deed of assignment John H. McAllister was the owner of a contingent remainder in a large tract of land situated in Henderson county, Kentucky, his future interest in which was based upon the contingency of the life tenant, Dr. C. E. McAllister, of Chicago, dying without heirs of his body.

It seems not to have been considered by either the assignee or the assignor in the deed of assignment that this contingent remainder passed under the deed of assignment to the assignee. Subsequently to the execution and delivery of the deed of assignment the life tenant, Dr. C. E. McAllister, died, without heirs of his body, and the contingent remainder interest of appellant became a fee-simple estate in said land. The appellee, the trust company, then instituted proceedings in the Henderson Circuit Court to subject the interest of John H. McAllister in said land, claiming that the interest of the assignor passed to it under the deed of assignment. Upon trial in the court below the chancellor held that said interest passed by the deed of assignment, and that the fee-simple interest was vested in appellee for the benefit of the creditors of assignor. From this judgment appellant is complaining in this court.

The question as to whether or not the contingent remainder passed under the deed of assignment to appellee is one of law, and what the assignee and assignor may have thought about the matter is quite beside the question. The assignee undertook to convey to the assignor, in trust for his creditors, all of the property owned by him, whether real or personal, and if the contingent remainder constituted a vendible interest which passed by deed or

will, then it vested in the assignee, in trust for the creditors, whether the parties to the deed of assignment believed it so passed or not.

Section 76 of the Kentucky Statutes, among other things, provides: \* \* \* "And the deed (of assignment) shall vest in the assignee the title to all of the estate, real and personal, with all deeds, books and papers relating thereto belonging to the assignor at the time of making the assignment, except the property exempt by law shall not pass unless embraced in the deed."

Section 21 of the Kentucky Statutes provides: "Any interest in, or claim to, real estate may be disposed of by deed or will, in writing."

In the case of the Bank of Louisville v. Baumeister, 87 Ky., 6, it was held that a contract for an option to purchase real estate, at an agreed price, within a specified time, is enforceable, and such option may be sold, assigned or mortgaged.

In the case of White, Trustee v. White, 86 Ky., 602, passing upon this very question, this court said: "It is contended that by the common law a contingent remainder could not be sold by a decree of court, for the reason that the decree could operate on the title only, and as no title passed to the contingent remainderman until the happening of the contingency, there could be no sale in the interim by a decree of court. But section 6, article 1, chapter 63 of the General Statutes (now section 2341 of the Kentucky Statutes) provides: 'Any interest in, or claim to, real estate may be disposed of by deed or will, in writing.' This provision clearly embraces a contingent remainder interest in land, and as R. G. White conveyed the same by deed for the equal benefit of his creditors, the chancellor should have ordered the sale of said interest."

Counsel for appellant seeks to distinguish this case from the case at bar, because in the deed of assignment, in the case cited, assignee undertook to convey his contingent remainder by name, whereas, in the case at bar, the deed of assignment does not specifically mention the contingent remainder interest of appellant as passing under the deed.

We do not think the distinction sound. The deed of assignment, as before said, undertook to convey to appellee all of the property, whether real or personal, owned by appellant at the date of the assignment, and the statute provides that such a deed shall operate to pass all property of the assignee, whether real or personal, except exempt property, which is not mentioned in the deed of assignment. The only question in this case is whether or not a contingent remainder is a vendible estate which passed by deed or will in writing. In the case of Richard Overton v. Preston Means, 2 Ky. Law Rep., 211, this court said: "Whether an interest, by devise, in lands is vested or contingent, it is vendible, and subject to sale for the satisfaction of debts." It seems to us that the question whether or not appellant's contingent remainder interest in the land in question passed, under the deed of assignment made by him to appellee, is concluded against him by the authorities herein cited.

Wherefore, the judgment is affirmed.

## COMBS, &amp;c. v. COMMONWEALTH.

(Filed January 15, 1903—Not to be reported.)

Bonds to keep the peace—Forfeiture—Pleadings—Appellants were sureties on a bond in a penalty of \$500 that L. and B. would keep the peace, as required by chapter 2 of Criminal Code. The Commonwealth's attorney filed a written statement, alleging a breach of the bond and moved for a forfeiture of it. Summons was issued on it against the sureties, commanding them to show cause why judgment should not be rendered against them for a violation of the bond by L. The summons was served and judgment by default was rendered. On the same day appellants filed affidavits and moved the court to set aside the judgment and permit them to file demurrers, general and special, also an answer which they tendered. The lower court refused to set aside the judgment or to permit the demurrers or answer to be filed. Held—That the court abused its discretion. The forfeiture of a peace bond on motion is not authorized by law. The motions allowed by section 414, Civil Code of Practice, do not include motions on peace bonds. Such remedy can be had only by an ordinary civil action.

W. F. Hall, John Baker, E. E. Hogg and Albert Williams for appellants.

C. J. Pratt and M. R. Todd for appellees.

Appeal from Perry Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 2d day of December, 1899, the appellants, D. Y. Combs and S. B. Combs, signed a bond in penalty of \$500 that Logan Combs and Brown Evans would keep the peace as required by chapter 2 of the Criminal Code. On the 16th day of March, 1901, H. L. Howard, Commonwealth's attorney, filed the following motion in the Perry Circuit Court:

"H. L. Howard, attorney for the Commonwealth; states: That Logan Combs, on the 2d day of December, 1899, in Perry county, executed a peace bond before H. T. Crawford, who was at the time judge of the Perry County Court, in the sum of \$500, with D. Y. Combs and S. B. Combs as his sureties; and that at the March term, 1900, of the Perry Circuit Court, and while said peace bond was in full force and effect, said Logan Combs was indicted, tried and convicted in said court upon a charge of felony, to wit, for willfully, maliciously, and with intent to kill, shooting and wounding Shade Combs; and that said shooting and wounding occurred after the execution of said peace bond. He, therefore, moves the court for an order forfeiting said peace bond, and for summons to issue against D. Y. Combs and S. B. Combs as sureties to show cause, if any they have or can, why judgment shall not be rendered against them for \$500 on account of the violation of the stipulations of said peace bond by said Logan Combs."

A summons was issued upon this motion returnable to the first day of the following December term of the court, which was executed upon appellants, and on the second day of the term a judgment was rendered against them by default for the amount of the bond. On the same day, a few moments after the calling of the case, the defendant, D. Y. Combs, appeared in open court, accompanied by his attorney, and filed his affidavit, in which he set out that he had been informed by his counsel that he had a good defense to the proceeding, and desired to appear to present it; that he had employed

an attorney to prepare his answer and make defense to the proceeding, and relied on him to do so. He also filed the affidavit of a practicing attorney at the Perry county bar, who said that he had been employed to defend the proceeding on the preceding day; and that he was unavoidably prevented from being in the courthouse at the time the case was called, but that within a few minutes thereafter he appeared in court and asked that the judgment should not be entered, as he was of the opinion that his client had a good defense. And he thereupon tendered and offered to file general and special demurrers to the proceeding, and an answer sworn to by appellants, in which they allege that at the time they signed the peace bond for Logan Combs it was expressly agreed and understood between them and the county judge of Perry county that R. W. Combs was also to sign the bond; and that the bond was not to become effectual or binding upon them until it was so signed by R. W. Combs. The trial court refused to allow either the demurrers or answer to be filed, and gave the judgment complained of.

In our opinion the trial court abused its discretion in refusing to set aside the judgment, and also in refusing to allow the pleadings tendered by appellants to be filed.

Section 392, which is a provision of chapter 2 of the Criminal Code, provides that "the attorney for the Commonwealth may proceed by action in the name of the Commonwealth against the defendant and his surety upon a breach of a bond for good behavior."

Section 2 of the Civil Code provides that "a civil action is a demand by pleading in a court of justice for the enforcement of an alleged right of a plaintiff against a defendant."

And it is only in cases where a specific remedy is provided by statute that rights can be enforced otherwise than by a civil action. Section 144 of the Civil Code recites some of the acts in which summary proceedings may be resorted to. For instance, a judgment may be obtained on motion by a surety against his principal, or a co-security for money paid by a client against his attorney for money collected or property received by a party or officer against a surety for cost, and by a party against an officer for money collected or property received, and for the damages which such party is entitled to recover. And there are numerous other cases in which special proceedings are authorized by statute. But our attention has not been called to any provision of the Code, and we have not been able to find any embracing "bonds for good behavior." In the absence of express statutory authority authorizing the Commonwealth to proceed by motion in this character of cases they must be remitted for the enforcement of their rights to an ordinary civil action by pleading, setting out the execution of the bond and its alleged breach.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

## MASON v. DEWIS.

(Filed January 18, 1903—Not to be reported.)

1. Damages—Breach of contract giving exclusive privilege to sell melons—Appellant instituted this action against a fair association to recover damages for breach of a contract by which appellant was given the exclusive privilege of selling melons and other refreshments on the fair grounds, alleging that appellant by its servants and agents sold melons and other refreshments over the grounds, thereby greatly damaging appellant. Held—That appellant had a valuable privilege, for a violation of which he is entitled to compensation.

2. Pleading—The allegation that the appellee did these acts maliciously and with intent to injure appellant was not necessary, as the damages to appellant were the same whether appellant did or did not sell the melons with intent to injure him.

3. Measure of damages—Appellant is not entitled to recover damages for being harrassed, annoyed and disturbed. He can only be compensated for the loss proximately resulting from the invasion of his exclusive privilege to sell watermelons and other refreshments on the grounds.

R. S. Crawford for appellant.

K. D. Perkins for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, Mason, instituted this action against appellee. It is averred in the petition as amended that the Whitley County Fair Association owns ground adjacent to the city of Williamsburg; that it conducted a fair on the 16th, 17th and 18th of August, 1900, which consisted in giving exhibitions of stock and farm products and awarding premiums to successful competitors; that it had the right to make charge for admission to the grounds and to charge for the right and privilege of vending watermelons and refreshments in the interior of its premises, which right it had granted to the appellant.

It is further averred that the appellant expended \$300 in procuring watermelons and supplies of refreshments, and in preparing stands and in procuring assistants to carry on the business of supplying all demands for his wares; that the appellee, with the intent to injure and damage him by preventing him from selling his wares, did, against his will and consent, and that of the fair association, forcibly, by himself, his agents, servants and employes, sell and deliver watermelons over the inclosure of the fair grounds; that by such acts his privilege was rendered wholly worthless; that his wares were rendered of no value; that he lost his time in preparing his stands and expense of assistants, whereby he was damaged in the sum of \$300. These are substantially the material averments made by the plaintiff, and they are to the effect that he acquired the exclusive privilege of vending watermelons and other refreshments on the fair grounds during the fair; that that right was invaded and the privilege destroyed by the acts of the appellee in selling melons over the inclosure of the fair grounds to those visiting the fair, thus causing him to lose his wares and his time and to incur expenses, all of which damaged him as stated.

The appellant acquired a valuable right when he obtained from the fair

association the exclusive privilege of selling watermelons and other refreshments on the fair grounds. If he lost the enjoyment of that privilege by the acts of appellee, he sustained an injury to his rights, for which he is entitled to be redressed. For every injury the law provides a remedy, except in cases of *damnum absque injuria*. The right invaded was a private one, not one enjoyed in common with the public, nor was the injury inflicted on his rights suffered in common with the public. It was just as much a wrong to destroy this privilege to sell wares upon the fair grounds, as it would be for one to prevent another from using and enjoying his land and tenements; it could only differ from that in the extent of the injury received. To the extent that the acts of appellee in selling melons on the fair grounds damaged the appellant, he is entitled to recover. Selling melons over the inclosure had the same injurious effect on the rights of the appellant as if the appellee had entered within the inclosure and sold them. It is averred that the acts of the appellee were done maliciously and with the intent to injure the appellant. The right of the appellant to recover does not depend upon the intent with which appellee did the acts complained of, but because he did them with the injurious effect stated. The appellant's damages were the same whether appellee did or did not sell the melons with intent to injure him. Appellant says he was greatly harassed, annoyed and disturbed by the conduct of the appellee. For this he is not entitled to recover; he can only be compensated for the loss proximately resulting from the invasion of his exclusive rights to sell watermelons and other refreshments on the fair grounds. The case was dismissed on demurrer.

The case is reversed for proceedings consistent with this opinion.

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**BURGHARD v. BARRETT'S TRUSTEE.**

(Filed January 15, 1902—Not to be reported.)

**Wills—Trusts—B.**, by his will, nominated two trustees, who were to have the right to control and manage the estate, pay the income to the beneficiaries and sell property and reinvest the proceeds, and directed that the purchaser should not be required to look to the reinvestment of the purchase money. He also directed that his wife should have the authority to nominate a trustee to fill any vacancies that might occur, and might relieve the trustee or trustees so appointed from executing bond. Vacancies in the position of trustee occurred more than once and the wife exercised the power of appointment to fill the vacancy. Appellee, the Fidelity Trust and Safety Vault Co., was thus appointed, and proposes to sell a house and lot belonging to the trust estate, and appellant is willing to purchase same. This appeal involves the question as to the authority of the trustee by uniting with the cestui que trust to vest the purchaser with a valid title. Held—That the trustee was properly appointed by the widow, and the deed tendered by it and the cestui que trust passed a good title to the purchaser. The widow had full authority under the will to make successive appointments of trustees.

**Isaac T. Woodson** for appellant.

**Harris & Marshall** for appellee.

**Appeal** from Jefferson Circuit Court, Chancery division, No. 2.

Opinion of the court by Judge Barker.

John G. Barrett died testate in 1890, a resident of Jefferson county, Kentucky. By the third clause of his will the testator devised to his daughter, Amanda Barrett, among other things, a piece of real property in the city of Louisville, fronting about 54 feet on the west side of Third street, between Market and Jefferson streets, being the same bought of Shipp & Norris, and valued at \$12,000. So much of testator's will as we think pertinent to the issues involved in this case is contained in the following clauses of that instrument, which are given entire:

"5th. I desire and direct that the title to the real estate and money or securities which I have devised and bequeathed to my said two daughters, not including what I have heretofore given or conveyed to them, shall be conveyed to John E. Norris and Thomas J. Wood, as joint trustees, to hold the same in trust for the sole and separate use of my said daughters, respectively, free from debts, control, courtesy or marital rights of any husband either of them has or may have. The said trustees shall keep the funds of my said daughters separate and distinct. They shall have power to sell and convey the said property, and reinvest the proceeds, and hold, manage and control the same, and after deducting the expenses of the trust, including repairs, insurance, taxes, assessments, etc., they are directed to pay over to my said daughters the net income to which they may respectively be entitled, and take their own receipts for such payment, and which receipts shall be a good discharge to such trustees. If either of such trustees shall decline to act, or die, or become incapable of acting, the other trustee may act with full powers, and as if he were named as sole trustee, and in such event, or in case both trustees die, or decline to act, or, in any way, cease to be trustees of both or either of said trusts, I authorize my wife, by written instrument, to appoint a successor or successors, with the same rights, powers and duties as if named herein, and in such event my wife may provide in such instrument that such trustees shall not be required to give bond or security. I direct that the said trustees named herein shall not be required to give bond or security, and I declare that the power herein given to them, and the immunity from bond, are personal confidences in them.

"6th. If either of my said daughters shall die, leaving any issue or descendant then surviving her, the entire trust fund above provided for her, with any accumulations or reinvestments thereof, shall go to such issue or descendant. If, however, either of my said daughters shall die, leaving no surviving issue or descendant, she shall have power, by last will and testament, to dispose of one full half part of the said fund to be held for her benefit, and the other half shall revert to my heirs; and if she does not exercise the right to dispose of the one-half by last will, then the whole shall revert to my heirs.

"11th. I give to my executrix full and complete power to adjust, compromise and settle all claims for or against my estate, and I empower her, in her discretion, to renew any bill of exchange or note upon which I may be bound as maker, security or endorser.

"13th. No purchaser from executrix, or any trustee under this will, shall be held to any duty of seeing to the application of the purchase money.

"15th. I nominate and appoint my wife, Ann E. Barrett, sole executrix of

this, my will, and direct that she shall qualify and act as such, without giving bond or security, and I desire her to consult my said son in the management of my estate."

The trustees, John E. Norris and Thomas J. Wood, nominated by the terms of the will, qualified as trustees in due form, and all of the trust property devised to them under said will was formally conveyed to them by the executrix and heirs at law of the testator. Subsequently these trustees resigned, whereupon the Louisville Trust Co. was appointed to succeed them by Ann E. Barrett, the widow of the said John G. Barrett, whereupon John E. Norris and Thomas J. Wood conveyed all of said trust property held by them to said Louisville Trust Co. Thereafter the Louisville Trust Co. having settled its accounts as trustee, resigned, and appellee, Fidelity Trust and Safety Vault Co., was appointed trustee for Amanda Barrett, under said will, by order of the Jefferson County Court, and qualified according to law; and thereupon Ann E. Barrett, the widow of John G. Barrett, and as executrix of said will, by writing, nominated and appointed the appellee, the Fidelity Trust and Safety Vault Co., as successor to the Louisville Trust Co. in the trust provided by the will of her husband, John G. Barrett; whereupon the Louisville Trust Co. conveyed by deed all of the trust property in question held by it to the Fidelity Trust and Safety Vault Co.

These various appointments and successions of trustees under the power created by the will of John G. Barrett were made and performed with great care, ceremony and circumspection, so that whatever question arises concerning the trust and power of appointment under the terms of the testator's will is free from any doubt emanating from carelessness in carrying said power into effect. After the appointment and qualification of appellee as trustee aforesaid, to wit, on the 16th day of October, 1902, it received a proposition, in writing, from appellant, E. R. Burghard, by which he offered to purchase, for the sum of \$15,000, the following described property, which is a part of the trust property held by it for the use of Amanda Barrett under the will of John G. Barrett: "Lying and being in Louisville, and beginning at a point in the west line of Third street, 99 feet north of the northwest corner of Third and Jefferson streets; thence running northwardly 54 feet 6 inches; and thence westwardly at right angles to Third street 105 feet; thence southwardly in a line parallel with Third street 54 feet and 6 inches; thence eastwardly 105 feet to the beginning."

Said proposition was contingent on the trustee conveying to the purchaser a good and valid fee-simple title to said land, free from all encumbrances. This proposition was accepted by the Fidelity Trust and Safety Vault Co., trustee for Amanda Barrett, and on the 16th day of October, 1902, the Fidelity Trust and Safety Vault Co., as trustee, under the will of John G. Barrett, and Amanda Barrett, cestui que trust, executed and tendered to said E. R. Burghard, a general warranty deed, made out in due form, for said property, in accordance with the terms of the written proposition of purchase made by Burghard. The appellant, being apprehensive as to whether said deed so tendered was sufficient to pass the title to the property in question to him, declined to accept the same, or pay the purchase price for said property, whereupon the parties, appellant and appellee, in good faith, and



in order to have an adjudication upon the questions of law arising out of the transaction in question, filed this action, based upon an agreed statement of facts, and submitted the same to the chancellor in the court below, who held that the tendered deed was valid in form, and made in the execution of a power in appellee under said will sufficient to convey said property to appellant in fee simple, and gave judgment accordingly, whereupon appellant excepted and prayed an appeal to this court.

We think the deed of conveyance tendered by the trustee and cestui que trust in every way sufficient in form. No reasonable mind can seriously doubt or question that the trust company undertakes in said deed to act as trustee for Amanda Barrett under the will of John G. Barrett; the property described in the deed tendered to appellant is the same property devised to Amanda Barrett by the will of her father, and is the same property which has been transmitted by due and orderly succession through the various trustees, under the will of John G. Barrett, until it was conveyed to the Fidelity Trust and Safety Vault Co., so that there can be no question about the identity of the property, or the identity of the power sought to be exercised in relation thereto. The Fidelity Trust and Safety Vault Co. proposes to act as trustee under the will of John G. Barrett, and in no other capacity.

The deed tendered seems to be, in every way, sufficient in form, nor do we find any difficulty in arriving at the conclusion that the appellee, the Fidelity Trust and Safety Vault Co., is trustee under the will of John G. Barrett, by appointment of Ann E. Barrett, in pursuance of the power given her by the terms of said will, possessing all of the power of the original trustees.

A reference to the 5th clause of the will in question discloses the following power of appointment given to testator's wife, Ann E. Barrett, with reference to the trust in question: "I authorize my wife, by written instrument, to appoint a successor or successors, with the same rights, power and duties as that named herein, and in such event my wife may provide in such instrument that such trustee shall not be required to give bond or security."

There is no force in the suggestion that the power of appointment given to Ann E. Barrett was exhausted by the appointment of the Louisville Trust Co. It is apparent, from an examination of the language used by the testator, that the power of appointment was to be continuous in the wife of the testator. It seems plain that the testator had sufficient confidence in the judgment and discretion of his wife to give her the power of appointing, upon the death or resignation of either or both of the trustees mentioned in his will, a successor or successors, with the same rights, power and duties as those possessed by the trustees nominated in the will by the testator, himself; and in order to still further show the confidence the testator had in his wife, he provided that she, in her discretion, might relieve the trustee or trustees appointed by her of the burden of giving bond or security. To limit the power in testator's wife to one appointment is an unreasonable construction, and would do violence to the language used by the testator. No good and sufficient reason can be given for such limitation of the power of appointment in testator's wife. It is conceded that the testator had sufficient confidence in her judgment and discretion to make one appointment,

and to relieve her appointee of the necessity of giving bond. If she possessed the necessary discretion to make one appointment under said power, if the necessity for the same should arise, why should she not have the discretion and wisdom to be entrusted with a second or third appointment? It was the same property, the same cestui que trust, and the necessity for filling up the vacant trusteeship was precisely the same. If the testator had sufficient confidence in his wife to authorize her to make one appointment, we see no reason, in the absence of language positively requiring such a construction, to limit this power to the first appointment.

We are of opinion, therefore, that Ann E. Barrett, widow of John G. Barrett, had full power and authority, under the will of her husband, to appoint all necessary succeeding trustees, and that the exercise of said power by her has been such as to constitute appellee trustee for Amanda Barrett, under the will of John G. Barrett, and that such trustee has all of the power of sale for reinvestment which was given to Norris and Wood by the will of the testator. Appellant has nothing to do with the reinvestment of the proceeds of the sale to him by the express terms of the will, nor is it, in our opinion, necessary that the deed should contain anything on this subject.

The learned chancellor properly construed the will of John G. Barrett, in reference to the subject-matter of this litigation, and his judgment is hereby affirmed.

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SIEVERS-CARSON HARDWARE CO. v. CURD.

(Filed January 15, 1908—Not to be reported.)

1. Evidence—Testimony of witness on former trial—This was an action to recover the amount of a loan alleged to have been made by appellant to appellee's husband. This is the second appeal of the case. Substantially the same proof was produced on the last trial as on the first. C., a witness who had testified on the former trial for appellee, died before the last trial, and his testimony, as taken by the official stenographer, was read in evidence against the objection of appellant. Held—That under section 4643, Kentucky Statutes, the evidence of a witness given on the former trial may be read in the discretion of the court, and was properly admitted in this case.

2. Appeals—Res judicata—An issue raised on the former trial, and which was considered by the Court of Appeals on the former appeal, is res judicata, and can not be considered on the second appeal.

John C. Strother and Thos. R. Gordon for appellant.

R. D. Hill for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Chief Justice Burnam.

This is the second time this cause has been before this court upon appeal from a judgment of the Whitley Circuit Court. The opinion upon the former appeal (21 Ky. Law Rep., 361), recites in substance the pleadings and proof upon the former trial. After a very careful consideration of the entire record it was then determined that the verdict in favor of the defendant was flagrantly against the weight of the evidence, and the

judgment was reversed for that reason. Upon the return to the lower court a new trial was had and substantially the same proof introduced as upon the former appeal, with the exception that Mrs. Boron was permitted to testify that appellant company gave to her husband checks for \$150, which she supposed was the dividend upon twenty shares of stock owned by her, which was declared July 1, 1890. This transaction is fully explained by the witness, Slevvers, who testifies that the money represented by these checks was a loan to her husband. L. P. Curd, who testified upon the former trial, had died before the last trial, and over appellant's objection appellee was permitted to read his evidence from the transcript of the official report of the former trial made by the official stenographer. But we think it was competent under section 4643 of the Kentucky Statutes, which provides: "That the testimony of any witness or witnesses taken by said reporter in any court, or division, as aforesaid, shall constitute a part of the record of the case, and may, in the discretion of the presiding judge, be used in any subsequent trial of the same case between the same parties, where the testimony of such witnesses can not be procured, which fact must be made to appear satisfactorily to the court by affidavit of the party desiring to use the same, or his attorney."

It is also insisted that the only issue raised by the pleadings is whether a dividend of \$450 was declared in July, 1890, upon sixty shares of stock owned by appellee, was placed as a credit upon the account due by the estate of A. J. Curd to appellant by appellee's consent. This exact contention was made by appellee upon the former appeal, and the decision of the court was against her, and is now, so far as this case is concerned, *res adjudicata*. We have carefully re-examined the record, both upon this and the former appeal, and are of the opinion that the trial court erred in not directing the jury to find a verdict for the appellant for the amount sued for with interest.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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BROOKS v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed January 15, 1903—Not to be reported.)

1. Railroads—Negligence—Instructions—Evidence—Appellant was a section hand working on appellee's road under a boss, and while returning from work on a hand car the section boss ordered the men to go in a hurry. Appellant, who was standing and working with his back in the direction in which the car was going, bore down on the lever, which broke, and he fell in front of the car, and was injured by being run over and having his leg broken. In this action, at the close of the evidence on both sides, the lower court gave a peremptory instruction for defendant, from which this appeal is prosecuted. Held—That the peremptory instruction was properly given. It is the duty of a master to furnish his servant tools that are reasonably safe for his use. He does not warrant that there is no defect in them, nor does the contract imply such warranty. The master is not liable for such defects in the tools which he furnishes the servant for use in his service, unless he, or those entrusted by him with the selection or inspection of such tools, had notice of such defects, or could have discovered them by the use of ordinary care in the selection or inspection of them. In order to have made

out a case of negligence against the appellee it was essential that appellant should have shown that there was a defect in the part of the machinery which broke, and which caused it to break, and that the foreman knew it, or by the exercise of ordinary care could have discovered it.

2. Pleading—An amended answer charging contributory negligence was filed, to which plaintiff filed no reply. This entitled defendant to a peremptory instruction.

J. H. Thurman and J. W. S. Clements for appellant.

W. C. McChord, Edward W. Hines and B. D. Warfield for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Paynter. •

The appellant was a member of a section gang in charge of one Savage as foreman. At the close of the day, as was customary, the foreman, together with his force, boarded a hand car for the tool house, and when they were ready to start the section foreman told them to "bear down," which meant to go in a hurry. While proceeding at the rate of about eight miles per hour the "short lever" broke, which threw the appellant in front of the hand car, which ran over him, with the result that one of his legs was broken in two places. He was one of the men propelling the car, with his back toward the course that the car was going.

In making this statement the evidence offered by the appellee is not considered, because, at the conclusion of plaintiff's testimony, a motion was made for peremptory instruction, which was refused by the court. As the appellee's evidence did not strengthen the case attempted to be stated by the appellant, the court, at the conclusion of all of the testimony, gave a peremptory instruction to the jury to find for the appellee, which was accordingly done. The first question arising is, did the plaintiff offer testimony sufficient to authorize the court to submit the question of negligence to the jury?

It is the duty of a master to furnish his servant tools that are reasonably safe for his use; he does not warrant that there is no defect in them, nor does the contract imply such warranty. The master is not liable for defects in the tools which he furnishes the servant for use in his service, unless he, or those entrusted by him with the selection or inspection of such tools, had notice of such defects or could have discovered them by the use of ordinary care in the selection or inspection of them. This doctrine has been repeatedly enunciated by this court. In order to have made out a case of negligence against the appellee it was essential that appellant should have shown that there was a defect in the part of the machinery which broke, and which caused it to break, and that the foreman knew it, or by the exercise of ordinary care could have discovered it.

The case seems to have been tried in the lower court upon the idea that a case had been made out for the jury when the evidence showed that appellant was in the employ of the appellee, and that he was in the discharge of a duty when the lever broke and threw him under the car. It is urged in the brief of counsel for appellant that the law presumes negligence from the state of facts proven in this case. To support his contention he cites a certain line of cases which it is not necessary here to analyze. When a servant

is injured he does not show himself entitled to recover by showing that he is injured while in the discharge of a duty, but he is required to produce some evidence tending to show that it was caused by the negligence of the master or some one representing him. (*Hughes v. Cincinnati, & Co., Ry. Co.*, 91 Ky., 536; *Wintuska v. L. & N. R. R. Co.*, 14 Ky. Law Rep., 579.)

It has been the uniform rule of this court, in so far as it has made an announcement on the question, that in an action of a servant against the master negligence can not be presumed, but must be proven. While we recognize the correctness of the rule enunciated in *Ward v. L. & N. R. R. Co.*, 23 Ky. Law Rep., 1826, still the application of the rule would not, on the state of facts in this case, entitle the appellant to recover. That case does not decide that the master warrants that the implement or machinery or tool with which he may supply the servant for the performance of the labor undertaken shall be absolutely safe, nor does it decide that it is not necessary for the plaintiff to show that there was a defect in the machinery of which the defendant was aware, or might have been aware, by the exercise of ordinary care. It simply holds that in a case like that the servant may rely upon the superior judgment of his foreman, and was not required to exercise his own judgment as to the safety of the hand car.

We are of the opinion that the appellant failed to make out a case for the jury, because he failed to show that there was a defect in the hand car known to the foreman, or one which he could have discovered by the exercise of reasonable care. There is another reason why the court properly gave a peremptory instruction. The defendant filed an amended answer in which contributory negligence was pleaded, and the plaintiff failed to reply to it. This entitled the defendant to a peremptory instruction. (*White's Adm'r v. L. & N. R. R. Co.*, 15 Ky. Law Rep., 49; *L. & N. R. R. Co. v. Mayfield*, 18 Ky. Law Rep., 224; *Illinois Central R. R. Co. v. Nall*, 21 Ky. Law Rep., 281.)

For the foregoing reasons the judgment is affirmed.

#### LEONARD v. BOYD.

L. D. & J. C. HUSBANDS v. COOK.

(Filed January 15, 1908--Not to be reported.)

1. Partnership—Profits—Appellee, Boyd, induced appellant, Leonard, to furnish the money and to form a partnership with him in purchasing Lyon county bonds, and to share the profits of the venture. A large number of bonds were thus purchased, some of them from C. After considerable trouble they effected a compromise with the county court, and realized a profit of about \$10,000, and this action was instituted by appellee Boyd to recover one-half of said profits. Appellant Leonard denies appellee's right to share the profits on the ground that Boyd agreed to furnish one half the money with which to purchase the bonds, and had failed to do so. Held—That the proof amply sustained the fact that appellee and appellant were partners in the transaction, Boyd participating extensively in the purchase of the bonds and in their settlement. The failure of Boyd to furnish his share of the money in the partnership venture furnishes no defense to his claim for profits.

2. Attorneys' fees—Champertry—C., before selling his bonds as above stated, employed appellants, Husbands, as attorneys, to collect same under a contract, agreeing to pay them a fee of 90 per cent. of the amount collected, with certain conditions in case of a compromise, and in this action said attorneys are seeking to collect the amount due under said contract. Champertry is pleaded as a defense. Appellants offered to file an amended petition, asking for a reasonable compensation for services rendered. The lower court denied their claim for any fees, from which this appeal is prosecuted. Held—That said contract, fixing the amount of fees, also the conditions, was champertous and void. The lower court erred in refusing to permit the amended petition to be filed as C., having accepted the services of the attorneys, is bound to pay them a reasonable fee. C. could not defeat their claim for a reasonable attorneys' fee by selling the bonds.

Husbands & Husbands for appellants Husbands.

T. L. Edelen for appellant Leonard.

John K. Hendrick and W. M. Reed for appellee Boyd.

Landes & Allensworth for appellee Cook.

Appeal from Lyon Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, Boyd, conceived the idea that there was a great speculation in bonds which Lyon county issued in aid of the Elizabethtown & Paducah railroad: the appellant, Leonard, was reputed to be a man of large means; Boyd proposed to him that he furnish money for the purpose of buying bonds and that he (Boyd) would purchase same, and be a partner in the venture. He claims that Leonard agreed to furnish the money for the purpose of purchasing bonds held by Thompson and some owned by Cook. He did purchase bonds with money which Leonard furnished for the purpose.

On the other hand, it is contended by Leonard that Boyd agreed to furnish one-half of the money necessary to purchase bonds, but failed to do so, and, therefore, he forfeited his right to be a partner in the venture, and to participate in the profits arising therefrom. The evidence conduces to show that a settlement was effected with the county authorities, after much trouble and litigation, and that the profits arising from the transaction amounted to more than \$10,000, and that Boyd was active in looking after a settlement of the matter with Lyon county. The evidence further conduces to show that Leonard regarded Boyd as his partner from the time the bonds were purchased until after their collection. This is not only proven by Boyd, but by others besides Boyd, and is supported by the circumstances surrounding the transaction. The proceeds of the bonds were deposited in the bank to their joint credit, and this was done with the consent of Leonard. In addition to that Leonard paid Boyd \$1,000 on his share of the profits.

Although Boyd may have agreed to furnish one-half of the money to purchase bonds, but failed to do it, still if Leonard treated him as a partner in their purchase and thereafter until their collection, and allowed him to assist in their collection, etc., he can not now deny Boyd's right to participate in the profits. Our conclusion as to the question of fact is that Leonard was

to furnish all the money necessary to be invested in the partnership, therefore, the judgment was quite as favorable to Leonard as he was entitled to have.

#### HUSBANDS v. COOK.

Before Leonard and Boyd purchased the bonds from Cook he had employed L. D. & J. G. Husbands, practicing attorneys, to collect his bonds, interest coupons and costs from Lyon county. Husbands & Husbands claim they were to have an amount equal to 20 per cent. of the amount collected. Cook claims they were to have 20 per cent. of the money collected on the bonds, providing they collected the debt, interest and costs, and to have nothing if they did not succeed in doing that, and were to have nothing if Cook compromised the debt against the county. Cook's defense is based upon the claim that they were to have a certain part of the fund collected, therefore, the contract is champertous and unenforceable, and, further, when he sold his bonds to Leonard and Boyd for less than the principal, interest and cost, it was equivalent to a compromise, and, for that reason, under the terms of the contract, they were not entitled to any compensation for their services.

The evidence shows that the contract was made by letters which the parties exchanged upon the subject. There is no escape from the conclusion that by the terms of the contract the appellants were to have 20 per cent. of the money which they might recover on appellee's claim against the county. The contract being champertous and void, appellants are not entitled to recover 20 per cent. of the appellee's claim against the county, nor that per cent. of the amount realized by a sale of it, unless that would be reasonable compensation for their services. This being true, necessarily that part of the contract which stipulates the specific conditions under which they were to receive the 20 per cent. are likewise void and unenforceable.

The whole contract was champertous and void, and was so at the time the appellants began to render services to the appellee in his effort to collect his claim against the county. Notwithstanding the contract is champertous, the appellee accepted the appellants' services, and the law raises a promise on the part of appellee to pay them a fair and reasonable compensation therefor. The appellants sought to recover on the champertous contract, but were not entitled to do that. Upon the facts the appellants were entitled to recover reasonable compensation for the services rendered. The court should have permitted the amendment offered to be filed which sought to recover such compensation; it would have been in the furtherance of justice to have permitted this to be filed. It could not have been misleading to the appellee or prejudicial to his rights, because, from the facts conceded by him, the liability arises.

The foregoing conclusion renders it less important to adjudicate the question of the right of Cook to sell his claim, and thus defeat their right to receive reasonable compensation for their services. We are of the opinion that he could not do so; that would not have been a compromise in the meaning of the contract, besides, that part of the contract failed to be enforceable as heretofore stated.

The case is affirmed on the appeal of Leonard against Boyd and reversed

on [the appeal of *Husbands & Husbands* against Cook, with directions that the court ascertain what would be a reasonable fee to *Husbands & Husbands*, and allow it, and for proceedings consistent with this opinion.

## JOHNSON v. ZWEIGART.

(Filed January 16, 1908.)

1. **Contracts**—Parol evidence to contradict a writing—Appellant, a lawyer, brought this suit against appellee, on account of legal services and for money paid thereabout. The services are not denied. The real defense, outside the value of the services, is that the fees sued for were settled by a contract between the parties, by which it is claimed that appellee bought his claim for fees and five certain promissory notes for \$2,500 cash. The question involved on this appeal is whether the sale was an absolute one, or whether it was a loaning by appellee of \$2,500 to appellant, and a pledging of the notes to secure it. A written contract was introduced in evidence, reciting that appellant had delivered to appellee a number of notes, including a life insurance policy for \$2,500 cash, in the second clause of which appellee obligates himself to return to appellant the unpaid notes after collecting \$2,500 and interest. A receipt reciting settlement in full for attorney's fees of same date was introduced in evidence. Appellee was permitted to introduce oral testimony to vary or dispute the writing. Held—That such evidence was incompetent without an allegation of fraud or mistake. The court should have excluded all that transpired between the parties that tended to substitute a different contract or understanding for the one evidenced by the writing.

2. **Instructions**—The court should have instructed the jury that the effect of the writing, the first mentioned, was a mortgage or pledge of the notes therein mentioned to secure to appellee the payment of \$2,500, with interest, and that the agreement to relinquish the fees, executed simultaneously and as a part of the other agreement, was without lawful consideration and void. The sole question then left to the jury was, first, whether there was a special contract by which appellant agreed to collect the notes mentioned in his account at the rate claimed; and, second, if not, then the jury should have found such sum as under the evidence was a reasonable compensation for the services rendered.

L. W. Robertson and E. L. Worthington for appellant.

G. S. Wall and L. W. Galbraith for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge O'Rear.

This suit was brought by appellant, a lawyer, against appellee, on an account for legal services and for money paid thereabout. The services are not denied. The real defense, outside the value of the services, is presented by a plea that the fees sued for were settled by a contract, made September 3, 1898, between the parties, by which it is claimed appellee bought from appellant his claim for fees and five certain promissory notes, for \$2,500 cash. There is no dispute that at the time and place claimed by appellee appellant transferred to him the notes and the claim for fees, or, which is the same, appellant agreed to release his claim for fees to get appellee to



take the notes for \$2,500. Nor is there dispute that appellee at that time and place advanced to and for appellee the sum of \$2,500 (about), and took possession of the notes and took appellant's receipt in full for the fees.

The disputed question is, was that sale an absolute one, as appellee contends, or was it a loaning by appellee of the \$2,500 to appellant, and a pledging of the notes to secure it, as appellant contends. If it was the latter, then the agreement evidenced by the receipt, whereby appellant released or acquitted appellee of the fees, was without lawful consideration, that is, it was in its nature usurious, and not obligatory on appellant. The form of the transaction will not control; it is the fact that determines its character. So we must look to the whole transaction to determine what the parties intended to do, and what they did in this connection. The negotiations were begun, as is customary, by parol propositions and counterpropositions, resulting in the agreement above stated. The parties then reduced to writing their agreement, as follows:

"Maysville, Ky., September 3, 1898.

"Milton Johnson has sold and delivered to me, for the sum of \$2,500 cash, the following notes, viz: Wm. Wormald, mortgage, \$1,000; J. A. Coughlin, mortgage, \$100; Wesley Vloroy, personal note, \$125; George Myall, personal note, \$1,200, and policy of insurance; John McGraw, chat. mortg., about \$500.

"I am, however, after I have collected (net) on said notes the sum of \$2,500, and interest from this date, payable every six months, to return to said Johnson the unpaid notes or cash, if same be then collected.

"C. F. ZWEIGART."

"September 3, 1898.

"Received from C. F. Zweigart full settlement of attorney's fees due me in cases of Martin v. Long and others, and Zweigart v. Lloyd and others. In full to date.

"MILTON JOHNSON."

The question presented by this appeal is whether appellee could, by his testimony, vary or dispute the writing above copied and signed by him without an allegation of fraud or mistake in its execution, and whether it was proper for the court to submit to the jury the question of the binding effect of the above-named writing. Appellee was allowed, over objections, to testify as to an oral sale, and the court submitted to the jury to decide as to whether such an oral sale was made. The court is of opinion that this question was improperly submitted to the jury. Where a series of conferences is consummated by a written document, executed by the parties for the expression of their conclusions, such writing must be regarded not only as expressing their final views, but as absorbing all other parol understandings prior or contemporaneous. It must be conclusively presumed in such a state of case, in the absence of an allegation of fraud or mistake in the execution of the paper, that the entire engagement of the parties is embraced in the writing; and where its terms are not uncertain, oral testimony of previous colloquies between the parties that would tend in any instance to substitute a new or different contract for the one evidenced by the writing, must be rejected. (2 Wharton on Evidence, section 1014; Crane v. Williamson, 28 Ky. Law Rep., 689; DeWitt v. Berry, 184 U. S., 806.)

This rule, founded upon long experience, recognizes that the parties to the agreement have seen fit to culminate all their negotiations in a memorial not subject to the uncertainties of forgetfulness or other similar infirmity, and have thereby agreed to adopt such memorial as the sole evidence of their contract. Expedience and experience alike sustain the wisdom of the rule.

Applying the doctrine to the case at bar, the court should have excluded, under the state of the pleadings in this case, all that transpired between the parties that tended to substitute a different contract or understanding for the one evidenced by the writing. It should, on the contrary, have told the jury that the effect of this writing, the one first copied above, was a mortgage or pledge of the notes therein mentioned to secure to appellee the payment of \$2,800 and legal interest from September 8, 1898, and that the agreement to relinquish the fees, executed simultaneously and as a part of the other agreement, was without lawful consideration, and was void. The sole question then left to the jury was, first, whether there was a special contract (as claimed by appellee) by which appellant agreed to collect the notes mentioned in his account at the rate claimed by appellee; and, second, if not, then the jury should have found such sum as under the evidence was a reasonable compensation to appellant for the services rendered.

The judgment is reversed and cause remanded, with directions to award appellant a new trial under proceedings not inconsistent herewith.

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LEBUS v. SLADE, &c.

(Filed January 16, 1908—Not to be reported.)

Judicial sales—Insufficient description of real property—In this action improved city property was ordered to be subdivided into three lots and sold. The commissioner had the lots appraised separately and as a whole. Bids were received on the lots separately and then as a whole, and the bid on the whole was accepted. The court sustained exceptions to the report of sale, and set the sale aside on the ground that neither the judgment directing the sale nor the advertisement described the property definitely enough to apprise bidders of the boundaries they would bid for. The purchaser has appealed. Held—That the court properly set aside the sale as the description of the lots was too indefinite. The width of neither of the three lots was given in the judgment or advertisement.

J. J. Osborne for appellant.

Lafferty & King for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge O'Rear.

Real property in a city was adjudged to be sold in proceedings to enforce mortgage liens. The property was improved. It really constituted one lot. The court found and adjudged it to be susceptible of advantageous division, and ordered it to be sold in three parcels, thus: "First, lot known as residence lot fronting on Bridge street, and running back northward 142 feet; second, being known as the blacksmith shop or property, being situated immediately on the corner, the northeast corner, at the intersection of Bridge

and Church streets; third, fronting on Church street, the east side thereof, and running back east to the west line of lot No. 1, herein, and known as the scales lot or property."

The commissioner executing the judgment of sale sold the property first in parcels, as above described, and then as an entirety, accepting the latter bid, it having produced more than the others. The judgment of sale did not direct the property to be sold as one lot. It was appraised in separate parcels, and as a whole. Numerous grounds of exception to the sale were filed by the owner. Among them is one that neither the judgment of sale nor the advertisement so described the property as to apprise contemplating bidders of the boundaries they would be bidding for. The circuit court sustained exceptions to the sale, and ordered the property to be surveyed, and a resale had. The purchaser has appealed. The court is of opinion that the description of the lots was insufficient to properly designate the subdivisions to be sold. The width of the first lot is not given. Neither the width nor the depth of the second is shown, nor is the width of the third. If these lots had by any record, or by some well-defined natural object, been previously marked, as subdivided, these descriptions would have answered. But so far as the record shows this was the first attempt to subdivide this property. No purchaser could have told from the description above just what he was getting. Necessarily such an uncertainty affected the bidding. The sale was properly set aside for that reason.

Judgment affirmed.

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WILLIAMS v. WILLIAMS, &c.

(Filed January 16, 1903—Not to be reported.)

**Wills—Evidence—Husband and wife**—In this action contesting a will the wife of the attending physician was a daughter of the testator, and a contestant, and testified, and afterwards her husband was introduced as a witness, to prove the mental incapacity of the testator, but the lower court refused to permit him to testify. Held—That both husband and wife could not testify, and the husband was properly rejected as a witness. On the trial a paper signed by a number of the adult contestants was introduced in evidence. The paper was an agreement to set aside the will and distribute the property as if no will had been written. There were infants whose interests would have been affected by the agreement. The paper was competent evidence to prove bias of the contestants.

H. Clay White and B. F. Graziani for appellant.

W. W. Dickerson, Wm. Carnes and A. G. DeJarnette for appellees.

Appeal from Grant Circuit Court.

Opinion of the court by Judge O'Rear.

In this contest over the probate of the will of D. W. Williams the sole question at issue was the testamentary capacity of the testator.

This question was submitted to the jury by instructions which told them in substance that if they believed from the evidence that the paper offered by the propounders was signed by the testator, and by him acknowledged in

the presence of the subscribing witnesses, who became such at testator's request, and in his presence, and that at the time the testator had mind and memory sufficient to take a complete and rational survey of his estate, and to know the objects of his bounty and his duty to them, and to dispose of his property according to a fixed purpose of his own, then they should find the paper to be his last will. The evidence abundantly sustained the jury's finding setting up the will. There are but two matters of evidence complained of. Dr. Robinson, who had been testator's attending physician during the fatal illness, was offered by the contestants as witness to prove mental incapacity at the time the paper was executed. The doctor was a son-in-law of the testator. His wife was named as one of the devisees, but seemed to be unsatisfied. She was a witness in favor of contestants, she being one of them. The circuit court refused to permit her husband to testify. This was correct.

Section 606, Civil Code, prohibits a husband or wife from testifying against each other; and while it allows either to testify in a case such as this, it expressly provides that both can not. By offering herself as a witness her husband became excluded. The fact that others were interested in whose behalf he would have been a competent witness can not affect the case. (*Milton v. Hunter*, 18 Bush, 163; *Wise v. Foote*, 81 Ky., 10; *City of Covington v. Geyler*, 98 Ky., 275.)

Before the contest was instituted some of the devisees, who were contestants, entered into a written agreement, and by their attorney solicited the other adult devisees to join in it, whereby they agreed to have the will set aside and to divide the estate among the signers as if it had descended to them by the intestacy of the decedent. All did not sign the paper. Some of the devisees, who would have been deprived entirely of their interests by the proposed agreement, were infants. This paper was offered and allowed as evidence against the contestants. It was either harmless (in which event its use in evidence was not prejudicial), or it was a proposition to unlawfully suppress a will. In the latter view it affected the good faith of the contestants, and tended to show the extent of their bias. In this view it was relevant as evidence in the case against them. There is no error in the record.

Judgment affirmed.

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MORGAN v. WICKLIFFE.

(Filed January 5, 1903—Not to be reported.)

Lucius P. Little for appellant.

Jep. C. Jonson for appellee.

Appeal from Daviess Circuit Court.

Judge Paynter delivered the following dissenting opinion:

The opinion of the court will seriously affect property rights in this State. As it is disregardful of previous decisions of this court I am constrained to dissent.

The opinion is based upon the rulings of courts of other States, not upon

a statute which this court has construed as being intended to get rid of the very doctrine enunciated in the opinion. Section 2135, Kentucky Statutes, reads as follows: "The wife shall not be endowed of land sold, but not conveyed by the husband before marriage, nor of land sold, in good faith, after marriage, to satisfy a lien or incumbrance created before marriage, or created by deed in which she joined, or to satisfy a lien for the purchase money; but if there is a surplus of the land or proceeds of sale after satisfying the lien, she may have dower out of such surplus of the land or compensation out of such surplus of the proceeds, unless they were received or disposed of by the husband in his lifetime."

In *Schweitzer v. Wagner*, 94 Ky., 458, the court had under consideration the construction of the statute and the question here involved. In that case it appeared that the wife joined in the mortgage; in the proceedings to sell the land she was not made a party; afterwards she brought a suit to have dower assigned her out of the land. It was claimed she was not a party to the proceedings to enforce the lien, therefore, was entitled to recover dower.

The court held that the mortgage in which she joined was a deed in the meaning of the statute. In effect the court held that she by the mortgage divested herself of any right in the land, except in the surplus proceeds which the statute gave her. The statute expressly authorizes the husband to sell the land to pay a lien or incumbrance created by deed (a mortgage being a deed) in which his wife joins. If he has the right to do that, then it is the duty of the court to compel him to do it, with exactly the same effect as if he had voluntarily done the act.

The statute was intended to protect purchasers under such circumstances, for the wife loses her dower and compensation therefor in the surplus if they are received or disposed of by the husband in his lifetime. This is true, whether the surplus proceeds were received by the husband as the result of a private or judicial sale of the property to satisfy a lien or incumbrance. These conclusions are supported by *Malone v. Armstrong*, 79 Ky., 248; *Ratliff v. Mason*, 92 Ky., 190; *Johnson v. Cantrill*, 92 Ky., 59; *Tisdale v. Risk*, 7 Bush, 141.

In *Tisdale v. Risk* the court expressly held that the widow's "title can not be extended to the land purchased by appellant's vendor from the court and conveyed to him by the court without incumbrance of any lien in her favor."

As neither the mortgagee nor purchaser were under any liability to the wife, no bond to her was necessary, although she was unnecessarily made a party to the action. The plaintiff had no right to the surplus proceeds or liability for its application, and the purchaser was not compelled to look to the application of any part of the purchase money, therefore, the bond could not protect the wife against the act of the husband in getting the surplus proceeds, if any. It would have been an idle thing to have executed it.

Judges White and Hobson concur in this dissenting opinion.

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BELL v. SMITH, &c.

(Filed January 9, 1903—Not to be reported.)

Infants—Judicial sales—A proceeding was instituted by one heir, who was an adult, against two other heirs, who were infants, one of whom was

under fourteen years of age, to sell a house and lot alleged to be worth about \$300, it being alleged that the property was not susceptible of division. Process was served personally on the infant under fourteen years of age, but was not served on any of the persons named in section 52, Civil Code of Practice, but the statutory guardian answered and joined in the prayer of the petition. A judgment of sale was ordered and appellant became the purchaser of the property, and instituted this action to set aside the sale on account of irregularities. Held—That the purchaser acquired a perfect title. Although process was not properly served on the infant the object of the Code was substantially complied with when the statutory guardian appeared and answered.

2. Divisibility of property—The lot is forty feet wide and 100 feet long, with a house on it, and no proof as to its indivisibility was necessary.

R. C. Stoll for appellant.

Wm. Wood and J. Alexander Chiles for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Paynter.

Mrs. Combs died seized and possessed of a house and lot in the city of Lexington, leaving as her only heir at law appellees, Frank Smith, Henry Burnett and John Burnett, the Burnetts being infants. Smith instituted this action against them, asking a sale of the property, averring that Henry Burnett was seventeen and John Burnett fifteen years of age; that the property was of less value than \$300, and that it was not susceptible of division without materially impairing its value and asked a sale of it, and that its proceeds be divided so as to give one-third to each of them.

The court ordered the property sold, and the appellant, Bell, became the purchaser. He seeks to have the sale set aside for various reasons, the principal one being as considered herein.

One of the grounds for setting aside the sale is that the infants were not served with process as required by section 52 of the Civil Code of Practice, which reads as follows: "If the defendant be under the age of fourteen years the summons must be served on his father; or, if he have no father, on his guardian; or, if he have no guardian, on his mother; or, if he have no mother, on the person having charge of him. If any of the parties upon whom summons is directed to be served by this section is a plaintiff, then it shall be served on the person who stands first in the order named in said section, and who is not a plaintiff; and if all such persons are plaintiffs, it shall, on the affidavit of one or more of them showing that fact, be the duty of the clerk of the court to appoint a guardian ad litem for the infant, and the summons shall be served on such guardian."

It appears that one of the infants was under fourteen years of age at the time the summons was served upon him. It was served by giving him a copy, not by giving a copy to the person designated in the section. The method of serving a summons on infants under fourteen years of age prescribed by the Code is to bring the attention of some one of those mentioned in the Code that the infant in which such one is particularly interested had been sued, and that his rights were to be affected thereby. It was believed that in this way the infant's interest would be looked after by the one most

interested in him. While the summons was not served on the infant's statutory guardian, that guardian appeared, answered for him and joined in the prayer of the petitioner for a sale of the property. All that a summons could have accomplished had it been served upon the statutory guardian was accomplished when she appeared and answered for the infants; she and her wards were before the court. The appearance of the infants, under the circumstances stated, made the judgment conclusive on their rights. (Garr v. Eble, & Co., 16 Ky. Law Rep., 661; Lawrence v. Connor, 12 Ky. Law Rep., 58; Cheatham v. Whitman, 86 Ky., 614; Shelby v. Harrison.)

The case of Isert v. Davis, 17 Ky. Law Rep., 686, does not conflict with these cases, because in that case it appeared the statutory guardian was plaintiff, and did not appear for the infant, and, of course, made no defense for him.

It is claimed that the pleading filed by the administrator of Mrs. Combs was in the nature of an action to settle the estate. It is sufficient to say that the administrator joined in the prayer to sell the land, and if any creditors had any claim upon the fund arising from the sale the court can fully protect them. It is insisted that there was no proof that the property could not be divided without materially impairing its value. The lot was 40 feet wide and 100 feet long, with a house upon it. The court will presume that it could not have been divided without materially impairing its value. (Fought v. Henry, 13 Bush, 473.)

The record is sufficient to show that the interest of each infant was less than \$100. In our opinion the appellant will get a good title under his purchase.

Judgment is affirmed.

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#### KEININGHAM V. KEININGHAM'S EX'OR.

(Filed January 16, 1903—Not to be reported.)

1. Wills—Duty of personal representative—K. and his wife had been divorced by a decree of the Fayette Circuit Court, in which the custody of their child, a little girl about six years old, was given to her mother. The judgment reserved the right to make further orders concerning her future custody. When the girl was about fifteen years old her father died, resident in the District of Columbia, leaving about \$1,800 in money, which he disposed of by his will in trust to F., if she was living and could be found, directing said F., as his executor, to use all reasonable means and expense to find his daughter and make known to her his character and history, and to use the money given in trust in his discretion for his daughter's benefit, towards educating and training her, allowing her such sums of money for clothing and sustenance as he deemed proper, and requested that he take control of and train her as he would his own daughter. The will further provided that if the daughter should fail or refuse to obey the will of her father, then the executor should pay the bequest to the son of the executor. Shortly after the probate of the will the executor learned that the testator's daughter was living with her mother and stepfather near White Hall, Madison county, and wrote her a letter, informing her of the bequest of her father, and requesting her to come and live with him. The daughter in response wrote a letter, stating that she was happy, and well cared for, and

declining to leave her mother, but expressed a desire to conform to the wishes of her father. The executor wrote another letter, expressing his willingness to take charge of her and apply the funds as directed by the will. No further response from the daughter was received, and the executor paid the fund over to the son, thus construing the acts of the daughter as a disobedience of the will of her father. The daughter brought this suit to recover the legacy. Held—That the executor did not exercise reasonable diligence in complying with the wishes of the testator before paying the money over to his son. It was his duty to see her personally, and fully explain the terms of the will to her and her mother. He had no right to demand custody of the girl while she was in the custody of the mother under decree of court. The court could have reinstated the case on the docket, and would have made proper orders for the custody, education and maintenance of the child. She is entitled to recover the legacy.

2. Jurisdiction—Although testator died resident in the District of Columbia, and his executor qualified there, the legatee had the right to sue the executor, who has removed to this State, to recover her legacy.

John H. Wilson and Hazelrigg & Chenault for appellant.

T. L. Edelen for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted by the appellant, Jennie Moss Keiningham, against the appellee, H. F. Finley, as executor of her father, James L. Keiningham, to recover a legacy devised to her by her father's will. The father of appellant died domiciled in the District of Columbia, and his will was probated in the proper court of the district, and appellee duly qualified as executor thereof and took possession of the devised estate. After making a number of small bequests to relatives, the will contains the following provisions:

"5th. I will and bequeath all the money I have on hand, or on deposit in the National Bank of the Republic in this city (after the payment of all my just debts and funeral expenses) to H. F. Finley, in trust for my daughter, Jennie Moss Keiningham, if living, and can be found.

"6th. I will that my executor hereinafter named use all reasonable means and expense to find my said daughter, and make known to her my history and character, as he shall believe me to have lived. And he will, in his discretion, use the money hereby given him in trust for my said daughter's benefit, towards educating and training her, as in his judgment shall be best for her interest, allowing such sums of money to her for clothing and sustenance, from time to time, as in his judgment shall appear to be proper and consistent with her age, wants and means in his hands, putting such money at interest as best he can for her interest, as shall not be immediately wanted for the uses above indicated, and if, when my said daughter shall arrive at the age of twenty-one years, there shall be any balance in the hands of my executor, he shall pay the same, with any accrued interest in his hands, to my daughter.

"7th. If my said daughter shall not be living, or, if living, shall die before she attains the age of twenty-one years, without issue of her body living and born in lawful wedlock, then in that event my will is that all the



bequest made in trust for her benefit shall be paid by my executor to my cousin, F. W. Finley, to whom I hereby give and bequeath it.

"9th. I will that my executor take control of and raise and train my said daughter as he would his own daughter in so far as the money given him for that purpose will allow, and that she will submit to him in all respects as she would to me, my purpose being for her alone to receive the benefit of her bequest hereinbefore made; but shall my said daughter fail or refuse to obey my will in this respect, then it is my will that my executor pay this bequest to my friend and relative, F. W. Finley.

"10th. I hereby appoint and request my friend, H. F. Finley, to carry out in its true spirit this my last will and testament."

After setting out the facts above recited, the plaintiff alleged that James L. Keiningham had on deposit to his credit in the National Bank of the Republic at the time of his death \$1,735.75, which was taken possession of by the defendant as executor. And in the second paragraph of her amended petition she alleges that she was born on the 25th day of June, 1875; that on the 20th day of May, 1881, her mother was divorced from her father by a judgment of the Fayette Circuit Court; that she was then only six years old, and was placed in the custody of her mother. The judgment, however, reserved the right to make any orders in regard to her future custody as the court might think proper; and that by virtue of this judgment she lived with her mother and under her control until the death of her father without any communication of any kind with him; that when her father made his will he did not know of her whereabouts, or whether she was living or dead; that shortly after his death the defendant addressed a letter to her at White Hall, Madison county, Kentucky, where she was then residing with her mother and her stepfather, the letter being dated March 18, 1890, in which he informed her of her father's death, and the provisions of his will with reference to her, and invited her to become a member of his family, in accordance with her father's wishes, promising to discharge in good faith the duties imposed by his trust; that this letter was received through the mail, and was taken possession of by her mother, who wrote and mailed to the defendant in plaintiff's name the following letter:

"Hon. H. F. Finley: "White Hall, Madison Co., Ky., March 18, 1890.

"Dear Sir—Yours of the 13th to hand, and contents noted. I thank you very kindly for the interest you and your family have manifested to me, and am sorry to be under the painful necessity of declining your offer of acceptance as a ward. You will please pardon me for expressing myself freely to you upon this subject. In the first place, understand I do not wish to interfere with or act in any way contrary to my father's last will and testament. But it was my mother who has struggled through adversity to obtain for me all the advantages I have had, and it is to her that I owe all. And it would be contrary to nature's laws for me to leave her now that I can be a comfort and help in her declining years. Truly if a child has a friend it certainly is her mother, and from my own experience have found it to be the case. My home is plentiful and happy, which necessitates me to decline your kind offer in your home. My uncle, Charles F. Smith, of Richmond, says he met you several times in Williamsburg, and would have cheerfully

given you all the information concerning my whereabouts had he known of my father's illness or desire to see me before his death, as also my uncle and aunt, Mr. and Mrs. Million, would have cheerfully given my father my address last fall when he was in Kentucky on a visit. I will not say more on this subject, as there is enough being said throughout Kentucky, but it would be a great satisfaction if you would send me a copy of his will."

In response to this communication the defendant, Finley, addressed to her the following letter:

"Washington, D. C., March 31, 1890.

"Miss Jennie M. Keiningham,

"White Hall, Ky.:

"Dear Miss—Your letter of the 18th inst. to hand. Its tone is the reverse of what I wished it to be, but you are young yet, and I shall not despair. You have need of an education now, later on you may not be so 'pleasantly and plentifully situated.' With good education you can more certainly be able to aid yourself and mother, and it will be of great satisfaction to you in after life. It can but be the wish of your mother and relatives that you be educated and fitted for the position in the best circles of society and usefulness. And even though you may be so situated that you can and will obtain this, without the provisions made for you by your father, I can but hope you will take and use for your accomplishment the small, but sufficient, sum left by your father for this purpose. I know you know but little of your father's life. I know you were not forgotten by him in his earnest prayers for your welfare. You, more than all else, he desired to know and love him, and he was worthy of it. He was loved by all who knew him here, and all who loved him felt an interest in your welfare. If you will allow me, I will love you as my own daughter, and treat you in the same way; and guard and protect you as a father. I would deny you nothing that I would give my own child, and shall feel sadly disappointed if you shall refuse to accept the wish and will of your father as expressed in his will. Now it would be to the interest of my family that you should not do this, for in this event you refuse to allow me to advise and superintend your education and training, the money left in my hands for this purpose goes to my son. But I want you to have it, and you shall if you will. I can put you in school now with my own daughter; you will be surrounded with fit and pleasant associations; and you will be loved and cared for and in all respects treated as a young lady of your age should. Now I do not wish to respond to the suggestion in your letter, in substance that you could have been found and brought to the bedside of your father before he died. The reasons why this was not done are abundant, and will be satisfactory to you whenever you will give opportunity to learn them. The relations that existed between your father and mother were not pleasant, but he is dead. I have no doubt he died a Christian. If he erred in life, which all do, let the grave hide his faults, and let those that live forgive and forget all wrong, real or imaginary. He loved you and prayed for you, his prayers ought not to be in vain.

"I go home the first of next month, and would like to take you with me and put you in school. I hope you will consult your friends and relatives

in regard to this matter, and trust your own good sense and that of your friends will decide for the best.

Your friend,

"H. F. FINLEY."

That when she received this letter she was only fifteen years of age, under the control of her mother, and being well treated, provided for by her and her stepfather; that she did not know what to do, or how to act in the premises; and that she had no power, without the consent of her mother, to accept defendant's proffer of protection; that the defendant, Finley, did not come to see her, or take any steps to reinstate the divorce suit upon the docket of the Fayette Circuit Court, or to get any order as to her care and custody, so as to enable her to comply with her father's will; that on the 16th of May, 1890, then four months after he had received the funds, he paid over to his son, F. W. Inley, about \$1,200 of the money devised to her by her father; that in February, 1893, he made a settlement of his accounts as her guardian with the judge of the Whitley County Court, in which he charged himself with \$1,220.86 as a balance remaining in his hands as executor of her father. On this pleading the case was submitted, and the circuit judge decided that she was not entitled to any relief, and struck the case from the docket. From that judgment the plaintiff appeals.

It is the contention of appellees that this judgment should be affirmed for two reasons: First, because he was appointed and qualified as executor and received the assets in the District of Columbia, the domicile of testator at the time of his death; and that for this reason he can only be required to answer for the faithful discharge of his duties in the tribunals of the District of Columbia; second, that the averments of plaintiff's petition and the exhibits filed therewith clearly show a performance on his part of all the duties imposed upon him by testator's will, and a refusal on the part of plaintiff to comply with the conditions annexed to the bequest to her by the terms of the will.

Appellee has cited numerous authorities of great weight to support the contention that an executor can not be sued outside the jurisdiction of his appointment for a failure to carry out the trust imposed upon him; but in the early case of *Dorsey's Ex'or v. Dorsey's Adm'r*, 28 Ky., 280, it was held by this court, in an opinion by Judge Underwood, that the distributee of a decedent might enforce distribution in the courts of the State of assets received by an administrator appointed in Maryland if found in this State. This case was followed by that of *Atcherson's Heirs v. Lindsey*, 45 Ky., 86, in which the administrator and infant heirs of John Atcherson sought to recover of James Lindsey, who administered upon the estate of decedent in South Carolina, certain assets received by him in that State. And the contention was made in that case that as Lindsey was appointed administrator in South Carolina and received the assets sued for there, he could not be held responsible in the tribunals of this State for the surplus remaining in his hands at the suit of a local administrator and infant heirs of decedent. In response to this contention the court, through Judge Marshall, after referring to the case of *Dorsey's Ex'or v. Dorsey's Adm'r*, quoted *supra*, said: "Upon the express authority of this case, and under our own sense of what is required by convenience and justice, and of the comity due to the sovereignty and laws of South Carolina, we are of the opinion that the mere fact

that Lindsey was appointed administrator in that State, and received there the assets for which he is now charged, does not of itself exempt him from all liability to be sued in the tribunals of this State for a claim growing out of his having thus received the assets, or the proceeds, of which the complainant, or some of them, are entitled. Whether any decree should finally be rendered against him on this account may depend upon the facts disclosed in his answer and upon the proof, but we think he was bound to answer."

The question was again before this court in *Manion's Adm'r v. Titworth*, 57 Ky., 597, and in a well-considered opinion by Judge Simpson it was decided that it was settled doctrine in this State "that the administrator or executor, who is appointed or who qualifies in another State, and there receives assets in his hands, may be sued in the tribunals of this State by the persons entitled to such assets, if he shall have removed to and settled in this State."

It follows from these decisions that appellant was entitled to maintain this suit against the appellee to recover the balance found due in his hands after the payment of the debts of the decedent in the courts of this State, if shown entitled thereto. It is apparent from even a casual reading of the will that two ideas were dominant in the mind of testator: First, he desired the bulk of the property owned by him should, after his death, go to his daughter for her education and maintenance; second, that she should be thrown under the influence of his friends and relations rather than those of her mother. To this end he directs that his executor should use all reasonable means and expense to find her and acquaint her with his history and character, and when found should take control of, raise and train her as his own daughter. The question then to be determined is whether appellee carried out in good faith the spirit and intention of testator's will with reference to his daughter, and whether she, with a full understanding of her rights, refused to accept the provision made for her with the annexed condition. It is essential to a correct decision of this question that we should look at the surroundings of the parties. Appellant at that time was only fifteen years old; she had never known her father; her life had been spent exclusively in the society and companionship of her mother and her friends, and on whom the burden and care of her support had, up to that time, been thrown. Her age, surroundings and opportunities in life rendered it wholly improbable that she would realize the importance of the proposition communicated to her by letter by an utter stranger, who, in this formal way, invited her to leave her mother and friends for the society and companionship of persons with whom she had no acquaintance, and of whom in all probability she had never heard. Besides, she could not have left the custody of her mother without her consent, even if she desired to do so, without violating the judgment of the Fayette Circuit Court, which at that time was in full force and effect. In qualifying as executor of his deceased friend appellant assumed to discharge delicate and solemn duties to his orphan and neglected child. Under these circumstances the two formal letters of appellant to her did not measure up to the full requirement of the duties assumed by him. The spirit of the will required that he should seek her out, make her personal acquaintance, detail to her the history, life and character of her

deceased father, and to have impressed her with his sincerity and friendship for her, and the advantages which would have accrued to her from a loyal compliance with the wishes of her father. And when his attention was called to the conditions of the judgment of divorce, placing her in the custody of her mother, it was his duty to have gone before the judge of the court and asked his intervention, and that he be awarded the custody and clothed with the power to direct the education of this young girl. It seems that there can be no room to doubt that if these steps had been taken that some plan would have been devised under the judgment of the court to carry out the wishes of testator, and to have secured to appellant the provision made for her in her father's will. At least he should have given her, as suggested in his letter, some reasonable opportunity to change her mind, instead of hastening to pay over the money to his own son.

The trial court erred in sustaining the demurrer to appellant's amended petition, and the judgment dismissing her petition is reversed and cause remanded for proceedings consistent with this opinion.

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FINLEY v. CITY OF WILLIAMSBURG.

(Filed January 16, 1908—Not to be reported.)

Municipal government—Damages—Surface water—Instructions—Appellant brought this action against appellee, alleging that the city in constructing its streets and drains had collected the surface water, by diverting it from the natural course in which it was accustomed to flow, and throwing it in unusual quantities into the branch, without enlarging the culvert through which it was required to pass; that the overflow of appellant's lot thus occasioned caused great damage to appellant's property. The answer was a traverse, but admits that it did divert the drainage, covering a small area, from its natural course. It further alleges that this was done, and the culvert constructed more than fifteen years, and that the overflow complained of occurred more than five years before the institution of the action, and pleads the statute of limitation. A trial resulted in a verdict for appellee, from which this appeal is prosecuted. The proof showed that the overflows occurred every year for twelve years before the bringing of this suit, and frequently within five years. Held—That a city is liable to the property holder who has been damaged by the collection of surface water and its discharge upon his premises, provided the city did any act that caused the accumulation of surface water at the point charged. Each overflow of appellant's lot occurring within five years next before the institution of this action, if caused by appellee in the manner complained of, was a distinct trespass. So it is wholly immaterial whether the acts of appellee, which caused the increased flow of water on appellant's lot, were committed within fifteen years before the bringing of the action or not. It is sufficient if the conditions resulting from those acts continued to exist, and that in consequence thereof the injuries to appellant's property were caused within five years before the institution of the action. The court improperly instructed the jury that if appellant's property was injured by the overflow of surface water within five years before bringing the suit, and that such overflow was caused by appellee's manner of constructing the sewers on its streets, still they were not authorized to find for appellant unless they further believed

from the evidence that the sewers were constructed within fifteen years before the institution of the action. They should have been instructed to find whether such conditions were produced by the acts of the appellee complained of; whether they existed at the time and were the cause of the overflow of and injury, if any, to appellant's lot, and finally whether the overflows occurred within the five years next before the bringing of the action. The court erred in giving the second instruction, authorizing the jury to apportion the damages in case the damage was caused by the insufficiency of the culvert. It was difficult, if not impossible, for the jury to perform the task required of them by this instruction.

R. S. Crawford for appellant.

Geo. P. Johnson and W. W. Lester for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Settle.

This action was brought by appellant in the Whitley Circuit Court to recover of appellee, city of Williamsburg, damages for the overflow of his residence lot by surface water, and to compel appellee to enlarge its culvert, or provide other means of escape for the water, to prevent further injury to his property.

The overflow is alleged to have come from a branch or stream into which the city, in constructing its streets and drains, had collected the surface water, by diverting it from the natural course in which it was accustomed to flow, and throwing it in unusual quantities into the branch, without enlarging the culvert through which it was required to pass to such an extent as to carry it off; that the overflow of appellant's lot thus occasioned washed away the soil, and left pools of water, filled with filth from the privies and stables of his neighbors, standing on the lot, causing disagreeable and unhealthful odors, that compelled him to close the front of his house for days and weeks at a time.

The answer of appellee traverses the allegations of the petition, but admits that it did divert the drainage, covering a small area, from its natural course. It avers, however, that this was done and the culvert constructed more than fifteen years, and that the overflow complained of occurred more than five years before the institution of this action, and pleads the statute of limitation in bar of a recovery. Other matters of defense are relied on in the answer not necessary to consider, as they were practically ignored by the parties on the trial and by the court in the instructions given. The trial in the court below resulted in a verdict for appellee, and appellant's motion for a new trial having been overruled the case comes to this court by appeal. While the evidence introduced on the trial in the lower court was conflicting, much of it conduced to prove that appellant's property has been injured as alleged in the petition, and that the overflows of which he complains have occurred every year for twelve years next before the bringing of the suit, and frequently during the last five years of that time; and further, that some of appellee's streets, ditches and drains, by the opening of which the surface water was diverted from its natural course and thrown on appellant's lot in unusual volume, have been constructed in less than fifteen

years of the institution of his action, and since the gutter complained of was made. It has been repeatedly held by this court that a city is liable to the property holder who has been damaged by the collection of surface water, and its discharge upon his premises, provided the city did any act that caused the accumulation of water at the point charged. A recent declaration of this doctrine will be found in *Thoman v. City of Covington*, 28 Ky. Law Rep., 117.

In *L. & N. R. R. Co. v. Cornelius*, 28 Ky. Law Rep., 1069, which was an action for damages for destruction of a field of tobacco in 1899 from the negligent construction of a culvert made by the railroad company in 1886, this court said: "The issue made in the evidence and presented to the jury by the instructions was upon the question whether the construction of the culvert was proper and skillful. This being so, it follows that the injury resulting from collecting the surface water upon the land opposite and casting it in a body upon appellee's land is not to be considered as of a permanent character, but each overflow was a distinct trespass, and the statute of limitation began to run only from the time when the overflow occurred."

The same doctrine was announced by this court in *City of Louisville v. Coleburn*, 22 Ky. Law Rep., 67, which was an action to recover damages for injury to plaintiff's property from the unskillful grading and paving of the carriage way of Twenty-fourth street, whereby the surface water accumulated and stood in the gutter, emitting foul and loathsome odors to such an extent as to poison the atmosphere around her lot. The plea of the statute of limitation was relied on to defeat a recovery, in discussing which this court said: "Ordinarily in actions for injury to real estate the plaintiff can only recover for injury done up to the commencement of the action. In addition to that it does not appear to us that the injury in this case is necessarily of a permanent character like that sustained from the construction and operation of a railroad, which in its nature is necessarily enduring. On the contrary it may be remedied by a regrade of the street, or, what is more probable, by the extension of the sewerage system of the city along this street." \* \* \*

It is manifest that the oft-recurring overflow of plaintiff's lot, which appears to have been superinduced by appellee's diverting much of the surface water from its natural course, might have been prevented by enlarging its culvert or providing other means of escape for the water. Besides, the overflows that occurred within five years after the institution of the action would doubtless have been prevented if appellee had complied with its promise to provide for the escape of the water, which it seems to have made, to procure the dismissal of a former suit brought against it by appellant in the same court, for injuries similar to those now complained of.

In our view of the law, each overflow of appellant's lot occurring within five years next before the institution of this action, if caused by appellee, in the manner complained of, was a distinct trespass, as said in *L. & N. R. R. Co. against Cornelius*, *supra*. So it is wholly immaterial whether the acts of appellee which caused the increased flow of water on appellant's lot were committed within the fifteen years preceding the bringing of the action or not. It is sufficient if the conditions resulting from those acts continued

to exist, and that in consequence thereof the injuries to appellant's property were caused within five years after the institution of the action.

We are of opinion that the court erred in giving instruction No. 1 as the law of the case, for it in effect told the jury that although the lot of the appellant may have been injured by overflow of surface water within five years next before the bringing of the action, and that such overflow was caused by appellee's manner of constructing the sewers on its streets, still they were not authorized to find for appellant unless they further believed from the evidence that the sewers were constructed within fifteen years before the institution of the action. It was not proper to submit to the jury the question of whether the conditions which caused the overflow of the lot were produced by appellee within or beyond the fifteen years next before the institution of the action, as it is not material, but they should have been instructed to find whether such conditions were produced by the acts of the appellee complained of, whether they existed at the time and were the cause of the overflow of and injury, if any, to appellant's lot, and finally, whether the overflows occurred within the five years next before the bringing of the action.

We likewise disapprove of the second instruction given by the circuit court as it erroneously directed the jury, if they found that appellant's damages were caused partly by reason of the insufficiency of the culvert to carry off the water, and partly by appellee's diverting water to it, but for which it would not have flowed to the culvert, they should find against appellee for such proportionate part of the damages as were caused by the diverting of the water. By this instruction the jury were led into the realm of speculation, and required to apportion the damages by allowing only such as resulted from the diversion of the water by appellee. It must be presumed that appellee knew the capacity of the gutter, and if it so negligently constructed its streets or sewers as to divert the surface water from its natural course, and throw it in increased volume where it would have to flow through the gutter in order to escape, and the gutter, by reason of its inability to accommodate the increased flow, caused the water to back upon and overflow appellant's lot, can it be said that the insufficiency of the gutter contributed any less to the injury of the lot than the diverting of the water? We think not. It was difficult, if not impossible, for the jury to perform the task required of them by this instruction. All that was needed on the point intended to be covered by it was a simple instruction defining the measure of damages applicable to the issues and state of facts presented.

On account of the errors contained in the instructions the cause is reversed and remanded for a new trial, and for further proceedings consistent with the opinion herein.

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(Former publication omitted by mistake.)

LOUISVILLE AND JEFFERSONVILLE FERRY CO. v. COMMONWEALTH.

(Filed June 13, 1900.)

**Taxation—Statute of limitation—**Section 4021, Kentucky Statutes, provides that a lien can not be enforced for taxes against property which



has been transferred more than five years, but it does not limit the time within which an action shall be brought to enforce a lien for taxes against the owner. Taxes do not become due until after assessment, and the cause of action to recover same does not accrue until after assessment. Action to recover taxes are barred five years after assessment.

Humphrey & Davie for appellant.

M. H. Thatchers for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Paynter.

The questions involved in this case are the same as in five other cases of the same appellant against the same appellee, this day decided, except it is insisted that the statute of limitation bars a recovery. This court decided in *Central Railway and Bridge Co. v. Commonwealth*, 20 Ky. Law Rep., 1890, that an action could be maintained under certain sections of the Kentucky Statutes, not necessary to mention, but it is sufficient to say the right to do so is not based on the act to which counsel refer. Section 4021, Kentucky Statutes, being a part of the act of November 11, 1892, gives the Commonwealth, and each county, incorporated city, town and taxing district a lien on the property assessed for the taxes due them respectively, which shall not be defeated by gift, devise, sale or alienation, or any means whatever, unless the gift, devise, sale or alienation shall have been made for more than five years before the institution of proceedings to enforce the lien, and nothing shall be exempt from levy and sale for taxes and cost incident to the sale. This section gives a state of case wherein the lien can not be enforced, but does not seem to limit the time in which the Commonwealth, county, city, etc., shall assert a lien against property undisposed of by the owner. We have examined the revenue act, and are unable to find any provision therein limiting the time in which an action shall be brought to enforce a claim for taxes against the owner. Taxes are liabilities created by statute and are barred after the lapse of five years after they are due and payable, and they do not become due until after the assessment is made (Section 2515, Kentucky Statutes.) These taxes were not assessed until 1898, and of course the statute does not bar a recovery.

The judgment is affirmed.

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#### MEACHAM v. DEMOCRATIC STATE EXECUTIVE COMMITTEE, &c.

(Filed January 20, 1903.)

Appeals—Advancement of case—The transcript was filed in this court four days after the beginning of the term, and a motion made to docket and advance it for decision. Held—That the law does not authorize docketing and advancing the case. This court has uniformly held that under sections 753 and 754, Civil Code of Practice, appeals do not stand for trial unless the transcript is filed twenty days before the beginning of the term, except by consent of all parties in interest. Section 738, Civil Code of Practice, confirms this rule.

John W. Ray for appellant.

W. S. Pryor for appellee.

Appeal from Franklin Circuit Court.

Chief Justice Burnam delivered the following response to motion:

The appellant asks that the appeal in this case be docketed and advanced for decision at this term of the court. The judgment appealed from was rendered on the 6th day of January, 1903, and the appeal granted by the lower court. The record was filed in this court on the 9th day of January, 1903, four days after the beginning of the present term of this court.

The time for trial and decision of appeals in this court are regulated by sections 753 and 754 of the Civil Code, which are as follows:

"Section 753. Appeals shall stand for trial during the first term twenty days before which the transcript is filed in the clerk's office, if—

"1st. The appeal be granted by the inferior court; or—

"2d. The appearance of the appellee be entered five days before the day on which the case is set for trial on the docket; or—

"3d. The appellee be summoned actually twenty days, or constructively thirty days, before said day.

"Section 754. 1st. The clerk shall arrange the appeals upon the docket, setting the proper number for each day of the term; and in arranging them may have due regard to the convenience of litigants, in placing together the appeals from the several judicial districts.

"2d. He shall, at least fifteen days before each term, furnish a copy of the docket to the public printer, who shall immediately print not less than five hundred copies thereof, and send one of said copies to the clerk of each circuit court, chancery court, and court of common pleas, for public use; and the claim of the printer shall be approved and certified by the court, and be paid as other claims upon the treasury."

This court has uniformly held that under these provisions of the Code appeals do not stand for trial unless the transcript is filed twenty days before the beginning of the term, except by consent of all parties in interest. And this construction is abundantly fortified by section 738 of the Code, which provides:

"Section 738. The appellant shall file the transcript in the office of the clerk of the Court of Appeals at least twenty days before the first day of the second term of said court next after the granting of the appeal, unless the court extend the time, as, for cause shown, the court may do."

For these reasons the motion to docket and advance is overruled.

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PIRMANN v. NEWPORT, LICKING AND ALEXANDRIA TURNPIKE CO.

(Filed January 20, 1903—Not to be reported.)

Turnpikes—Negligence—Damages—Evidence—Appellant, in his petition, alleges that in riding over a bridge on appellant's road his horse stepped upon and broke through a defective and decayed plank in the floor, and that he was thrown from his horse to the floor and sustained severe and painful injuries, which confined him to his bed for several weeks, causing him great expense in nursing and medical attention, and sought to recover damages therefor. The petition also alleged that appellee knew, or could have known

prior thereto by the exercise of ordinary care and diligence, of the existence of such defective plank. At the close of appellant's evidence the court gave to the jury a peremptory instruction to find for appellee, from which ruling this appeal is prosecuted. Held—That the peremptory instruction was improperly given. The evidence shows that the bridge spans a stream about eighteen feet wide and was sufficiently high for a man to walk under it without difficulty, and that several planks showed decay and cracks. The court improperly excluded evidence as to the general condition of the bridge. The law imposes upon turnpike companies the legal duty to keep its bridges safe for public travel, and to this end should cause such inspections to be made as ordinary care required, and to see that the timbers are strong and suitable for the purpose for which they are intended.

C. L. Ralson, Jr., and Ahlering & Caldwell for appellant.

S. C. Bailey for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Adolph Pirmann, instituted this suit against the appellee, the Newport, Licking and Alexandria Turnpike Co., and alleged in substance that on the 7th day of October, 1900, whilst riding horseback across a bridge on the defendant's road, his horse stepped upon and broke through a defective and decayed plank in the floor of the bridge; and that the defendant knew, or could have known prior thereto by the exercise of ordinary care and diligence, of the existence of such defective plank; and that by reason thereof he was thrown from his horse against the floor of the bridge, sustaining serious injuries, from which he suffered great pain and was confined to his house and prevented from attending to his business for six weeks, and was compelled to and did pay \$35 for medical services rendered him, and asked a judgment because of such injuries, suffering, medical attention, etc. The defendant controverted the affirmative averments of the petition, and plead contributory negligence. At the conclusion of the plaintiff's evidence the court directed the jury to find for the defendant upon the ground that there was no testimony conducing to show that the defendant company knew, or could by the exercise of ordinary care have known, of the decayed and rotten condition of the plank which broke, and from the judgment thereto plaintiff appeals.

The testimony is conclusive that the floor in defendant's bridge broke beneath the weight of plaintiff and his horse, as he was riding over it; and that in consequence thereof he was thrown from his horse and sustained injuries which confined him to his house for several weeks; and that they were of a very painful character, requiring the employment of a physician to whom he paid a fee of \$35 for his services, besides other attention from members of his household. We do not agree with the contention of the trial court that there was no evidence conducing to show that the defect in defendant's bridge could not have been discovered by the use of ordinary care on their part. It was shown that the bridge spanned a stream eighteen feet wide, and was sufficiently high for a man to walk under it without difficulty.

Fred Weber, a witness for the plaintiff, testified that he looked at the bridge after the accident from the under side and noticed that a plank close

to the one which broke through was cracked entirely across and considerably sprung, and that there was also some rotten lumber on the side of the hole; and that he could see from the upper side that two other planks in the floor of the bridge were badly decayed. The plaintiff also offered to prove the general condition of the bridge, which the court, upon exception, refused to allow.

The law imposes upon turnpike companies the legal duty to keep its bridges safe for public travel, and to this end should cause such inspections to be made as ordinary care required, and to see that the timbers are strong and suitable for the purpose for which they are intended. In passing upon this question, in the case of the Frankfort Bridge Co. v. William, 39 Ky., 405, the court, through Judge Ewing, said: "The public is deeply interested in its being a safe bridge, the security and safety of the lives of the citizens as well as their property required that it should be constructed with care and caution, and its condition and safety well looked to by the company before they open their gates and hold out to the public inducements to venture upon it. It is not to be expected that the citizen when he approaches the bridge will alight and examine for himself to ascertain whether the bridge has been constructed in a workmanlike manner, and upon a suitable plan or with proper materials, but he has a right to look to and trust in the company that those things have been attended to and that the bridge is safe. If, therefore, the company have not attended to those things with ordinary vigilance at least, they are unquestionably liable to any persons who have been injured in their person or property by reason thereof."

We are of the opinion that the trial court erred in excluding testimony as to the general condition of this bridge. "The thing speaks for itself." And if the general appearance of the structure indicated neglect and decay, it was enough to put the defendant upon inquiry as to its condition.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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WILSON, &c. v. WINSOR, LETTON, &c.

(Filed January 20, 1908—Not to be reported.)

**Fraudulent conveyance—Husband and wife—Undue influence—**In this action by appellees it is sought to cancel a deed of conveyance made by a husband and wife to a third party, who conveyed same to the husband for a consideration of \$4,445.15, alleged to have been paid at the date the deed was executed. Mental incapacity and undue influence are alleged as grounds for cancellation of the deed. Held—That the evidence preponderates in favor of appellants that she was capable and competent to trade, transact business and protect her rights in business transactions with strangers, but that she was not capable and competent to deal with and protect her rights as against her husband, who, as the evidence shows, was a man of strong will power and a shrewd business man, and who had her love and confidence, she being under his control. The conveyance from the husband and wife to the husband's brother, and from the brother to the husband, was for the sole purpose of getting the title out of the wife and in the husband in order that it might descend to his child and prevent the heirs of the wife from receiving

any benefit therefrom, and that the recited consideration in said deed of \$4,445.15 was a pretense and false, and that she received no part of said consideration, and same was inserted in the deed to deceive. The marital relationship existing between these parties, the advanced age of the wife, the questionable strength of her will power and mind, and the unquestionable strength of his will power, makes this one of the cases which places the burden upon the grantee and those claiming under him to show by the clearest evidence that the wife understood the nature and effect of the transaction, and that it was fair and just to her.

Russell Mann, W. S. Pryor, J. M. McVey, E. M. Dickson and T. E. Ashbrook for appellants.

McMillan & Talbott for appellees.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Nunn.

This action has heretofore been in this court on appeal, as appears in 19 Ky. Law Rep., 1154. Judge Guffy, speaking for the court, reversed and remanded the cause, with directions to "set aside the agreement in the original suit and cancel the deed from the said Verlinda Cray to M. A. Cray, and the deed from M. A. Cray to John R. Cray, and adjudged the land to the real representatives or heirs at law of the said Verlinda Cray.

The court afterwards, in the same case, on petition for rehearing, said: "That so much of the opinion rendered in this case as directs the cancellation of the deed from Verlinda Cray to M. A. Cray, and the deed from M. A. Cray to John R. Cray, and adjudging the land to the real representatives and heirs at law of said Verlinda Cray, is withdrawn, but the residue of the opinion shall remain in full force, and the cause is remanded, with directions to the court below to set aside the agreement and judgment rendered pursuant thereto and hold the same for naught, and the parties may litigate the questions involved in the original suit. In other words, all questions affecting the validity of the deed from Verlinda Cray to M. A. Cray, and the deed from M. A. Cray to John R. Cray, may be further litigated and the parties may, if they so desire, amend their pleadings and take such additional proof in support of, or adverse to, said deeds as they may desire."

On the return of this cause to the lower court appellants offered an amendment to their answer, pleading the statute of limitation. The lower court, in the exercise of its discretion, refused to allow the plea to be filed, and this court is of opinion that the lower court did not abuse its discretion in so refusing. A great many witnesses were heard on each side; the one to show that Verlinda Cray was, by reason of her advanced age, ill health and mental incapacity, incompetent to trade, transact business and dispose of her property and protect her rights, and also that her husband, John R. Cray, was a man of strong will power and a shrewd business man and trader. The other to show that Verlinda Cray was strong in body and mind and fully capable of knowing her property, the value of it, and of disposing of it with a fixed purpose and intention, and fully capable of protecting her rights in all transactions. The lower court, upon this evidence, found for the appellees.

We are of the opinion that the evidence preponderates in favor of appel-

lants that she was capable and competent to trade, transact business and protect her rights in business transactions with strangers, but that she was not capable and competent to deal with and protect her rights as against her husband, who, as the evidence shows, was a man of strong will power and a shrewd business man, and who had her love and confidence, she being under his power and control. Let us consider the subject of undue influence independent of incompetency as affecting transactions between husband and wife.

In Story's Equity Jurisprudence, section 1395, we find this language: "Courts of equity examine every such transaction between husband and wife with anxious watchfulness, caution and dread of undue influence."

To the same effect is the doctrine laid down by this court in the case of *Golding v. Golding*, 82 Ky. Reps., 55: "The chancellor, at the instance of the wife, will scrutinize closely the conduct of the husband and the motive influencing the wife to part with her estate, and when the husband, having won the affections of his wife, has such an influence over her as to make her entirely subordinate to his will, the chancellor will not undertake to adjudge that the parties are dealing at arm's length and hold the wife to the contract, as he would a stranger. The husband will not be allowed to take advantage of the marital relation so as to invest himself with title to the wife's estate, and then insist upon her ability to resist his importunities as a reason to make her stand by the executed agreement investing him with title."

The court is of the opinion that the conveyance from Verlinda Cray and her husband to his brother, M. A. Cray, and from M. A. Cray back to his brother, John R. Cray, was for the purpose, and only purpose, of getting the title out of Verlinda Cray and in John R. Cray, that it might descend to his child and prevent Verlinda Cray's heirs from receiving any benefit therefrom; and that the recited consideration in said deed of \$4,445.15 was a pretense and false, and that she received no part of said consideration, and same was inserted in the deed to deceive.

For proof of this fact we refer to the following language in the answer of John R. Cray, filed in the original action in 1891 of Verlinda Cray against him, after traversing the allegations of the petition, in general terms, viz.: "Defendant says that his said wife had no children at the time of her marriage to him or at the time of the execution of said deed; she was then about fifty years of age and it was highly improbable, if not impossible, that any children would be born to her; and she expressed the desire to give to ----- all of her real estate, and states that she desired and intended that he and his children should have the same because of her affection for them; and the said conveyance and sale of said land to M. A. Cray was made at her special instance and request, and the same was wholly voluntary upon her part."

If it was a fact that she actually received \$4,445.15 in hand paid, as stated in the deed, why the necessity of using this language in his answer and seek to change the consideration, or in part change that named in the deed to love and affection? This of itself makes it evident to our mind that all was not fair and equitable on the part of John R. Cray and M. A. Cray. We also refer to the depositions of J. B. Cray and J. A. L. Wilson, the

former being the son of M. A. Cray, and the other the son of appellant, and also the deposition of J. N. Ross, cashier of the Carlisle Deposit Bank. Wilson and Cray profess to have been present when said deed was executed and saw M. A. Cray pay to Verlinda Cray the amount of cash named in the deed, and that Verlinda Cray gave all of it to her husband except \$1,000, which she retained. Young Cray claimed that he received the cash on a check of his father, payable to him one or two days prior to the date of the deed, April 28, 1879. The bank's books, as shown by the evidence of Ross, the cashier, show that no such transaction took place; that no such amount of money was drawn by M. A. Cray in favor of any one, from April 1, 1879, to August 13, 1879, and on August 13, 1879, his account is charged with a check given to Verlinda Cray for \$2,222.57 on a check professed to have been given April 28, 1879, the date of the deed. And on September 1, 1879, his account is also charged with a check to Verlinda Cray for \$1,722.59. It is certain that M. A. Cray did not, on April 28, 1879, pay to Verlinda Cray \$1,445.15 in money, and also on the same date give her the two checks named above. We are convinced that the young men were mistaken about seeing the cash on that occasion, and it is possible that these checks were an after-thought, to further the deception, and were given about August and September, and were dated back to correspond with the deed.

The marital relationship existing between these parties and the advanced age of Verlinda Cray, and the questionable strength of her will power and mind, and the unquestionable strength of his will power, makes this one of the cases which places the burden upon the grantee and those claiming under him to show by the clearest evidence that Verlinda Cray, his wife, understood the nature and effect of the transaction, and that it was fair and just to her.

In the case of *Smith, & Co. v. Snowden, & Co.*, 96 Ky. Reps., 3638, this court, Judge Hazelrigg rendering the opinion of the court, says: "The learned chancellor was doubtless guided by the general rule that the plaintiff, who seeks to set aside a deed of the character here involved, must take the burden, and make out affirmatively a case of fraud or the existence of undue influence. \* \* \*

"We may say in general that when such a relation exists the person obtaining the benefit must show, by the clearest evidence, that the transaction was freely and voluntarily entered into, and devoid of inequitable incidents. A most important feature in this case is the false recital of the consideration. These old people were themselves as clay in the hands of the potter. As to them the question of consideration was immaterial, but it appeared important to the grantees to show to those equally and naturally interested in the partition about to be made of the estate that a bona fide sale had been consummated for a valuable consideration. The recital of the false consideration carries with it the thought and purpose of a designing and intentional concealment of the truth, and this falsehood and concealment are the highest evidences of the fraudulent intent with which the writings were procured; not necessarily of actual but of constructive fraud, assumed in view of the relation of the superior contracting with the inferior, the independent with the dependent, the strong with the weak. The grantees, it seems to us, can find no relief in assuming the position, after the attack on the deeds was

made, that the real consideration was love and affection, and an agreement to care for the grantors during the remainder of their lives."

In the case before us it is shown by the evidence that at least John R. Gray was superior in intellect and of much stronger will power than his wife, and that he obtained a great advantage of his wife in the transaction, as he obtained all her property, and recited a false consideration therefor, and under such circumstances the burden was on him to show, by the clearest evidence, that the transaction was freely and voluntarily entered into, and devoid of inequitable incidents.

Appellant failing to show this, the judgment of the lower court is, therefore, affirmed.

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DILAS' ADM'R v. CHESAPEAKE & OHIO RY. CO.

(Filed January 20, 1903—Not to be reported.)

1. Railroads—Negligence—Trespassers—J., by permission of a superintendent of appellee company, was riding on a tricycle belonging to him on the railroad and D. was riding with him on his invitation. Just before reaching their destination a passenger train struck the tricycle and killed both J. and D. This action was instituted to recover damages for killing D. At the close of appellant's testimony the court gave a peremptory instruction to find for appellee, and this appeal is prosecuted from that ruling. Held—That the peremptory instruction was properly given. The proof showed that the injury occurred very early in the morning, when it was very foggy, and that after the engineer discovered their presence he did all he could to prevent the injury, and as J. and D. were both trespassers the company owed them no duty until it discovered their peril.

2. Evidence—The court properly excluded testimony to show that the superintendent told J. that he did not care if he used the tricycle. It also properly excluded evidence to show that appellee had permitted its track to be used by the public for travel at the place where the accident occurred, as mere acquiescence on the part of the railroad company in the use of the track by the public does not confer any authority or right, or amount to a license, to use the same.

J. B. Bennett, W. T. Cole and Cole & Son for appellant.

W. H. Wadsworth for appellee.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Settle.

The appellant, L. T. Mowry, as administrator of the estate of Crit Dilas, deceased, instituted this action in the Greenup Circuit Court against appellee, Chesapeake & Ohio Ry. Co., to recover damages for the alleged negligent and wrongful killing of his intestate, October 28, 1897, by a passenger train in charge of its servants. The answer traverses the allegations of the petition and avers negligence on the part of the decedent.

Upon the trial in the lower court, and at the conclusion of appellant's evidence, the jury found for appellee upon a peremptory instruction from the court, and appellant having been refused a new trial, prosecutes this appeal. It appears from the record that the intestate, at the invitation of one Ad. Jacobs, was riding with him upon a railroad tricycle from the latter's house



into the village of Russell, where he (Jacobs) was employed in the shops, presumably of appellee, when but a short distance from Jacobs' house, and within three miles of Russell, the tricycle was struck by the passenger train, and both Jacobs and Dilas were killed. The accident occurred between 6 and 7 o'clock in the morning. A dense fog prevailed at the time, which doubtless obstructed the view of the two men on the tricycle, as well as that of the engineer and fireman on the train. It appears that the collision took place at a point about four hundred yards from a private crossing, known as Powell's crossing, and that between that crossing and Russell were two other crossings, both of which were public crossings, one, Pond Run, or Chinn's crossing, being a quarter of a mile to a half mile from Powell's crossing, and the other, Clancy's crossing, being about the same distance from Chinn's crossing.

While the evidence is somewhat conflicting, it fairly establishes the following facts that the train was running on time, and not at an unusual rate of speed: That it gave no signal, either by the ringing of its bell, or the blowing of its whistle, for the Powell crossing, but it did give the usual whistle signal for the Chinn public crossing, which, as stated, was a quarter or half mile from the Powell crossing, and one or more witnesses testify that the train whistled for the Clancy crossing.

In view of the foregoing facts we are unable to see why appellee should be held accountable for the death of appellant's intestate, for as he and Jacob were mere trespassers in thus making use of appellee's track, the latter's servants in charge of the train were under no duty to keep a lookout for them, nor does the evidence show any negligence on the part of those in charge of the train in failing to use all reasonable means to avoid the injury after discovering Dilas and Jacobs on the track. It is contended, however, that as there is evidence tending to show that the tricycle on which the parties were riding was owned by one Stout, appellee's road superintendent, and that Jacobs, with his permission, had used it for nearly two years on appellee's track in going to and from his house to Russell, his use of the track was thereby known to and acquiesced in by appellee, for which reason he and Dilas were not trespassers in thus using the track. It must be borne in mind that Jacobs, if in the employment of appellee at all, was employed to work in its shops at Russell. He had nothing to do with the track or road-bed, nor did his duties, so far as this record discloses, require him to travel over appellee's track with, or without, a tricycle, and certainly he was without authority, either express or implied, to take Dilas on the tricycle with him.

In *Ky. Central R. R. Co. v. Gastineau's Adm'r*, 88 Ky., 119, it was held by this court that even where one undertakes to assist an employe of a railroad company at the request of such employe, "it (the railroad company) is not required to use care to anticipate and discover the peril to such a person, but only to do so after the discovery of the danger, until then no legal duty is imposed upon it, because no one by a wrongful act can impose a duty upon another."

The doctrine announced in the case *supra* was followed and re-affirmed in *Eastern Ky. Railway Co. v. Powell, &c.*, 17 Ky. Law Rep., 1051, in which case the injuries sued for were inflicted in a collision between a train and

hand car, the latter having been furnished by the station agent of the railroad company for the use of himself and others. In discussing in this case the want of authority on the part of the station agent to run or allow the use of hand cars on the railroad track, the court said: "There was an entire absence of proof showing Irwin had any authority to use, or to authorize any one else to use, defendant's road in the manner stated. Besides, the presumption might be indulged that the officers of a railroad would not permit a subordinate like Irwin to go upon its track, or allow others to do so, with a hand car at will, when special trains were being frequently run over the road. If he had no authority to so use the track, he could not vest any one else with such authority."

We are of opinion, therefore, that the lower court did not err in refusing to allow appellant's counsel to prove a conversation between the road superintendent, Stout, and Ad. Jacobs, in which the former said he "did not care" if the tricycle was used by Jacobs. We are also of the opinion that the court properly excluded the evidence offered by appellant, to the effect that persons had been permitted by appellee to use its track for travel at the place of the accident and from there to Russell. It was not shown by the avowal of what the witness would state, by whom and to what extent the track had been used, and, besides, as said by this court in *Brown's Adm'r v. L. & N. R. R. Co.*, 17 Ky. Law Rep., 145, "the mere acquiescence on the part of the railroad company in the use of the track by the public does not confer any authority or right, or amount to a license, to use the same."

Appellant has failed to plead the alleged consent of appellee's road superintendent to the use of the tricycle by Jacobs and Dilas, or that he had authority from appellee to give such consent, nor does he plead the alleged license from appellee to the public to the use of its track as a walkway.

In *Embry v. L. & N. R. R. Co.*, 18 Ky. Law Rep., 434, it was held in an action against a railroad company to recover for injuries resulting from its negligence that "the petition is fatally defective in failing to show that plaintiff had any right to be on the track, or that defendant owed him any duty, and, therefore, a peremptory instruction to find for the defendant was proper."

The law is well settled in this State by numerous decisions of this court, that as to persons who are trespassers upon its track a railroad company can only be held liable in damages for injuries inflicted by its trains, where it is shown that the danger to the injured party was discovered in time for the injury to have been avoided by the exercise of reasonable or ordinary care on the part of those in charge of the train. In addition to the cases above indicated the following may be cited in support of the doctrine announced, viz.: *Haskins' Adm'r v. L. & N. R. R. Co.*, 17 Ky. Law Rep., 78; *L. & N. R. R. Co. v. Wade*, 18 Ky. Law Rep., 549, and *L. & N. R. R. Co. v. Tinkham's Adm'r*, 19 Ky. Law Rep., 1784.

It is contended for appellant that appellee's engineer was guilty of negligence in failing to have the headlight of the engine burning at the time of the collision, but we are unable to see that any good could have resulted from the use of the headlight in such a fog as that which enveloped the railroad track and contiguous territory, and the engineer, whose statements are

uncontradicted, testified that the headlight was extinguished at Russel because of no further service in affording light. We do not believe that appellee's servants in charge of the train, under the existing conditions, could have anticipated that persons would be on the track with a tricycle, nor was it their duty to do so. The collision occurred where appellee's track ran through a field, and at a point four hundred yards from the nearest crossing. The train, according to the evidence, was making a great noise at the time, and gave as it approached the usual signal at each of the public crossings, Clancy's and Chinn's. It was not required to whistle for the Powell private crossing, though it may at times have theretofore done so.

It is manifest, therefore, that those in charge of the train did not discover the peril of Jacobs and Dilas in time to avoid the collision. Upon the other hand, it does appear that Jacobs and Dilas were familiar with the running of the trains on appellee's road, and it follows that in venturing to use appellee's track with the tricycle, in the face of an approaching train, they were guilty of the grossest negligence, but for which they would not have been killed.

Being of the opinion that the circuit judge did not err in giving the peremptory instruction asked by appellee, the judgment of the lower court is affirmed.

Judge Paynter not sitting because he was a witness in the case.

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POWERS v. COMMONWEALTH.

(Filed January 20, 1908—Not to be reported.)

Criminal law—Petition for rehearing—An opinion of this court reversing a judgment of conviction of appellant was filed at the September term, 1902, and a petition for rehearing was tendered and offered to be filed, to which appellant objects. Held—That the provisions of section 780, Civil Code, authorizing the filing of petitions for rehearing, does not apply to criminal cases, but this court has, by virtue of its appellate jurisdiction in such cases, power to suspend the issue of the mandate and rehear the case during the term at which it is tried. But if the power is not exercised during the term the decision in the case becomes final, and the court has no jurisdiction at a subsequent term to retry the appeal. Petition for rehearing refused to be filed.

J. R. Morton, J. G. Sims and J. B. Finnell for appellant.

T. C. Campbell, R. B. Franklin, T. B. Sebree, John K. Hendrick, B. G. Williams, Victor F. Bradley, L. W. Arnett, T. Earl Ashbrook and Davis Dundon for appellee.

Appeal from Scott Circuit Court.

Chief Justice Burnam delivered the following response to motion for rehearing:

On the first day of the present January term of this court the Commonwealth of Kentucky tendered and asked permission to file a petition for rehearing in the case of the Commonwealth v. Caleb Powers, charged with murder, which was tried and decided at the last September term of this

court. The defendant, by counsel, objects to the filing of this petition on the ground that there is no authority for such proceeding.

Appeals to this court in felony cases are regulated by section 836 of the Criminal Code, which provides as follows:

"An appeal may be taken by the defendant in the following manner only:

"1st. The appeal must be prayed during the term at which the judgment is rendered, and the prayer noted on the record in the circuit court. The appeal shall be granted as a matter of right.

"2d. When an appeal is prayed the court shall, if the defendant desire it, make an order that the execution of the judgment be suspended until the expiration of the period within which the defendant is required to lodge a transcript of the record in the clerk's office of the Court of Appeals. After the expiration of such period the judgment shall be executed unless the defendant shall have filed in the clerk's office of the court rendering the judgment the certificate, as provided in subsection 8 of this section, that the appeal has been taken, or a copy of the order of the Court of Appeals granting further time to lodge the transcript.

"3d. The appeal is taken by lodging in the clerk's office of the Court of Appeals, within sixty days after the judgment, a certified transcript of the record. The clerk of the Court of Appeals shall thereupon issue a certificate that an appeal has been taken which shall suspend the execution of the judgment until the decision upon the appeal.

"Section 857. Appeals in criminal cases shall take precedence over all other business of the court, and be placed first upon the docket for trial.

"Section 858. They shall stand for trial at the first term succeeding the lodging of the transcript in the clerk's office of the Court of Appeals, provided it be so lodged ten days before the commencement of the term.

"Section 359. When an appeal by the defendant in a case of felony is lodged within ten days before the commencement of the term, or during the term, it shall stand for trial on the tenth day after it is so lodged."

"Section 360. The appeal shall be decided at the same term at which it is tried."

It will be observed that all these provisions of the Criminal Code look to a speedy trial and decision of felony cases by this court. No provision is made for a rehearing by the defendant, and except in cases expressly provided for by statute a rehearing is not a matter of right. But we are of the opinion that this court has, by virtue of its appellate jurisdiction in such cases, power to suspend the issual of the mandate and rehear the case during the term at which it is tried. But if the power is not exercised during the term the decision in the case becomes final, and the court has no jurisdiction at a subsequent term to retry the appeal. In *Nelson v. Commonwealth*, 94 Ky., 594, it was decided that section 760 of the Civil Code applied to civil cases only, and as there was no provision in the Criminal Code for time in which to file a petition for rehearing, that in case of an affirmance of the judgment of conviction the mandate might issue immediately. The question in that case partly involved the decision of the one before us, and we are of the opinion that this court has no jurisdiction to grant a rehearing in this case at this term of the court.

Motion overruled.

Whole court sitting.

## MASTERSON v. MASTERSON.

(Filed January 20, 1908—Not to be reported.)

Parent and child—Custody of child—A divorce having been granted appellant from her husband, the appellee, the lower court gave the custody of their infant child, a girl about eight years of age, to her father, and appellant has prosecuted this appeal. Held—That the lower court did not err in giving the custody of the child to her father, as he was in law entitled to its custody and bound for its support besides the evidence shows that the family and surroundings of the husband were such as to promote the moral and social interests of the child in every way, while the evidence as to the surroundings of the mother showed a lack of conditions that would be beneficial to the child. This court is indisposed to interfere with the decision of a chancellor concerning the custody of children unless he abuses that discretion. He is familiar with the witnesses and the surroundings of parties, and better qualified to pass upon such questions.

C. T. Atkinson and Geo. S. & John A. Fulton for appellant.

John S. Kelley and Nat. W. Halstead for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge O'Rear.

The question on this appeal is the right of the divorced husband (appellee) to the custody of the infant child, Mary Ruth, as against the divorced wife (appellant), the child's mother. This case has been twice before in this court on appeal. (20 Ky. Law Rep., 631; 22 Ky. Law Rep., 1186.)

The first judgment appealed from dealt mainly with the subject of alimony and maintenance. But it gave to appellee, the father, the custody of this child. In the opinion reversing that judgment as to alimony, and the maintenance of appellant, concerning the custody of the child it was said: "Appellant should also be given the custody of the infant child \* \* \* unless there are insuperable obstacles to this not apparent from the record now before us."

On the return of the case to the circuit court further preparation of the case on both branches, that is, as to alimony and the custody of the child, was made. On the second appeal the only question decided was the one of alimony. The other question had not been decided by the circuit court. Upon that branch this court said: "That matter is yet before the chancellor, whose special duty and prerogative it is to carefully consider and conserve the interest of the child."

The circuit court, upon the evidence before it on the first trial, and the additional evidence brought into the record since, and after a privy examination of the child (now about eight years of age), adjudged that the father should have its custody for the present. From that judgment the mother has prosecuted this appeal. For appellant it is contended that this court, in controlling terms, decided, in the first opinion that she should be given the custody of the child unless there was some "insuperable obstacle" not then apparent from the record; that the facts then in the record would not alone be enough to sustain the chancellor's judgment giving the custody of the child to the father. Exactly what was meant by the term "insuperable obstacle" was not further stated in that opinion.

On the second appeal we said of this phrase: "The court intended thereby and expressly authorized a further investigation by the circuit court before requiring the custody of the child to be delivered to the mother."

The court could not have meant in the first instance to decide that, as a matter of law, the mother was entitled to the custody of her children, upon a separation from her husband unless the record presented insuperable obstacles thereto, as that term is commonly understood.

On the contrary, if the welfare of the child be equally conserved by its custody by either parent, the father, being under legal obligation for its support, is generally entitled to its custody and control. (*McBride v. McBride*, 1 Bush, 15; *Merritt v. Swinley*, 82 Va., 433.) What the court then must have meant was that, in view of the then state of the record, the sex and very tender age of the child at that time, its best interests appeared to be to consign it to the mother, but that further investigation of that question was authorized; and then, if the additional facts developed did not show an "insuperable obstacle," that is, one which in law would have been sufficient in the first instance to control the chancellor's judgment to the contrary, the child's custody should be awarded to the mother.

Thus the question is presented as though an original one, under the declaration by the court that mere excessive temper on the part of the mother (the only fact originally appearing that would militate against her claim for custody of the child) was not sufficient to exclude her claim. The facts since added tend to confirm the wisdom of the chancellor's final conclusion on this point. Without going into the detail, we will say that appellant's present circumstances and surroundings, whilst not reprehensible, indeed, rather moving one's sympathy than criticism, are such as to make it very questionable whether it would be just to the child to change its present home for hers. Appellee, who is making his home with his parents, is affording the child fair opportunities for education, and she is there surrounded by conditions conducive in a high degree to her comfort, and moral, physical and intellectual development. After all, and indeed first of all, the welfare of the child is the controlling question. (Kentucky Statutes, section 2123.) The situation of the chancellor, his presumed acquaintance with the parties and local surroundings, afford him peculiarly valuable opportunities for determining such questions. It should be only where there is a manifest abuse of his discretion in such case that his judgment should be interfered with. Should conditions change, making it proper to change his judgment, the statute gives him the right to alter the judgment so as to protect the child's welfare throughout its minority. It will doubtless be his pleasure, as it is his duty, to make such orders as will allow appellant more of the presence of this child, when, and as conditions may change, so as to make same proper.

We are unable to see that the judgment is erroneous. It is, therefore, affirmed.

1354 MORELAND'S ADM'R, &C. V. CITIZENS SAV. BANK.

MORELAND'S ADM'R, &c. v. CITIZENS SAVINGS BANK.

(Filed January 21, 1903—Not to be reported.)

1. Bills and notes—Duty of notary in protesting bills—Two bills for \$5,000, one for \$3,685, one for \$3,000, and one for \$3,200, were sought to be collected by suit, and the drawer and endorser seek to escape liability on the notes on the ground that the law was not observed in noting protest, giving notice of protest and writing the instruments of protests by the notaries public. The notary who protested the bills for \$5,000 on the day of their maturity endorsed on them "protested for nonpayment," and in addition to that gave the day of the month and year, to which endorsement he affixed his official signature. Held—That the endorsements on the bill made by the notary were sufficient noting, and the instruments of protest were written soon thereafter and notices duly sent as required by law. The proof showing that the notary who protested two other notes made a similar noting on separate slips, but destroyed them after writing out the instruments of protest, was a sufficient compliance with the law. The only object of noting the protest is to make a basis to write out the proper instrument of protest.

2. Construction of bill—Supplying omitted words—A bill payable "one hundred and eighty days" is construed to mean that it is payable "one hundred and eighty days after date," and the protest was duly made on that idea.

3. Notice of protest—Assignment for benefit of creditors—After an assignment has been made by the maker of a note for the benefit of his creditors a notice to the assignor is sufficient to preserve his liability, and the holder of it is entitled to participate in the distribution of the estate.

4. Usury—The report of the commissioner purging the bills of usury not being excepted to in the lower court can not be questioned on appeal, and same is approved.

W. S. Pryor and Walker & Slack for appellants.

J. A. Dean for appellee.

Appeal from Davies Circuit Court.

Opinion of the court by Judge Paynter.

The issue herein arises over certain bills of exchange. There is no issue as to the drawing, acceptance and endorsement of them. In this action it is sought to hold the accommodation drawer and endorser responsible on them. The payment is sought to be avoided by the drawer and endorser of same on the grounds that the law was not observed in noting protest, giving notice of protest and writing the instruments of protest by the notaries public.

Two of the bills over which there is a controversy are for \$5,000 each, one for \$3,685, one for \$3,000, and one for \$3,200. These bills were drawn by J. P. Moreland, accepted by S. D. Walden and endorsed by J. P. Fuqua. It appears that the bills (unless the one for \$3,685 was not) were protested on the days that they matured. As to that bill it is insisted that it was not protested until the day after its maturity. That defense is interposed in addition to the others heretofore stated. I. N. Parish, N. P., protested the bills for \$5,000 each on the days of their maturity and endorsed on them "protested for nonpayment," and in addition to that gave the day of the month and year, to which endorsement he affixed his official signature. W. H. Moore was the notary who protested the bill for \$3,000 and the one for \$3,200.

No memorandum noting the protest was left attached to either of the bills by the notary, nor was such endorsement made upon them. Either on the day the bills were protested, or on a subsequent day, the instruments of protest were written, but the evidence leaves no doubt that the notices of protest were duly mailed to the drawer and indorser of the several bills on the days they were protested.

The first thing which we will consider is whether the noting by Parish was sufficient. The authorities seem to be agreed that the noting or initial protest was unknown to the law as distinguished from the protest, but that it has grown into practice within recent years. It seems to be well established that if the instruments of protest are not written shortly after the demand and protest, the noting or initial protest is necessary as a basis for the instrument of protest. (3 Denials on Negotiable Instruments, 4th edition, section 939.)

This court, in *Reed v. Bank of Kentucky*, 1 Mon., 63, had under consideration the question as to the necessity of noting. The court said: "The protest was drawn up so soon as the ordinary course of business would permit, or at least in sufficient time to supersede the necessity of noting the bill at the moment."

The court seemed to be of the opinion that if the instrument of protest was written as soon as the ordinary course of business would permit, or at least in sufficient time to supersede the necessity of noting the bill at the moment, then those sought to be held liable were bound. We are of the opinion that the endorsements which Parish made on the bills were sufficient. The facts as to the bills protested by Parish differ somewhat from those protested by Moore.

We will not go into the discussion of the question of the competency of evidence to prove the course of business of notaries in protesting paper, neither is it necessary for us to determine whether the instruments of protest were written on the day the bills matured or on a subsequent day, hence the necessity is obviated of determining whether the proof is sufficient to impeach the dates of the instruments of protest, they bearing dates that the bills matured. If the noting of protest was made, the instruments of protest could have been prepared thereafter. Moore testified that when he protested the bills he attached to each of them a memorandum showing the protest, but when the instruments of protest were written he destroyed it, as he had no further use for it. Counsel for appellee urges that the preservation of these slips was essential to the validity of the protest in extenso, as they form a necessary part of the record in establishing the steps that must be taken in order to fix liability upon the drawer and endorser.

The object of noting is to have a record from which the instrument of protest can be written so a notary will not be required to rely upon his memory as to the facts. If the noting was made, the destruction of it, whether it was purposely or accidentally done, could not invalidate the instrument of protest which was based upon it. It reserves the right of the notary to prepare that instrument, and, when done, the essential steps have been taken to fix the liability upon the accommodation drawer and endorser. The bill having been protested for nonpayment and notice having been given to the drawer and endorser, the noting having taken place and the instrument of



protest having been executed, the liability of the drawer and endorser was fixed. The destruction of the paper upon which the noting was made could not relieve them of the liability that had attached by the necessary act of the notary. After the several bills were drawn, and before their maturity, Moreland made an assignment to E. P. Taylor for the benefit of his creditors. When the bills were protested notices of protest were not sent to the assignee, but to Moreland. It is insisted that as the assignee accepted the trust and qualified as such assignee, notices of protest should have been given to him, instead of to Moreland, in order to bind the trust estate.

The exact question here presented has not been before this court, although this court in *Callahan v. Bank of Kentucky*, 82 Ky., 231, held that notice of the dishonor of a bill to one who is the assignee of the payee was sufficient. But the court said: "We must not be understood as determining whether a notice of the dishonor of negotiable paper sent to the bankrupt or insolvent alone, and not to the assignee, would or would not be sufficient, as that question is not presented in this case."

The text-writers upon this question are extremely unsatisfactory. 1 *Parsons on Notes and Bills*, 500, in speaking of the person to whom notice of protest should be given in the case of a bankrupt, says: "That perhaps the notice should be given to the assignee, if the holder knows, or might know by the exercise of due diligence, that the estate is in his hands," but he adds: "But notice might perhaps even then be sufficient if given to the bankrupt." *Byles on Bills*, page 216, says: "If the drawer of the bill become bankrupt, notice must nevertheless be given to him, in all events before the choice of assignees; if the assignees are appointed, perhaps notice should be given to them." *Daniel on Negotiable Paper*, section 1002, says: "If the party be bankrupt, it is best to give notice to him and to his assignee also. If there be yet no assignee appointed, notice to him is sufficient, and perhaps it might be sufficient, even if one had been appointed. If given to the assignee alone, it would probably be sufficient."

When a party assigns all of his property for the benefit of his creditors and places it in the hands of a trustee for distribution, all of his creditors are entitled to participate in the distribution of it. This is true whether the debts have matured or not. Moreland's liability on these bills existed at the time of the assignment, and if it was preserved, then the holder of them was entitled to participate in the distribution of the proceeds of the assigned estate. He being personally liable to the holder, it was important to it that he receive notice of protest that that liability might be preserved. When that liability was preserved it seems to us to necessarily follow that the holder of the bills is entitled to participate in the trust estate, because the very purpose of his assignment was to pay his liabilities in full or pro rata as the case may be. We conclude that notice to Moreland was sufficient to preserve his liability, and if his liability continued, there is no escape from the conclusion that the holder of the bills which evidenced it was entitled to participate in the distribution of the estate.

The bill for \$3,685 reads as follows:

"Citizens Savings Bank. Owensboro, Ky., March 29, 1892. \$3,685.  
"No 14,773. One hundred and eighty days pay to the order of J. A.

Boqua, negotiable and payable at Citizens Saving Bank, thirty-six hundred and eighty-five dollars, for value received, with interest at ten per centum per annum after maturity, until paid. And charge to account of

"J. P. MORELAND.

"To S. V. WALDEN, City."

The note was protested upon the idea that the bill was payable 180 days after date. It is insisted for the appellant that it was due within 180 days. In our opinion the words import that the bill was due 180 days after date. It is often necessary for a court, by construction, to supply words obviously omitted through oversight, to give an instrument the meaning manifestly intended. In order to construe it as meaning within 180 days we would have to supply the word "within." We know from the customary way of drawing such instruments that they are usually payable at the time specified after the date upon which they are drawn. The parties did not mean that the money should be paid on or before 180 days, and if we should hold that it was to have been paid within 180 days, we should in effect hold that it was to be paid on or before 180 days.

The commissioner, to whom the case was referred to purge the bills of usury, made a report showing that he had done so. No exceptions were filed to the report and no question made as to the correctness of it, except in the brief in this court. It is too late to raise the question. It was the duty of the appellants, had there been a correction which should have been made in the report of the master commissioner, to have called the lower court's attention to it so that he could have had an opportunity to make the correction. Besides, we fail to find an error in the report of the master commissioner.

The judgment is affirmed.

# WOOLLEY, & CO. V. CITY OF LOUISVILLE, & CO.

(Filed January 21, 1903.)

1. Municipal taxation—Liens—These three action were instituted to enforce the lien of the city for taxes for the years 1885-1900, inclusive. Mrs. Wolley died in February, 1897, leaving her husband and two daughters, who are the appellants herein. Actions were instituted at different times for taxes due for certain years on the several pieces of property, and appeals were had involving the question of revivor of the action, when the court held that the life interest of the husband could be subjected to the payment of the taxes without a revivor. The actions were consolidated and numerous pleadings filed, with ample time for preparation, and a trial resulted in favor of appellee, enforcing the lien. On this appeal numerous grounds are relied on for a reversal.

2. Premature trial—The objection that the action was submitted before it regularly stood for trial can not be considered on appeal, as it was a clerical misprision, and the court had power to vacate or modify it on motion under section 763, Civil Code of Practice, and no motion has been made to set it aside in the lower court. Although the court struck from the files certain amended answers, they were but reiteration of defenses previously filed.

3. Proof prima facie sufficient to sustain claim for taxes—It is insisted that the allegations of the petitions being denied the proof is insufficient to

sustain a recovery. Held—That under section 2996, Kentucky Statutes, it is provided that a tax bill authenticated by the assessor shall be prima facie proof that all steps have been taken to make it a binding tax bill. This statute has been declared to be valid. Substituted tax bills were on file in the papers, but the clerk by an oversight had failed to mark them "filed." This omission of the clerk does not affect the rights of parties. While there is no order of court filing the original tax bills, it is stated in the pleadings that they were filed, and this allegation not being controverted, it will, therefore, be assumed that the statements of the pleadings are true. Proof of ordinances levying taxes was not necessary as the court must take judicial knowledge of the ordinances under sections 2761 and 2775, Kentucky Statutes. When the city shows a tax bill made out and signed by the assessor, a prima facie case is made out as fully as if there had been no denial of the regularity of the tax bill, and it is unnecessary for the city to show that all the steps required by the statute in levying the tax were taken. The burden then shifts to the defendant to show that the proper steps were not taken. The assessor may make duplicate tax bills in case any should be lost, and they will have the same legal effect as the originals.

4. Res judicata—Injunction—A judgment enjoining the collection of taxes for 1894 does not prohibit the recovery of taxes for subsequent years.

5. Statute of limitation—Lack of diligence in the prosecution of actions to recover taxes for more than five years does not bar a recovery.

6. Questions settled on former appeal—Revivor—The question as to the liability of the life estate of the husband for the taxes, also the question as to revivor against the heirs of the wife, were settled on former appeals.

7. Constitutional law—Interest on unpaid taxes—Interest on unpaid taxes is not unconstitutional as it is in the nature of penalties. How taxes shall be levied, how their collection shall be enforced and what penalties may be imposed upon delinquents in the several classes of cities is a matter of legislative discretion. There is nothing in the Constitution forbidding different regulations as the necessities of the case may require in different classes of cities. Laws regulating the subject are not local or special legislation forbidden by the Constitution.

8. Assessment—Section 2985, Kentucky Statutes, which is a substantial re-enactment of the old city charter, provides that certain omissions and mistakes in the assessment shall not prevent a recovery of the tax if the lands and improvements be otherwise fully identified in the books. It is insisted that this provision is local and special. Held—That said section is valid as it applies alike to all cities of the first class, and the fact that there is but one city of that class does not change the rule. The owner of property must know whether he has paid his taxes or not, and when he is sued for the payment of the taxes on his property there is no reason that the legislature may not provide that irregularities in the assessment shall not avail him to escape the payment of his public dues when there is enough in the assessment to show the property taxed. Any of these assessments were sufficient under the statute, the property being plainly identified by the number of the lot and block as marked on the assessor's maps. Similar provisions are made for suits to collect taxes and for interest on them in other classes of cities.

9. Commissioners of sinking fund—The fact that the corporation known as the commissioners of the sinking fund has gone out of existence presents no defense to the collection of city taxes. Section 2979, Kentucky Statutes, provides that all taxes already levied or imposed under existing laws, and not yet paid, remain payable. In a number of cases decided since this act

was passed the existence of the sinking fund commissioners of the city was upheld or recognized. There was an obligation on the city to pay its debts. The taxes levied for the benefit of the sinking fund are in substance levied for the payment of the debts, and the fact that they were made payable to the sinking fund commission does not affect in any manner appellant's liability, for the council was required to make a levy to meet the obligations of the city, and the form in which the levy was made did not prejudice appellants.

10. Board of Equalization—Although there has been no election of a board of equalization for any of the years from which taxes are claimed of appellants, they can not resist the payment of taxes on this ground as they did not complain of the assessments, otherwise they could have had a board of equalization appointed to consider their complaint under section 8994, Kentucky Statutes.

11. Pleadings—Appellants can not complain of the ruling of the court on demurrers to pleadings in the separate suits as the same objections were presented and disposed of in the consolidated action.

12. Statute of limitation—Parties to actions—As the wife held the lots for life, with remainder to her heirs, her children were not necessary parties to the suit in her lifetime, and limitation did not bar the action against them. They were made parties soon after her death, and the cause of action against them did not accrue until her death.

13. Manner of sale—While the lien for taxes exists on each lot the court did not err in directing a sale of so many of the lots as might be necessary to make the judgment, which was really less oppressive on the defendants than to order parts of the lots to be sold, and the court properly protected the interests of remaindermen by reserving the power over the distribution of the fund. The payment of fifteen years' taxes is a great burden, but he who enjoys the protection of society in the security of his property must share the common burden. There is only apparent hardship in the judgment and no real injustice.

R. W. Woolley and H. M. Lane for appellants.

H. L. Stone and John C. Russell for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hobson.

Mary J. Woolley owned a number of lots in the city of Louisville, and these actions were instituted to enforce the lien of the city for taxes on the property for the years 1885-1900, inclusive. She died on February 2, 1897, leaving surviving her her husband and two daughters, who are the appellants herein. The first suit, No. 3,140, was filed May 26, 1888, on the taxes for the years 1885-1888, inclusive. On June 18, 1888, the defendants filed a demurrer to the petition, and no further steps appear to have been taken until August 19, 1891, when they filed their answer. Nothing further was done in the case until June 30, 1900, when the plaintiff filed an amended petition, setting up the death of Mrs. Woolley. The property was assessed in the name of Mary E. Woolley: she was sued in this name, and also answered in the name of Mary E. Woolley. As we understand the record, her maiden name was Mary E. Johnston, and in this way her name was sometimes written Mary E. Woolley and sometimes Mary J. Woolley. As more than three years had elapsed after her death there was no revivor of the case

against the children, but the court held that it might proceed against her surviving husband, who was a party to the action originally, and that his interest in the land might be subjected to the taxes without revivor. A reply was filed to the answer and after various amendments to the pleadings the issues were made up. The second action, known as No. 4,992, was filed August 8, 1894, to recover for the taxes for the years 1888-1894, inclusive. The defendants filed a demurrer to the petition on September 12, 1894. The demurrer was passed from time to time; the plaintiff amended its petition, and on April 14, 1896, the defendants filed answer. After this, in some way, the papers of the case were lost and nothing was done until March 12, 1898, when the plaintiff tendered an amended petition, setting up the death of Mrs. Woolley and praying a revivor. The court held the application to be too late and refused to revive the action, but on appeal to this court the judgment dismissing the action was reversed. Among other things, a consent order was entered, filing a substitute for the original petition, also duplicates of the tax bills sued on, "to have the same force and effect as the original petition and original tax bills," and the action was dismissed without prejudice as to the taxes for the years 1893 and 1894. On the return of the case from this court an answer was filed to the amended and substituted petition, to which, on November 24, 1900, the plaintiff filed a reply. The third action, known as No. 5,040, was filed on August 16, 1894, to recover the taxes for the same years as in 4,992, but on other property, which was assessed in the name of R. W. Woolley, trustee for Mary E. Woolley. The defendants filed a demurrer to the petition as in the other cases; the plaintiff filed an amended petition, and on April 14, 1896, the defendants filed answer. Nothing further was done, as in the second case, until after the death of Mrs. Woolley, when a similar amended petition was tendered, and the then record being lost, a similar substitute petition was filed and duplicates of the tax bills sued on by a like consent order. The action was dismissed without prejudice as to the taxes for the years 1893 and 1894. There was the same ruling as to revivor, appeal to this court and reversal, as in the second case. A reply was filed to the answer and various other pleadings were filed making up the issue.

On July 14, 1898, the city filed five actions, numbered 18,257, 18,258, 18,259, 18,261 and 18,262 for certain taxes for the year 1897, and garnished appellant's tenant, besides seeking to enforce a lien on the land. In each of these cases the answers were filed and some other steps taken.

On August 16, 1898, the city filed two other suits, Nos. 18,534 and 18,535, to recover for the taxes for the years 1893-1898. Certain lienholders on the property were also made defendants to the petition. The defendants filed answer on June 24, 1899.

On November 17, 1900, the cases were consolidated, and on January 3, 1901, the defendants filed an amended answer of twenty-four paragraphs in the clerk's office. On March 2, 1901, the plaintiff filed an amended petition in the consolidated cases, setting up, among other things, taxes for the years 1899-1900. On March 23, 1900, the defendants filed answer to this amended petition. The court struck from the file the amended answer filed in the clerk's office on February 16, and refused leave to the defendants to file it of record. On April 16 the plaintiff filed a reply to the answer to the amended

petition, and on the 29th the defendants filed a rejoinder. On May 25 the defendants filed an amended answer, and on June 20 the court ordered that the amended answer filed on May 25 be controverted of record, and should not delay the trial of the case. The court also struck from the files the defendants' rejoinder of April 29, and the actions were submitted. To all of which the defendants objected and excepted. The court gave judgment in favor of the city, and the defendants have appealed. A great number of grounds for reversal are relied on.

1st. The actions were submitted before they regularly stood for trial.

As between the city and the defendants the issues were fully made up before its amended petition was filed on March 2. The answer to this amended petition, with plaintiffs' reply thereto, it seems to us, made up the issues completely. Certainly there was no new matter brought out in this pleading, which was not covered by the pleadings filed in the consolidated actions, and the court did not abuse a sound discretion in striking from the file the pleadings referred to which, so far as material, merely reiterated what had been gone over. We are unable to perceive that there was any issue of fact made with either of the lienholders, the Louisville Trust Co. or the Fidelity, Trust and Safety Vault Co. The actions had been pending for a long time. The parties had had very full opportunity to prepare their cases, and the court did not abuse a sound discretion in submitting them. Where the issues have not been properly completed for the requisite time, though they should have been, the party in default as to time is not entitled to a continuance. (Civil Code, section 364.) We fail to see that the defendants were in anywise prejudiced by the submission. It is not shown that they were taken at any disadvantage or deprived of any proof. Every allegation against them was controverted. "The court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." (Civil Code, section 134.)

To render judgment before the action stood for trial under the Code is a clerical misprision. The court has power after the expiration of the term to vacate or modify a judgment for a clerical misprision. (Civil Code, sections 516-518.) And no judgment which can be set aside or modified by the court that rendered it, upon motion made after the term in which it was rendered, can be reversed by this court until a motion to set it aside has been made in the inferior court and overruled. (Civil Code, section 763.) There has been no motion to set aside the judgment in the lower court, and this objection, if meritorious, is not now available.

2d. The allegations of the various petitions were all denied, and there being no proof to sustain them, the judgment is erroneous.

In section 2996, Kentucky Statutes, it is enacted concerning tax bills: "Each bill shall be authenticated by the assessor by his signature, or a stamped fac simile thereof, and when so authenticated it shall be prima facie proof that all steps have been taken to make it a binding tax bill for the amounts and purposes and against the person and property therein named or described; and this rule of evidence shall apply to the tax bills of 1885 and 1886 that have been so authenticated under the ordinance of the general council."

The validity of this statute was upheld in *Louisville v. Johnson*, 95 Ky., 354, and has been recognized in many subsequent cases. In certifying the original transcript the clerk stated that certain of the tax bills referred to in the petition, and the duplicate tax bills named in the consent orders above referred to, were not filed. But under a certiorari from this court he has sent up copies of these papers with the following certificate:

"I, John H. Page, clerk of the Jefferson Circuit Court, county and State aforementioned, do hereby certify that the papers attached hereto are true and correct copies of what purports to be, and evidently are, copies of the tax bills or duplicates thereof for the years 1889, 1890, 1891 and 1892, filed with the substituted petition in case No. 4,992, City of Louisville, plaintiff against R. W. Woolley, &c., defendants, said to be marked exhibits Nos. 1 to 56, inclusive. Said exhibits are and have been among the papers of this action though they are not marked as stated, nor are they marked 'filed.'"

Not only were the substituted tax bills filed by a consent order, but they were used in taking depositions and were evidently treated by the circuit court as part of the record. The only thing lacking is that the clerk failed to mark the papers filed as he should have done. This omission of his duty is not chargeable to appellee, nor are its rights affected thereby. We must, therefore, treat the papers as part of the transcript. (*Day & Congleton Lumber Co. v. Max, Straddler & Co.* 24 Ky. Law Rep., 640.) The case of *L. & N. R. R. Co. v. Mayfield*, 18 Ky. Law Rep., 224, was entirely different. There no order of court was made filing the pleading. While there was no order of the court filing the original tax bills, it is stated in the pleadings that they are filed therewith, and this allegation is uncontroverted and no objection was made in the trial court on the ground that the exhibits were not filed. We must, therefore, assume that the statements of the pleading are true. The exhibits are certified by the assessor as provided in the statute, and although the fact is denied by the answer, the authenticity of the certificate is established by the proof. The fact that the ordinances for the years 1885 and 1886, or copies of them, are not filed, and that there is no proof that the provisions of these ordinances were complied with by the assessor, is immaterial, because the court must take judicial knowledge of the ordinances of the city, and we find them in the biennial publication required by the statute. (Kentucky Statutes, section 2761, 2775.) When the genuineness of the tax bill is denied the city, to make out its *prima facie* case, must show that the tax bills were made out and signed by the assessor. (*Louisville v. Kimbel*, 23 Ky. Law Rep., 1834.) But when this is shown the *prima facie* case is made out as fully as if there had been no denial of the regularity of the tax bills, and it is unnecessary for the city to show that all the steps required by the statute in the levying of the tax were taken. The burden then shifts to the defendant to show that the proper steps were not taken. The duplicate tax bills were by the terms of the consent order given the same effect as the original bills. But aside from this, where the original bill has been lost, the assessor may make out another bill from his record and certify it as provided in the statute, and it will make out a *prima facie* case for the city as fully as the one first made out. There is nothing in the language of the statute limiting its operation to the bill first made out by the assessor and certified by him. The legislative purpose was to make the

bills duly authenticated by the assessor over his signature, or a stamped fac simile thereof, prima facie evidence. It is the official certificate of the officer that gives the bill this character, and when the original is lost we see no reason why the same effect should not be given to a duplicate of it made out and certified by the officer and proved by him to be a correct duplicate. We, therefore, conclude that the city made out a prima facie case by the tax bills referred to, no proof being taken by the defendants showing irregularities in the proceeding, or to sustain the affirmative defenses made in regard thereto.

3d. The taxes for 1885 and 1886 were barred by a judgment in a previous action between the parties.

That judgment is in these words, as admitted by the pleadings: "It is agreed, and so ordered, that the defendant, the city of Louisville, be, and is hereby, perpetually enjoined from asserting any claim for taxes in on or to the property described in the petition prior to March 31, 1884, being the day on which the petition was filed herein, and the plaintiffs shall recover their costs herein."

This judgment by its terms applies only to the taxes levied prior to March 31, 1884, and not to those for the years 1885 and 1886, or any subsequent year, although it was entered on June 19, 1889.

4th. Suit No. 3,140 not having been prosecuted with diligence for more than five years' limitation bars the taxes therein sued for.

This precise question was considered and determined otherwise in *City of Louisville v. Meglemery*, 21 Ky. Law Rep., 751.

5th. That action not having been revived against the heirs of Mary J. Woolley in proper time, there can be no judgment subjecting the life estate of her husband, Robert W. Woolley, to the payment of the taxes sued for, although he was a party to the action from the beginning.

In *City of Louisville v. Woolley*, 22 Ky. Law Rep., 405, it was held that no revivor was necessary against him, and that his life estate could be subjected to the payment of the taxes. In that case it was further held that actions 4,993 and 5,040 might properly be revived against the children of Mrs. Woolley. We regard both these questions as settled by the decision in that case, and not open now to discussion.

6th. Section 2998, Kentucky Statutes, in so far as it allows interest on taxes unpaid at 6 per centum per annum is unconstitutional and void.

This provision is taken from the act of May 12, 1884 (Session Acts, 1883-1884, volume 2, page 1274), and its validity has often been recognized by this court. (*Fonda v. Louisville*, 20 Ky. Law Rep., 1652; *Crecillus v. Louisville*, 20 Ky. Law Rep., 1651; *Powell v. Louisville*, 21 Ky. Law Rep., 654; *Louisville Bridge Co. v. Louisville*, 23 Ky. Law Rep., 1655.) While taxes do not bear interest unless it is so provided by statute (*L. & N. R. R. Co. v. Commonwealth*, 89 Ky., 538), the imposition of penalties for the nonpayment of taxes is everywhere sustained, and the giving of interest on unpaid taxes is no more than a penalty for their nonpayment.

In *Walston v. City of Louisville*, 23 Ky. Law Rep., 1852, this precise question was determined. The court said: "Under the Constitution the same rate of taxation must prevail in all cities of the same class, the same time for payment must be provided, and the same penalties imposed for the non-



payment of taxes. To require the payment of interest on past due tax bills is somewhat in the nature of a penalty; if not, then it is compensation for indulgence in the payment of taxes. It is as much of a general law to impose a penalty for the nonpayment of taxes or to require the payment of interest on past due tax bills in cities of a class as it is to provide that taxes shall be levied and collected therein. It is a governmental function to impose taxes, and it is equally so to prescribe the method of their collection and the penalties for nonpayment."

How taxes shall be levied, how their collection shall be enforced and what penalties may be imposed upon delinquents in the several classes of cities is a matter of legislative discretion. There is nothing in the Constitution forbidding different regulations, as the necessities of the case may require, in different classes of cities.

Laws regulating the subject are not local or special legislation forbidden by the Constitution, although there is now only one city in the first class, for when any other city is placed in this class the legislation would apply to it, and were the rule otherwise there could be no adequate legislation for a class of cities if at the time there was only one city in that class.

7th. There can be no recovery of a tax based on an assessment made under the provisions of the present act or the old charter, unless such assessment is made to and in the name of and against the person as provided in the act.

The act requires the assessor to keep books in which he shall cause to be entered the names of all persons who are the owner or holders of land and the number and block of each of his lots, according to the maps in his office. (Kentucky Statutes, section 2985.) It is further enacted: "No mistake in or omission of the right name of the owner or holder of the land or improvements liable to be assessed, under the provisions of this act, shall impair any assessment thereof, if such land be designated in said books by its corresponding number and block on said map; or if such improvement be there designated by the number and block of the land on which it rests; or if such lands and improvements be otherwise fully identified in said books." (Section 2986.)

It is earnestly insisted that this statute is invalid as local and special legislation, and much force is given to the fact that in the forepart of the section quoted these words are used, "any lot of land which is not now designated by a number in the assessor's book." It is urged that by the use of the word "now," as well as from the fact that this provision was brought over from the old charter, the legislature had in mind only the city of Louisville. But although this may be true, still the fact is the act applies to cities of the first class, whether now in that class or hereafter coming into it, and, as said, in no other way could the legislature provide for the government of a city when no other city of its class is in the State than by a general law. The Constitution, by section 156, requires the legislature to divide the cities of the State into six classes, and assign to the first class cities with a population of one hundred thousand or more. As long as there is only one city of one hundred thousand population in the State, there can be but one city of the first class, but in the meantime the legislature must provide by general law for the government of cities of the first class.

The owner of property must know whether he has paid his taxes or not, and when he is sued for the payment of the taxes on his property there is no reason that the legislature may not provide that irregularities in the assessment shall not avail him to escape the payment of his public dues when there is enough in the assessment to show the property taxed. Some of the property in the case before us was assessed in the name of R. W. Woolley, trustee; some in the name of Mary E. Woolley, and some of it, after her death, in his name and the children's. Any of these assessments were sufficient under the statute, the property being plainly identified by the number of the lot and block as marked on the assessor's maps, all of which is shown by the proof. (*Board of Councilmen of Frankfort v. Farmers Bank*, 22 Ky. Law Rep., 1738.)

8th. Section 2998, Kentucky Statutes, in so far as it allows taxes to be collected by suit in cities of the first class, is special and local legislation, and unconstitutional.

Similar provisions are made for suits to collect taxes and for interest on them in other classes of cities. (Kentucky Statutes, sections 3187, 3396, 3546, 3644.) The constitutionality of these statutes has often been recognized by this court. (*Louisville Bridge Co. v. Louisville*, 28 Ky. Law Rep., 1656; *Board of Councilmen of Frankfort v. Farmers Bank*, 2 Ky. Law Rep., 1738.)

9th. The corporation known as the commissioners of the sinking fund of the city of Louisville no longer exists, and the taxes levied for its benefit can not be collected.

The original act creating the board of commissioners of the city of Louisville became a law on March 9, 1867, and by section 3010, Kentucky Statutes, it is provided: "The sinking fund to pay the bonded debt of the city is hereby continued as established by law. Whenever it is apparent to the board of commissioners of the sinking fund of any city of the first class that the revenue and available assets of said sinking fund will be insufficient to pay when due any future maturing bonds of said city then issued and chargeable to said sinking fund, without unduly impairing the assets of the sinking fund, and the said commissioners of the sinking fund shall certify this fact to the general council of said city, etc."

In sections 3011-3024 other duties of the sinking fund commissioners are prescribed. By section 2979 it is provided: "All taxes already levied or imposed under existing laws and not yet paid remain payable, unless the contrary be hereinafter provided." In a number of cases decided since this act was passed the existence of the sinking fund commissioners of the city was upheld or recognized. (*Farson, &c. v. Board of Commissioners of Sinking Fund*, 97 Ky., 119; *Commissioners of Sinking Fund v. Grainger*, 98 Ky., 319; *Commissioners of Sinking Fund v. Zimmerman*, 101 Ky., 432.) There was an obligation on the city to pay its debts. The taxes levied for the benefit of the sinking fund are in substance levied for the payment of the debts, and the fact that they were made payable to the sinking fund commission does not affect in any manner appellants' liability, for the council was required to make a levy to meet the obligations of the city, and the form in which the levy was made did not prejudice appellants.

10th. There was no election by the board of aldermen of a board of equalization by a viva voce vote.

Appellants do not show that they made complaint of any assessment. Section 2904, Kentucky Statutes, reads: "If in any year a legal board of equalization is not elected, or fails to meet, or fails otherwise to perform any essential act, or if in any year the assessment books should not remain open for the requisite time, the tax bills shall not thereby become void; but when any taxpayer in such a case complains of the assessment upon him, such a board shall then be chosen in the manner indicated, or the board theretofore chosen shall meet, as the case may be, and hear all complaints in the manner stated; and the collection of tax bills from those so complaining shall be suspended till the board has heard and disposed of their complaints."

Under this statute the objection that the board of equalization was not properly elected is unavailing. (*Crecelius v. Louisville*, 20 Ky. Law Rep., 1551; *Fonda v. Louisville*, 20 Ky. Law Rep., 1652; *Powell v. Louisville*, 21 Ky. Law Rep., 554.)

11th. The court sustained a demurrer to the petitions in actions 18,257, 18,258, 18,262 and 18,534, but gave judgment on these petitions without amendment.

In actions 18,257, 18,258 and 18,262 there was an order filing a demurrer of the defendants to the first, second and third paragraphs of the petition. The demurrer was sustained to the first and second paragraphs and overruled as to the third.

Plaintiff was given leave to amend the petitions and reparagraph the same on the face of the papers.

The three cases were then consolidated. The petitions, as copied in the transcript, are in one paragraph, and really set out but one cause of action. We must assume, therefore, that the plaintiff amended its petitions by striking out so much of them as divided it into paragraphs. After the consolidation there was an order entered overruling the defendants' demurrer to the petition. This order should be treated as made in the consolidated actions, as these cases were consolidated with the other cases, and after the consolidation pleadings going to the merits were filed, both by the defendants and by the plaintiff. In action 18,534 the defendants' demurrer to the petition was overruled.

12th. Mrs. Woolley owned only a life estate in certain lots, and limitation bars the remainderman.

The deed under which these lots were held is not produced in evidence, although the condition of the title was denied. R. W. Woolley stated that the title was conveyed by James C. Johnston to Mrs. Woolley for life, who then had no children, with remainder to her heirs. It could not be known who would be the heirs of Mrs. Woolley until she died, and, therefore, her children were not necessary parties to the suit in her lifetime. They were made parties soon after her death, and the cause of action against them did not accrue until her death.

13th. The court erred in prescribing the manner in which the property should be sold.

Our statutes confer upon the chancellor very broad discretion in enforcing tax liens. It is provided: "All tax bills uncollected in whole or in part \* \* \* shall be deemed a debt from such person to said city arising as by contract, and may be enforced as such by all remedies given for the recovery

of debt in any court of the Commonwealth otherwise competent for that purpose." (Kentucky Statutes, section 2998.)

"The action herein authorized and the judgment and subsequent proceedings therein, except as hereinafter excepted, shall be conducted in all respects like suits upon liens arising from contracts, and the court shall have jurisdiction of all suits for taxes irrespective of amount." (Section 305.)

"From the beginning of the action a lien for each tax bill assessed against the same owner, or set of joint owners, shall also arise upon every piece of land or improvement still owned by him or them with a view to the sale of less than all the pieces for all the tax bills, subject to the marshaling of burdens as against third parties, as the rules of equity may require." (Section 306.)

Under these provisions the court did not err in directing a sale of so many of the lots as might be necessary to make the judgment, which was really less oppressive on the defendants than to order parts of the lots to be sold. Section 3007, Kentucky Statutes, relates to the collection of taxes due by infants and persons of unsound mind, and is properly thus headed by the editors. It reads as follows: "The goods of infants or persons judicially found to be of unsound mind shall not be distrained for the taxes assessed on their lands or improvements; nor shall their lands during their disability be sold for less than two-thirds of their appraised value on any judgment of sale rendered for taxes and cost alone, when those lands or improvements have come to them through descent, distribution or devise or the gift or settlement of some person then deceased, or have belonged to persons of unsound mind before they became such; nor shall for taxes chargeable to the owner of the particular estate the entire estate be sold for taxes and cost alone at less than two-thirds of the appraised value, so as to defeat the reversions, remainders or future estates while any future estates are outstanding, unless the reversions or remaindermen are ascertained and are of full age; nor shall such entire estates be put up to sale unless the particular estate of the taxpayer has first been put up and has failed to bring the amount of the taxes and costs."

The section first provides as to the goods of infants and persons judicially found to be of unsound mind; then as to their lands coming to them from some person who was of unsound mind or is deceased. It then takes up the state of case where these persons own the remainder and another the particular estate, and forbids a sale at less than two-thirds of the appraised value where the remaindermen are not ascertained or of full age, and then provides that such estate, that is, those estates as are referred to in the last clause, in which the reversions or remaindermen are not ascertained or of full age, must not be put up to sale unless the particular estate has first been put up and has failed to bring the amount of the taxes. In other words, where the remaindermen are not ascertained or of full age the entire estate can not be sold for taxes and cost alone at less than two-thirds of its appraised value, and the particular estate of the taxpayer must be first exhausted and fail to bring the amount of the taxes before the estate of the remaindermen is sold. The section has no application to sales where the remaindermen are ascertained and are of full age.

At the conclusion of the judgment is this clause: "The court reserves

power over the distribution of the fund arising from the sale as above ordered to the parties respectively entitled thereto." If it shall turn out, when the sale is made, that any injustice is done the remaindermen the court can adjust this matter between them and the life tenant, and direct him to contribute to them as the ends of justice require. But the city has a lien upon the remainder as well as the particular estate of the lots ordered to be sold as the property of the life tenant and the remaindermen, and in view of all the facts we do not see that any substantial injustice has been done any of the parties by the decree complained of.

It is true that to throw fifteen years' taxes upon the property at one time is to place upon it a great burden; but property is itself only the creature of civilized society, and taxes are the contributions made by property owners to society for its protection which they enjoy. He who enjoys the protection of society in the security of his property, without discharging his part of the common burden of maintaining the social system, violates the constitutional rule that taxes shall be uniform and equal. He not only reaps where he has not sown, but he places upon others the burden which his property ought to bear, for as the social system must be maintained, others must pay the part that in right should be paid by him. There is, therefore, only apparent hardship in the judgment, and no real injustice. It is shown by the proof that no taxes have been paid on appellants' property since about the year 1875, although, as stated, it was adjudged that the city be enjoined from collecting taxes prior to March 31, 1884.

14th. Certain paragraphs of the petitions were defective.

These defects were cured by the subsequent pleadings and by the proceedings had in the consolidated action.

Judgment affirmed.

Whole court sitting except Judge Barker.

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MERCER COUNTY v. PEARSON.

(Filed January 21, 1903—Not to be reported.)

Trusts—Compensation—Attorneys' fees—Mercer county voted a subscription of \$125,000 in stock of the Southern Railway Co. Said bonds were placed with M., a trustee, with instructions to deliver \$105,000 of them to said company when the road should be completed through Mercer county, and the remaining \$20,000 to be delivered when the terminal and divisional shops should be permanently located at Harrodsburg. M. resigned his trust, and appellee was appointed his successor. He delivered the \$105,000 of bonds to said company, but refused to deliver the \$20,000 of bonds, as he did not consider that the company had complied with its agreement as to the location of its shops at Harrodsburg, and instituted this action to determine the validity of the bonds; also his duty as to the delivery of the entire lot of bonds to the company. He employed counsel and a protracted litigation followed, and the case having been transferred to the Federal court, was finally decided by the Supreme Court of the United States in favor of the validity of the bonds, and that the trustee had acted properly in delivering the \$105,000 of bonds to the company, but that the \$20,000 of bonds should not be delivered. The question involved on this appeal is, the liability of the county for compensation of the trustee for his services; also for his attor-

neys' fees. It is insisted that before the trustee had a right to institute an action in the circuit court for the purpose of recovering compensation he was compelled, under chapter 27, article 8, section 11 of General Statutes, to have presented his claim to the court of claims of the county for allowance, and had it rejected. Held—That as the trustee sought a settlement of his trust and to be advised by the court as to how it should be executed, and in the same action sought to have his compensation fixed, the circuit court being a court of general jurisdiction, was the only one which had jurisdiction of the settlement of the trust, and as a necessary incident thereto the allowance for compensation for services, and it was proper to settle both questions in one suit and avoid a multiplicity of actions. It is insisted that as the statute did not expressly provide for the compensation to the trustee for services he was to perform, and for the necessary services rendered by counsel, therefore, no liability existed upon the part of the county. Held—That Mercer county, as a quasi private corporation, was represented by a trustee, and he was entitled to compensation for his services, and to contract for the services of attorneys needed to advise him in the execution of his trust, and the county should be held liable for same. It is urged as a defense that as the trustee voluntarily assumed the custodianship of the bonds he became a voluntary trustee, and is not entitled to compensation. Held—That although the act of the legislature did not provide for compensation for the trustee, nor did the county court make any provision therefor, still, from the character of the services contemplated by the act, and the labor, expense and responsibility assumed, it can not be believed that the legislature and the county court contemplated that the trustee should act without compensation, and in addition pay the necessary expenses incident to the execution of the trust, including attorney's fees. It is adjudged that the trustee is entitled to be compensated for his services; that he should be reimbursed for the necessary expenses which he incurred, and in addition thereto be allowed a reasonable sum to compensate his attorneys for the services which they rendered. The allowance of \$4,000 to the trustee is approved.

Robt. Harding for appellant.

Phil B. Thompson and W. C. Bell for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Paynter.

By legislative authority Mercer county was authorized to vote upon the question of a subscription to the capital stock of the Southern Railway Co. At an election held for that purpose a majority of those entitled to vote expressed themselves in favor of a subscription, amounting to \$125,000. Necessary steps were taken under the act to authorize the county court to make an order for the subscription of stock and to execute bonds in payment thereof. The act provided "that the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow and delivered to said railway company when it shall be entitled to the same by the construction of its road through said county: Provided, however, That such trust company or trustee shall, before receiving such bonds, give bond with good security, approved by the county judge, for the faithful performance of his or its duty in the premises."

By the order of the county court \$105,000 of the bonds were to be surrendered upon the road being completed through Mercer county, and \$20,000 of the bonds were to be surrendered when the company should locate permanently at Harrodsburg, in Mercer county, its terminal and divisional machine shops.

D. L. Moore was appointed and qualified as trustee. The railway company proceeded to construct the road, and claimed that it had complied with the act and the orders of the county court and had earned the bonds in question. When Moore was confronted with the responsibility of determining whether the bonds should be delivered or not, and realizing the embarrassing position he occupied, he thought it safer to resign his trust than to proceed to execute it. Thereupon the appellee, Isaac Pearson, was appointed, and duly qualified as trustee. After employing attorneys and obtaining their advice, he turned over to the railway company \$105,000 worth of the bonds, and stock was issued to the county therefor.

He was confronted with the question as to whether or not the railway company had permanently located at Harrodsburg its terminal and divisional machine shops. The railway company contended that it had done so, but others interested disputed that claim. Not being able to get any advice from the county court on the question as to whether the railway company had complied with that part of the order, he instituted this action for a settlement of his trust, and to determine whether or not the \$20,000 worth of bonds should be delivered to the railway company, and for compensation for the services which he had rendered the county. The case was transferred to the Federal Court, and such issues were joined as rendered it necessary for the court to determine whether or not the appellee had authority to deliver the bonds, amounting to \$105,000, to the railway company, and whether or not it was entitled to the remaining \$20,000 of bonds. The case finally reached the Supreme Court, where it was decided that he had acted properly in delivering the \$105,000 of bonds to the railway company. It was likewise adjudged in the course of the proceedings that the \$20,000 of bonds should not be delivered to the railway company.

The other questions having been settled, the question remained as to what, if any, compensation the trustee was entitled to receive for his services, and what compensation should be fixed for the attorneys which he employed to advise and assist him in the execution of the trust.

The first question presented is as to the original jurisdiction of the circuit court to determine these questions. Counsel for appellant contends that before the trustee had a right to institute an action in the circuit court for the purpose of recovering compensation, etc., for his services, he was compelled, under the General Statutes which were then in force, to have presented his claim to the court of claims of the county for allowance and had it rejected.

It is true that the General Statutes, chapter 27, article 3, section 11, provides that any person presenting a claim for allowance before the county court for a claim of \$20 and upwards is entitled to appeal to the circuit court from the judgment or order of the court rejecting the claim.

There was more involved in this suit than the right of the trustee to recover compensation for services; he sought a settlement of his trust, to be

Advised by the court as to how it should be executed, and in the same action sought to have his compensation fixed. The circuit court, being a court of general jurisdiction, was the only one which had jurisdiction of the settlement of the trust, and a necessary incident thereto was an adjustment of the allowance for compensation for services, etc. The circuit court having jurisdiction to settle the trust, it necessarily follows that it had jurisdiction to fix the compensation of the trustee. It would have simply multiplied actions to have brought suit to settle the trust, and then applied to the court of claims for an allowance for services in executing the trust.

It is urged that as the statute did not expressly provide for the compensation to the trustee for services he was to perform and for the necessary services rendered by counsel, therefore, no liability existed upon the part of the county. To support this *Wortham v. Grayson County*, 13 Bush, 54, is cited, wherein it is held that where the statute requires services to be rendered by its officers where no remuneration is allowed by law, they must be regarded as *ex officio* services, for which no charge can be made, and that State and county governments never become debtors by implication to any of their agents. The principle of that case does not apply to this case, as it was held in *Garrard County v. McKee*, 11 Bush, 234, that the county, by its county court, was a quasi private corporation, and had power to employ counsel to defend suit against it and test the validity of the subscription of that county for stock in the Kentucky River Navigation Co., and to bind the county for a reasonable fee for such services.

So was Mercer county a quasi private corporation. In this transaction the appellee represented it as trustee; was entitled to compensation for his services and to contract for the services of attorneys needed to advise him in the execution of his trust, and for which the county should be held liable.

Again, it is urged that the appellee voluntarily assumed the custodianship of the bonds, thereby becoming a voluntary trustee, and, therefore, is not entitled to compensation. In *Phillips' Adm'r v. Bustard, &c.*, 1 Ben Monroe, 249, the court had under consideration the question of the right of trustee to receive compensation for his time, trouble, skill, services, etc., where none was provided in the document creating the trust. In that case the doctrine of the British chancery antecedent to the American Revolution was invoked, which denied such compensation to a trustee. Judge Robertson, for the court, said: "We have never been able to perceive consistency in the rule or full force in the reasons assigned for it. It should be no less true in the municipal than in the divine code that 'the laborer is worthy of his hire;' and there can be no doubt that heavy and responsible trusts are rarely, if ever, undertaken as merely honorary, without expectation of indemnity at least. Moreover, there might be danger, not only of nonacceptance, but of injurious infidelity, if strangers, nominated for their skill, should know that, for all their devotion, time and responsibility, they can be entitled to no compensation, unless they make a contract, which, in many cases, can not be made for want of opportunity or competent parties. And we doubt not that, in most cases of onerous trust devolved upon strangers, there is an implied mutual understanding that there shall be a reasonable allowance for responsible, faithful and beneficial services. But the British rule has been extensively qualified, if not entirely exploded, by the local



law and usage of our own Commonwealth, where tutors and curators and executors and administrators are all entitled to reasonable compensation. Here, then, the civil law maxim and all the other analogies which fortified the rule in England have been abolished. Is there now, therefore, any sufficient reason here for applying a rule so harsh and unreasonable to the solitary class of cases denominated express technical trusts? We think not. For similar reasons the courts of Pennsylvania and of our parent State, Virginia, have decided that trustees may be entitled to compensation without any express direction or contract therefor. (8 Binney, 467; 1 Washington, 246; 4 H. & Mun., 415.) And this appearing to be intrinsically just, not forbidden by policy, and not only not inconsistent with any analogy in our local jurisprudence, but perfectly consistent with its complete harmony, we do not feel authorized to repudiate it and blindly adhere to the old English rule, the reasons for which, if ever good, are now altogether inapplicable in this age and country, whenever it may be presumed that compensation was expected and seems to be reasonable and just."

Although the act of the legislature did not provide for compensation for the trustee, nor did the county court make any provision therefor, still, from the character of the services contemplated by the act and the labor, expenses and responsibility assumed, it can not be believed that the legislature and the county court contemplated that the trustee should act without compensation and in addition pay the necessary expenses incident to the execution of the trust, including attorneys' fees. As an evidence that the county court thought it proper to compensate the trustee, it made an allowance to Moore for the time that he acted as trustee.

We are of the opinion that the trustee is entitled to be compensated for his services; that he should be re-imbursed for the necessary expenses which he incurred, and in addition thereto be allowed a reasonable sum to compensate his attorneys for the services which they rendered. The court ordered an issue out of chancery as to what allowance should be made to the trustee. The jury returned a verdict for \$4,000, which is less than the testimony showed he was entitled to receive. The court did not choose to disregard the verdict of the jury, and rendered judgment for the amount of the verdict.

Judgment is affirmed.

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PARIS MILLING CO. v. PARIS WATER CO.

(Filed January 21, 1908—Not to be reported.)

Contracts—Damages—This appeal involves the construction of a written contract between appellant and appellee made in 1890. Appellant had constructed several years before the contract was made a dam across Stoner creek for a mill pond, and agreed to permit appellee to withdraw therefrom water not exceeding 500,000 gallons daily. It was further agreed that in case it became necessary to draw off the water below a given point, in order to permit appellant to make repairs or improvements to any portion of the mill or other property of appellant, notice should be given to appellee, who should, without delay, at its own cost and expense, construct a suitable coffer dam, which shall enable appellant to make such repairs and improvements. Appellant instituted this action against appellee, alleging that

It became necessary to repair its mill property and for this purpose to draw off the water in the dam, and that it notified appellee to build a coffer dam, and that it built one so defective that it leaked to such an extent as to prevent making the repairs to the mill property, and that appellee failing to construct a proper dam after due notice, appellant constructed same at a cost of \$167.17, for which it prayed judgment. In the second paragraph it alleged that it had expended \$690.77 in reasonable repairs necessarily made to the mill dam and abutments, and that appellee refused to pay any part of it. A judgment for one half of said cost was prayed. The court sustained a demurrer to the first paragraph and on the trial of issue made on the second instructed the jury to find for appellant only \$1.75, on which judgment was rendered. This instruction was given on proof that the repairs were not made to the dam proper across the creek, or the abutment next to the mill, but were made on the forebay wall and the wall of the water way or sluice leading from the forebay up to the mill pond. Held—That this instruction was properly given as appellee under the contract was under obligation to repair the dam across the creek and the abutment, but no further. The first paragraph stated a cause of action against appellee, as it was under obligation to construct a sufficient coffer dam.

McMillan & Talbott for appellant.

Emmett M. Dickson for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Hobson.

This controversy turns upon the proper construction of a written contract, in which the appellant, the Paris Milling Co., is the party of the first part, and appellee, the Paris Water Co., represents, as assignee, the party of the second part. That part of the contract here material is in these words:

"For the consideration hereinafter mentioned, the party of the first part, (the milling company) for itself, its successors and assigns, hereby agrees with the party of the second part, its successors or assigns (the water company) that it will allow the said party of the second part to withdraw water not exceeding a daily average quantity of 500,000 gallons from that portion of Stoner creek so called that forms a part of said first party's mill pond, for the purpose of supplying to the inhabitants of the city of Paris and its immediate vicinity water for fire, domestic, manufacturing and all other necessary purposes.

"The said party of the first part further agrees that said party of the second part may at any time, at its own expense, make such repairs to the dam owned by said party of the first part as it may deem necessary to prevent any waste of water from the pond by leakage, the party of the first part having first approved of the method of making and the character of such repairs.

"The said party of the first part further agrees that it will not draw down water in the pond for any purpose below a point four feet below the top of the cap-sill of the said dam.

"In case, in the opinion of the party of the first part, it becomes necessary to draw off the water below said point for the purpose of making repairs or improvements to any portion of the mill or other property of said party of the first part, notice shall be given to the party of the second part, who shall, without delay, at its own proper cost and expense, construct a suitable

coffer dam, which shall enable said party of the first part to make such repairs and improvements. \* \* \*

"Said party of the second part further agrees that it will pay to said party of the first part annually one half of the amount the said party of the first part shall expend for maintaining and making all necessary repairs upon the dam; also that it will pay one-half of the cost and expense of rebuilding said dam whenever and as often as the same shall become necessary."

Appellant filed the suit. In the first paragraph of its petition it alleged that in the summer of 1897 (the contract having been made in the year 1890) it became necessary for it to make repairs to portions of the mill, and it gave notice to appellee of the fact that it was necessary to draw off the water for the purpose of making these repairs; that appellee undertook to construct a coffer dam to enable it to make the repairs, but failed to construct a suitable coffer dam for that purpose; that the water flowed through the insufficient coffer dam erected by appellee in such quantities as to prevent appellant from making the repairs; that it notified appellee of the insufficiency of the coffer dam and requested it to make a sufficient one, which it refused to do; that thereupon appellant was compelled to erect a suitable coffer dam, and did so at a cost of \$167.17, which was reasonable for the work, and had not been paid to it by appellee. Judgment was prayed for the amount so expended.

In the second paragraph of its petition appellant alleged that it had expended \$690.77 in reasonable repairs necessarily made in repairing the mill dam and abutments, and that appellee refused to pay any part thereof. Judgment was prayed for one-half the amount so expended.

The court sustained a demurrer to the first paragraph of the petition. A traverse was filed of the second paragraph, and on final hearing, under a peremptory instruction of the court, the jury returned a verdict in favor of the plaintiff on the cause of action set out in the second paragraph for \$1.75, on which judgment was entered.

The question as to the second paragraph turns on the meaning of the word "dam," as used in the written contract above quoted. Stoner creek is a considerable stream. The mill company had maintained its mill on it for a number of years before the contract was made. The dam ran across the stream from a rock on one side to an abutment built of loose stones on the other. At the upper end of this abutment there was a water way conducting the waters from the pond to the wheels of the mill. The repairs were made, in so far as the court rejected them, on the fore bay wall and the wall of the water way or sluice leading from the fore bay up to the mill pond. The court properly held that these repairs were not made on the dam, and could not be recovered under the clause of the contract, requiring the water company to pay one-half the amount expended in maintaining or making necessary repairs upon the dam. The dam, within the meaning of the contract, is the structure across the stream, including the abutment on the side next to the mill. This is the common meaning of the word, and that it was used in this sense in the contract is shown by the stipulation that the mill company is not to draw down the water in the pond below a point four feet below the top of the cap-sill of the dam; also by the clause requiring appellee to pay one-half the cost and expense of rebuilding the dam when

necessary. The thing which the water company was to rebuild was the structure across the stream, not the sluice way leading the water into the mill works or the forebay wall, which was under the mill and properly a part of it.

But we can not concur with the ruling of the circuit court that the first paragraph of the petition stated no cause of action. This ruling seems to rest on the ground that the mill company agreed not to draw the water down below a point four feet below the cap-sill of the dam, and that in case it became necessary to draw off the water below that point notice was to be given to the water company, so that it might erect a suitable coffer dam to maintain the necessary height of water; that the water company, in order to serve its patrons, must keep a supply of water in the pond, and that these stipulations were for the protection of the water company and not for the benefit of the mill company. We do not think that the language of the contract is fairly susceptible of this construction. It is this: "Notice shall be given to the party of the second part, who shall, without delay, at its own proper cost and expense, construct a suitable coffer dam, which shall enable said party of the second part to make such repairs and improvements." While in the stipulation in the contract that the water should be maintained at a certain height was evidently for the benefit of the water company, it is equally clear that it took this right with the burden that it should, on notice and without delay, at its own proper cost, construct a suitable coffer dam, which would enable the mill company to make repairs or improvements. It is earnestly argued that the contract can not mean that the water company was to dam up the stream so that the water would not escape in some way, but we do not see from the proof that anything impossible was demanded in this case, as a coffer dam at the sluice would, it seems, have cut off the water. The contract is, of course, to be given a reasonable construction. It does not require impossibilities, but it does require the water company to erect a suitable coffer dam to enable the mill company to make repairs, that is, to erect a coffer dam for this purpose of such dimensions and efficiency as men of ordinary care would usually be expected to provide for this purpose in the management of their own affairs.


The judgment of the circuit court as to the matters complained of in the second paragraph of the petition is affirmed, but as to the first paragraph the judgment is reversed and the cause remanded, with directions to overrule the demurrer and for further proceedings consistent with this opinion.

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CITY OF LOUISVILLE v. MICHELS.

(Filed January 21, 1903.)

Municipal government—Negligence—Obstruction of street by overhanging limbs—Appellee was driver of a patrol wagon in the city of Louisville, and while driving on Main street the top of the wagon collided with the limb of a shade tree about six or eight inches in diameter, which projected over the street, which caused the horses to break the king bolt, thus detaching the fore-wheels from the bed of the wagon and throwing him on the street, resulting in such serious injuries to his leg that amputation was necessary to save his life. He also suffered serious injury to his left arm from the fall.



Appellee recovered damages from appellant for this injury in an action alleging that it was the duty of the city to keep its streets in proper condition for travel and free from obstructions; that it knew of this obstruction and failed, after reasonable delay, to remove it. Appellant set up in defense that it was the duty of appellee, as a city employe, to know of this obstruction, and that he was guilty of contributory negligence, which will prevent a recovery. On appeal, Held—That it is not the duty of the driver of the patrol wagon to know the condition of the streets over which he drives. It is the duty of the city to keep its streets clear of obstructions which are dangerous to persons using them, and for failure to do so it is liable in damages to one who may be injured in consequence of such obstructions. The city owed a higher degree of care to appellee as driver of its patrol wagon than to the public generally, as it was his duty to drive at great speed in the discharge of his duties. The court properly instructed the jury, and the recovery was not excessive.

Henry L. Stone for appellant.

Augustus J. Bizot and O'Neal & O'Neal for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Paynter.

The appellee for some years had been a driver of a patrol wagon in the city of Louisville; previous to August 23, 1899, he had driven an uncovered wagon; on that date he was driving a patrol wagon to which was attached two horses; it had been used at the Central Police Station, but had recently been sent to the station where appellee was located. While driving on Main street the top of the wagon collided with the limb of a shade tree, about six or eight inches in diameter, which projected over the street so low as to come in contact with the top of the wagon, which caused the horses to break the king bolt, thus detaching the fore-wheels from the bed of the wagon and precipitating him from his seat to the street, resulting in such serious injuries to his leg that after ten months of great suffering it became necessary to amputate it to save his life, and as a result of the fall his left arm was seriously injured.

He sought to and did recover judgment against the city upon the grounds that the shade tree, being within the corporate limits of the city of Louisville, was permitted to grow and branch over the street in such a manner as rendered it dangerous to persons driving along the street, and that the city knew of its condition and failed, after reasonable delay, to remove it. The evidence tended to show that Michels' duties required him to drive at a considerable rate of speed to and from different points of the city in obedience to demands of the police department, for the purpose of conveying prisoners to and from the police stations, and that while driving along the street and passing a wagon loaded with tobacco stems, drawn by four mules, the top of the patrol wagon, as above stated, was struck by the projecting limb.

The case was prepared and tried upon the idea that the appellee was entitled to recover as would have been any citizen driving over the street, and who had received an injury under the circumstances detailed. It is urged upon the part of the city that as Michels was a servant in its employ, he had an equal opportunity of knowing the condition of the street as did the master, and that he should have negatived contributory negligence in his

petition by averring that he did not know the condition of the street, and did not have an equal opportunity with the master of knowing its condition. It was no part of the duty of a driver of a patrol wagon to examine the streets or report their condition. In the discharge of his duties it necessarily required him to drive hastily over the streets to such points as the demands of the police department required. It can not be said that, because his business required him to drive over the streets, his opportunities were as good as the master's for knowing their condition. It is the duty of the city to have the streets constructed, keep them in repair, and it is the business of the policemen of the city to discover and report any defects in them or dangerous obstructions over them.

If there had been a defect in the harness used upon the horses, or a defect in the wagon which he drove, of which he was aware, or could have been aware by the exercise of ordinary care, and from a failure to exercise it the injury resulted to him, then the principle invoked in behalf of the city, which is part of the law of master and servant, would apply. It was no more the duty of the driver of a patrol wagon to inspect the streets over which he drove than it is the duty of a brakeman to inspect the truck of a railway, or know that it has been safely constructed.

It is the duty of a municipal corporation to maintain its streets in good condition and repair so as to keep them reasonably safe for the traveling public. This imposes the duty of keeping them clear of obstructions which are dangerous to persons using them, and for failure to do so it is liable in damages to one who may be injured in consequence of such obstructions. This limb was six or eight inches in diameter, and necessarily it had been an obstruction for some years. Besides, the testimony in this case showed the city's attention had been called to the danger of permitting it to remain in its condition, in fact it appeared that persons had been previously hurt or had come in contact with it while using the street, and the city's attention had been called to these facts.

The court below gave the following instructions:

"1st. It is the duty of the defendant, the city of Louisville, to exercise ordinary care to keep its highways in a reasonably safe condition for public use, and if you shall believe from the evidence that at the time mentioned in the petition, that is, August 23, 1899, at the point on Main street, between Seventeenth and Eighteenth streets, where this accident is said to have occurred, there was a limb protruding from a tree across into the street, or highway, in such manner or in such a way as to make it dangerous to persons using that highway with vehicles, and that the city knew of the presence of the limb there, or could have known of it by the exercise of ordinary care, and that the plaintiff was injured by reason of the vehicle in which he was riding coming in contact with the limb in question, then the law is for the plaintiff, and you should so find, unless you should further believe from the evidence that the plaintiff, by negligence upon his part, contributed to cause or bring about the injury of which he complains, and that he would not have been injured but for his contributory negligence, if any there was.

"2d. But unless you shall believe from the evidence that the limb of the tree in question was a dangerous obstruction to the use of the street by persons in vehicles, or that the city did not know of the obstruction and could

not have discovered it by the exercise of ordinary care, then the law is for the defendant, and you should so find, unless you shall believe that the limb had existed in its dangerous condition for such a length of time that the city or its officers knew, or could have ascertained the dangerous condition of the limb with reference to people using the highway, by the exercise of ordinary care."

We think these instructions embody the law of the case. The verdict is not excessive, because of the great suffering of the appellee and the permanent injury which he received. The injury practically deprives him of any means of making a living for himself and family.

Judgment is affirmed.

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LOUISVILLE & NASHVILLE R. R. CO. v. MOUNCE'S ADM'R.

(Filed January 21, 1903—Not to be reported.)

Railroads—Negligence—Master and servant—Appellee's intestate was a night switchman in appellant's yards at Livingston, whose duty it was to transfer cars from one track to another under orders from the yardmaster. One night while engaged in this duty he switched a car onto the wrong track, which collided with some cars standing on that track, causing the death of the switchman. This action was brought to recover damages for his death, it being alleged that the injury resulted from some stationary switch lights being out, causing the deceased to switch the car on the wrong track, it being the duty of appellant to keep said lights burning. Contributory negligence was relied on as a defense. On the trial the court instructed the jury that it was the duty of the company to have the lights in reasonably good order and condition to show the location of the switch, and if it failed to do so appellee was entitled to recover. Held—That said instruction was erroneous and prejudicial. It is the duty of the master to use ordinary care in providing for the use of the servant safe machinery and premises in safe condition. He is not, however, an insurer. It was the duty of the deceased to have looked and found that the points of the switch rail were in proper position before giving the signal to the engineer to move. This he could have easily done by the light of a lantern he carried. This contributory negligence prevents his recovery. Besides, the proof shows clearly that the switch-lights were all burning at the time of the collision.

J. W. Aleorn and Edward W. Hines for appellant.

Robt. Harding, John W. Rawlings and Williams & Williams for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Chief Justice Burnam.

William M. Mounce was killed in a railroad collision while in the employment of the Louisville & Nashville R. R. Co., as night switchman in their terminal yards at Livingston, Ky., in January, 1901, and this action was instituted by his administrator for the recovery of damages for the loss of his life. He alleges that the defendant had maintained in its switch yard at Livingston certain fixed switch lights for the purpose of locating the switches and tracks, upon which they moved its trains and cars from one track to another, and which served as guides to his intestate in discharging the duties assigned to him, and without which it was unsafe to

do so; that on the night on which he was killed certain of these switch lights were not burning, and in consequence thereof, while transferring a number of cars from one track to another, he, by mistake, threw open the wrong switch, and the cars which he was transferring were run on the main track instead of onto a side track, and collided with the cars of a train standing thereon; that he was killed in the collision while in the discharge of his duty.

The answer of the defendant is a traverse of all the averments of the petition, and a plea of contributory negligence. It is conceded that the deceased was defendant's night switchman in its yards at Livingston; and that it was his duty, under orders from the yardmaster, to transfer cars from one to another of the tracks, in making up the trains at that point; and that in the discharge of these duties he had at his command the yard engine manned by the engineer and fireman. The yards ran north and south, and the engine always headed south. The switchman was required to carry a large lantern. For many years the company had maintained at each switch a stand about eighteen inches high on which was placed what was known as a target, composed of two cross pieces of sheet iron at right angles to each other, one painted red and the other painted white. If the white target stood at right angles to the track, it showed that the switch was closed, but if the red target was at right angles to the track it showed that the switch was open. At night lamps were used in place of those sheet iron targets, which showed lights from four sides: on the front and rear the lights were white and on the side they were red. The position of the target is always changed by throwing the switch; if its hows white before the switch is thrown, it becomes red thereafter and vice versa. The purpose of these targets was to enable the switchman approaching the switch to easily locate the switch, and know whether it was open or closed. And if it was closed, his duty required that he should descend from his train, go to the switch and turn it, and the testimony is uncontradicted that after throwing the switch, and before giving the signal to the engineer to move forward, that it was the duty of the switchman to examine the switch rails to see that they were in proper position and led to the track to which the cars were to be transferred. If the switch was a single one, a single light was maintained at the point, but at one point in the yard the company maintained what was known as a double switch light, which consisted of two lights about six feet apart, one of which marked the place where what was known as a cross over track led north to the main track from the passing track, and the other marked the place where the cross-over track led south to the main track from the passing track. At this point the yard is bounded on the east by Roundstone creek, and on the west by a series of coal bins twenty-five or thirty feet high. On the night of Mounce's death he was directed by the yardmaster to transfer "two cabooses and a carload of coal," which were standing coupled together on the passing track, and place them on what is known as the river track, or track number "four," which was the extreme eastern side-track in the yards, and which is to the left of the passing track looking south. The switch from the passing track to track number "four" was a single switch, but about one hundred feet north of it was the double switch spoken of above. The cabooses and car were standing



about five hundred feet south of the switch which lead to number four track, and were ahead of the engine. To comply with the orders of the yardmaster the deceased has to take his train to the first switch south of the double switch, and in doing this his duty required that he should place himself on the caboose of car at the end of the train; when the train passed beyond the switch to signal the engineer to stop; to get down and throw the switch; see that it was in proper position to make the transfer to track number four, and get back upon the car and signal the engineer to back up. Instead of doing this, he had the train pass entirely beyond the signal switch, which lead to track number four, and beyond the double switch, and threw that switch to the right, which sent his train over the cross-over track to the main track on which there was standing a freight train, which consisted of some thirty freight cars.

It is shown on the map that the distance between the passing track at the double switch and the main track on which the train of cars stood is only eight feet; and that this distance was continually narrowed until the actual collision by a passage of the train under deceased's command over the cross-over track to the main track ninety-four feet south of the double switch. The only negligence charged to the appellant company is that they permitted the south double-switch light and the light which lead from the passing track to track number four to go out.

The trial in the lower court resulted in a verdict for the appellee, which we are asked to reverse, first, because the verdict is palpably and flagrantly against the weight of the evidence; second, that instruction number one, given by the court to the jury, was erroneous and prejudicial to the defendant.

It is insisted for the appellant that there is no testimony conducing to show that the lights at the double switch and the first switch south of it leading to track number four were not burning at the time the deceased backed the train under his command through them. On this point the company introduced Thomas Farley, the yardmaster, who testified that both these lights were burning when deceased backed his train through the switches, and that after the accident he moved the yard engine and cars from the place of the accident down onto another track into the south part of the yard; and that in doing so he passed through both the double switch and the single switch, which lead to track number four; and that all the lights were properly burning. Johnson, the engineer in charge of the yard engine, testifies that both lights were burning at the time, and that he also saw them burning after the accident. A. C. Martin, another engineer, testifies to the same state of fact. Frank Grass, the engineer in charge of a freight train which was standing on the track in the yards at the time, testified that he saw Mounce when he threw the switch, and both lights at the double switch were then burning, and that he also noticed them burning after the collision. McGee, a car inspector and witness of plaintiff, testified that he was inspecting train number "thirty-one" on the main track at the time of the accident, and was about five cars lengths from the point where decedent was injured; and that he immediately went to where he was lying between two cars, and said: "Bud, what on earth is the matter?" That he answered: "Harry, I am killed; I did it myself; I threw the wrong switch.

Send for my mother, I am dying." He also testified on cross-examination that these lights were often extinguished by winds and the jar of the cars running over the switch. The witness, Cook, testified that some hours before he had lighted the lamps both at the double switch and the single switch leading to number four track; and that both lamps were in good condition. Whilst, on the other hand, none of the witnesses who testified on behalf of the plaintiff on the subjects of the lights claim to have had their attention directed to them until after from ten to thirty minutes had elapsed from the accident. At which time they say that one of the double switch lights was out, and also one south of the double switch. This, in point of time, was after the yard engine had been backed off the cross-over track and taken to the south part of the yard, and in being so moved it passed through both the double and single switch number four. This testimony does not in effect contradict the testimony of the witnesses who testified for the defendant that the lights were actually burning, and in good order at the time of the accident. There is no conflict in the testimony that it was decedent's duty in switching cars from one track to another, when he turned the lever which changed the switch to look at the points of the switch rail to see that they were in proper position; and that if the train was to be switched to a track on the right the left hand rail hugs the rail, and if on the left vice versa; that the lantern carried by him easily enables him to make this examination. Nor is it controverted that the track to which Mounce was ordered to switch the cars lead off to the left, and that the track to which he did switch them lead off to the right. It is also admitted that at the time he stopped his train at the double switches the car on which he was riding was then in less than eight feet of the train standing on the main track, and that he was on the side of the car next to the main track with a good lantern in his hand; and that after his car started forward he rode upon the front car. It would seem that if he kept any sort of a lookout, either to the front or rear, he would have seen the train on the main track and realized that he was approaching it. In the light of these uncontroverted facts there is no escape from the conclusion that plaintiff was guilty of such contributory negligence as to preclude recovery in this proceeding. The verdict is palpably against the weight of the evidence.

Besides, instruction number one, given to the jury, is erroneous and prejudicial to the defendant, as in it the court told the jury that it was defendant's duty to have the lights in reasonably good order and condition to show the location of the switch, and if he failed to do so, plaintiff was entitled to recover. Under this instruction, if the jury found that the lights were out, it was bound to find for the plaintiff, however great may have been the care exercised by the defendant. It was said by this court in *Needham v. L. & N. R. R. Co.*, 85 Ky., 425: "It is the duty of the master to use ordinary care in providing for the use of the servant safe machinery, and premises in safe condition. He is not, however, an insurer."

In *Shearman & Redfield on Negligence*, section 189 (4th edition), the principle is stated in these words: "The master is bound to use ordinary care, diligence and skill for the purpose of protecting his servants from encountering unnecessary risks in his service, but he is not bound to use any higher degree of care for that purpose."

These citations are in accord with the great weight of authority on this subject, in fact we know of none to the contrary.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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JAMES v. WEBB.

(Filed January 22, 1903—Not to be reported.)

Judicial sales—Mortgages—Exceptions to report of sale—Appellee, as surety for appellant to a bank on a note, took a mortgage on a fourth interest in a tract of thirty-three acres of land. Appellee paid the note and instituted this action to enforce his mortgage lien, making L and E. defendants, alleging that they held prior liens on the land. A judgment of sale was ordered to satisfy the liens in the order of their priority, and a personal judgment against appellant was improperly rendered in favor of E., as they had filed no pleadings asking for same. This error was afterwards corrected by setting aside the personal judgment. The property was appraised at \$400 and sold for \$270, more than two-thirds of its appraised value. Divers exceptions were filed to the report of sale. On appeal, Held—That the lower court properly overruled the first exception, alleging that appellee did not, before the judgment of sale, file or exhibit any mortgage to show that he had a lien on the land. Appellant was too late in making this objection; besides, the petition states that he had a mortgage and referred to it as filed, and there is a mortgage in the record. The second and third exceptions are made on the ground that no pleadings or exhibits are filed by L. or E. setting up their claim or mortgage. Held—That this exception can not avail appellant, as he took no exception to the judgment, and the court made an order that L. and E. should not be allowed to receive any part of the proceeds until they had shown their right thereto, by answer and cross petition, as required by section 682 of the Civil Code of Practice. Appellant made no objection to this order, and the court had the right to make it under section 763, Civil Code of Practice. It was not necessary for the judgment to direct the master commissioner to make an appraisal as the statute gives full directions in this matter. A sale can not be set aside on the single ground of inadequacy of price.

H. Clay White for appellant.

R. L. Webb for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Nunn.

In July, 1900, appellee Webb became the surety for the appellant, James, to the bank for the sum of \$26, and took a mortgage on an undivided one-fourth interest on thirty-three acres of land as indemnity to him. Afterwards appellee paid the note to the bank and brought suit on it to enforce his mortgage lien on said land. He made G. F. James and his wife, R. H. Elliston & Co. and J. L. Lee parties defendant, Elliston & Co. and Lee holding prior liens on the same interest in said land. All the defendants were duly served with process, and at the succeeding term of court judgment was rendered in favor of appellee against G. F. James for his debt, interest and costs, and also enforcing his mortgage lien on said interest for

the amount of his said debt, interest and costs, adjudged Elliston & Co. and Lee priority, and erroneously gave a personal judgment in favor of Elliston & Co. and Lee for their debts, they never having entered their appearance nor filing any plea in the cause. The master commissioner made the sale, but before making it, however, he had the property appraised, as required by the statutes, and the appraisers valued said interest at \$400. At the sale it brought \$270, which is more than two-thirds of its appraised value. The appellant, James, filed exceptions to the report of sale, which exceptions are as follows:

"1st. Because the plaintiff did not, before the rendition of that judgment ordering a sale of defendant's land, file or exhibit any mortgage to show that he had a lien on the land sought to be sold herein.

"2d. Because the defendants, R. H. Elliston & Co., filed no answer in this action asserting any lien upon defendant's land sought to be sold, nor any mortgage to show that they had any lien upon defendant's land, nor exhibit or note, or other claim to show any indebtedness to them in any way, before the rendition of the judgment in this action, so as to authorize such judgment for the sale of his land.

"3d. Because the defendant, J. L. Lee, filed no answer in this action, asserting a lien upon this defendant's land sought to be sold, nor any note or other claim to show any indebtedness by this defendant to him, nor filed any mortgage to show any lien upon his land before the rendition of a judgment therein ordering a sale of his land, and said judgment was rendered without authority and law.

"4th. Because said judgment ordering a sale of his land, did not direct the master commissioner to have his land appraised, or how to have it appraised, as required by law. And this defendant now comes and moves the court to set aside the judgment rendered against him in this action, and grant him a trial of this action, because there were not pleadings or exhibits filed in this action sufficient upon which to base a judgment in this action."

As to the first exception appellee was too late in making it, as it should have been made before judgment. But, however, the petition alleges that he had a mortgage and refers to it as filed, and there is a mortgage in this record. As to the second and third exceptions, the error mentioned therein can not avail him, for he took no exceptions to the judgment, and afterwards the court corrected the error by setting aside the personal judgment in favor of Elliston & Co. and Lee, and made an order that they should not be allowed to withdraw or receive any of the proceeds of such sale until they had shown their right thereto by answer and cross petition, as required by section 692 of the Civil Code of Practice. The appellant made no objection to this order, and if he had the court had the right to make the order under section 763 of the Civil Code of Practice. As to the fourth exception, it was not necessary for the judgment ordering the sale to direct the master commissioner to have the land appraised, or how to appraise it. The statute gives full directions with reference to these matters, and this record shows that the commissioner complied with the statute.

Appellant, in his brief and in an affidavit filed by him, claims that the sale should be set aside on account of the inadequacy of price. He failed to except to the commissioner's report on this ground, and if he had, there is

an unbroken line of decisions of this court to the effect that such a sale can not be set aside on such ground alone.

Perceiving no error prejudicial to the rights of the appellant the judgment is, therefore, affirmed.

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CHARLES v. MATNEY, &c.

(Filed January 22, 1903—Not to be reported.)

Statute of frauds—Fraudulent sale of land—Land of A. was sold under execution and B. the creditor, purchased it. Afterwards C. the brother of A. claimed that he had previously purchased the land from his brother by giving him notes for it, and was placed in possession of it. Held—That the evidence shows that the sale from A. to his brother was fraudulent.

Bart Belcher and T. H. Harmon for appellant.

J. M. Robinson for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge O'Rear.

James Charles owned a tract of land in Pike county. He had a tenant in possession of it. In 1896 appellee had begun an action for debt against him, and caused an attachment to be levied on the land. The attachment lien was not enforced, but appellee having obtained a personal judgment against his debtor, caused an execution to be levied on the land. At the execution sale the land was bought for appellee.

In this suit appellant, Green Charles, claims that in the fall of 1895 he bought this land from his brother, James Charles, by parol contract, and has since been in possession by his tenants. He claims to have paid for the land by surrendering to his brother certain notes he held against him for about \$750. This transaction is attacked by Matney, the creditor, as fraudulent. The circuit court dismissed appellant's petition, and we think properly. Besides the very loose transaction just mentioned, there was evidence to the effect that appellant, after the alleged purchase by him, continued to hold a \$500 note of those claimed to have been surrendered in consideration of the purchase; also that appellant, in conversations with his brother and others, treated the transaction as not closed, still claiming that James Charles owed him the \$500 note. There was some evidence, too, that James Charles, after the alleged sale, continued to exercise acts of ownership over the property. If this and similar transactions could stand, it would be well nigh impossible to subject an unwilling and tricky debtor's lands by execution. It was for such cases that the statute of frauds and perjuries was enacted, requiring written contracts before they were enforceable.

The judgment should be affirmed.

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

## KENTUCKY COURT OF APPEALS.

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McHARGUE, SHERIFF v. REAMS, TREASURER, &c.

(Filed January 23, 1903—Not to be reported.)

Appeals—Premature filing of mandate—Clerical misprision—This action having been reversed on former appeal, with directions to dismiss appellant's petition, on the filing of the mandate the lower court made an order directing a dismissal of the petition, to which appellant objected and excepted and has prosecuted this appeal on the ground that ten days' notice of filing the mandate had not been given before the first day of the term, as required by section 671, Civil Code of Practice. Held—That the order was a clerical misprision under section 517, Civil Code of Practice, and can not be the ground of appeal until a motion to correct it has been made in the lower court; besides, there is nothing in the record to show that appellant gave any notice of the filing of his schedule, as required by section 737, Civil Code of Practice.

W. L. Brown, D. K. Rawlings and H. C. Hazelwood for appellant.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Nunn.

This action has heretofore been in this court on appeal. The court reversed the judgment and remanded it to the lower court, with directions to dismiss the appellant's petition. Mandate was issued and filed in the lower court, and that court made an order dismissing the petition, in accordance with the mandate. The appellant objected and excepted to said order, and appeals again to this court to have that order set aside, giving as his reasons therefor that the ten days' notice before the first day of the succeeding term for the filing of the mandate had not been complied with as is required by section 671 of the Civil Code of Practice.

We find nothing in the record before us showing that the appellant made

any motion in the lower court to have said order set aside. Section 516 of the Civil Code of Practice says: "A misprision of the clerk shall not be a ground for an appeal until the same shall have been presented and acted upon by the circuit court." The next section says that "it is a clerical misprision to render judgment before the action stood for trial pursuant to the provisions of this Code." And according to the appellant's contention, this judgment was prematurely rendered, and in addition the record shows that the appellant filed his schedule, and there is nothing in the record showing that the appellee filed his schedule, or that the appellee had any notice of the filing of the appellant's schedule as required by section 787 of the Civil Code of Practice. The clerk of the lower court certifies that he only copied such parts of the record as was named in appellant's schedule.

For these reasons this appeal is dismissed.

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HAYS v. GILBERT.

(Filed January 22, 1903—Not to be reported.)

Parties to actions—Mortgages—Res judicata—New trial—A. was a junior mortgagee for \$400 on real property, and was, on his own motion, made a party to a proceeding instituted by B., the senior mortgagee, to enforce his mortgage. A. made no defense to the mortgage claim of B., but prayed that his mortgage lien be enforced. A judgment of sale was made directing that the claim of B. first be paid out of the purchase money and then the claim of A. A. became the purchaser of part of the property, and executed his bond for the purchase money. The sales realized only enough to pay the prior claim of B. and \$3.25 on the claim of A. This action was affirmed by the Court of Appeals. Afterwards A. filed this action, seeking to enjoin the collection of the purchase-money bond executed by him, alleging that the debtor had paid to B. \$150 for which no credit was given; also that the interest from 1891 instead of 1892 was included in the judgment by mistake; also that no interest should have been allowed on the claim of B. after the death of the debtor, as no demand was made of the personal representative within one year after his qualification. A new trial was asked to be granted under section 518, Civil Code of Practice. A temporary restraining order was granted by the clerk and the court finally adjudged that A. had the right to be made a party defendant to the suit of B., and set up defenses to his mortgage lien, but that having failed to do so, he can not now set up the defense of failure to credit the \$150 on the debt of B.; but treating the action as a motion for a new trial on the ground of newly-discovered evidence on the question as to the payment of usurious interest for the first year and the allowance of interest on the note notwithstanding the failure to verify same, and demand payment of the personal representative within one year after his qualification, decided that same would have been available had the action been filed within three years from the date of the judgment in favor of B., as required by section 844, Civil Code of Practice. It was also adjudged that the debt of B. should be credited by \$90, the first year's interest. On appeal, Held—That the judgment was proper.

J. Smith Hays and J. M. Hays for appellant.

B. B. Golden and Jas. D. Black for appellee.

Appeal from Knox Circuit Court.

**Opinion of the court by Chief Justice Burnam.**

This is an appeal from a judgment of the Knox Circuit Court dissolving an injunction and restraining order granted by the clerk and dismissing plaintiff's petition. The facts out of which the litigation grew are substantially as follows: In February 1896, William Gilbert instituted a suit in the Knox Circuit Court against E. Jane Mealer, administratrix of John Mealer and E. Jane Mealer individually, in which he sought to enforce a mortgage lien for \$1,500, with interest from the 20th day of March, 1891, upon a house and lot owned jointly by the defendants, situated in Barbourville, Ky. His attorney in this suit was the appellant, John T. Hays. Shortly after the institution of this suit Hays was employed by the defendant, E. Jane Mealer, to represent her in a litigation then pending in the Bell Circuit Court, under an agreement that if he succeeded he was to be paid a fee of \$350 and his expenses. As a result of this contract E. Jane Mealer, on the 25th day of January, 1897, executed her promissory note to the appellant, John T. Hays, for \$400, due twelve months after date, with interest at 6 per cent. per annum until paid, and to secure the payment thereof executed a mortgage upon the same property which was covered by the original mortgage to William Gilbert; and on the second day of March, 1898, he was made a party on his own motion to the suit of Gilbert against Mealer's administrator, and set up his debt, and asked an enforcement of his mortgage lien. On the 12th day of April, 1898, a judgment was entered in that proceeding subjecting the mortgaged property, first, to the debt of William Gilbert, and then the overplus, if any, to the debt of John T. Hays. The property was appraised at \$3,000, and the half interest of John Mealer and that of his wife, E. Jane Mealer, were sold separately. At this sale John T. Hays became the purchaser of the interest of John Mealer at \$1,000, and William Gilbert of the interest of E. Jane Mealer at \$1,200. The gross amount received from the entire sale only left \$3.25 to be paid to John T. Hays after paying the debt, interest and cost of William Gilbert. An appeal was prosecuted to this court and affirmed December 20, 1900. (22 Ky. Law Rep., 1523.)

Upon the return of the case to the lower court John T. Hays instituted this suit in which he sought to enjoin William Gilbert from collecting the sale bond for \$1,000, executed by him for the interest of John T. Mealer at the sale under the judgment in the suit of Gilbert v. Mealer's Adm'r, and to vacate and set aside that judgment under section 518 of the Civil Code, for the reason, as he alleges, that the judgment was erroneous and prejudicial to his rights as junior mortgagee in several particulars: First, he says that it adjudges Gilbert interest on his note from March 20, 1891, when in fact it did not bear interest until March 20, 1892; second, he alleged that on the 20th day of March, 1891, John and E. Jane Mealer paid Gilbert on his note \$150 for which he gave no credit; third, he alleges that Gilbert did not verify and demand payment of his note of the administrator of John Mealer within one year after his appointment, and that for this reason the note bore no interest after the death of Mealer. The temporary injunction was granted in accordance with the prayer of the petition by the clerk of the Knox Circuit Court. The regular judge of the Knox Circuit Court being of counsel for the defendant was disqualified from sitting, and this fact being certified to



the governor, Hon. J. M. Benton was appointed special judge and tried the case. His opinion is copied into the record, and succinctly states the facts and his conclusions of law. It is as follows: "It is the judgment and opinion of the undersigned special judge that the proper construction of the petition in this case is that it is one filed for the purpose of procuring a vacation or modification, according to section 518 of the Civil Code of Practice, of the judgment in favor of Wm. Gilbert in the action of said Wm. Gilbert, plaintiff, against E. J. Mealer, administratrix, which judgment was rendered on the 21st day of April, 1897. Upon the authority of *Hart, &c. v. Hayden, &c.*, 79 Ky., 346, I am of the opinion that the plaintiff, Hays, could, by petition, have been made a party to the action of Wm. Gilbert v. E. J. Mealer, Adm'x, before the Gilbert judgment was rendered on the 21st day of April, 1897, and could have presented any defense then known to him against Gilbert's claim; and I am of the opinion that in this case, and for the purposes of this motion, the plaintiff, Hays, should be treated as having been a party to that suit from the beginning of the April term, 1897, of the Knox Circuit Court. I am of the opinion that it can not be held under the statements of the petition in this case that there was any fraud or collusion between Gilbert and E. J. Mealer, prior to the time Gilbert obtained his judgment, and it is that judgment which is sought to be vacated or modified in this action, therefore, the question of fraud need not be considered. The only ground which I consider is stated in the petition which might be considered sufficient to justify a court to vacate and modify the Gilbert judgment is what might be termed the newly-discovered evidence with reference to the payment of the usurious interest to Gilbert for the first year, and the fact that he was allowed interest on this note notwithstanding the fact that he failed to verify and make demand of his claim within a year from the time the first personal representative qualified, and as an action to vacate or modify the judgment upon such grounds must, according to section 344 of the Civil Code, be brought within three years after the final judgment is rendered, that ground can not now avail plaintiff for the three years. So far as Gilbert is concerned the judgment runs from the 1st day of April, 1897, while this action was not instituted until April 5, 1901. The clerical misprision mentioned in the petition, if any in fact exists, can be corrected by the motion which is now pending in the action of William Gilbert v. E. J. Mealer, Adm'x, and full relief to plaintiff on that account can be obtained in that action. It being the opinion of the special judge that, according to the showing made in the petition, the only reduction in Gilbert's judgment that plaintiff is entitled to have made is the \$90 on account of the first year's interest, and it appearing that with that reduction only made the judgments of Gilbert and Hays will more than consume the proceeds of the sale of the property, the attachment prosecuted by Burnside against Mrs. Mealer and the notice of garnishment served on Hays need not be considered, for his answer that that notice can truthfully state that he owed Mrs. Mealer nothing when the notice of garnishment was served. It is, therefore, ordered that the restraining order and injunction issued by the clerk of the Knox Circuit Court in the case of John T. Hays v. Wm. Gilbert be, and they are hereby, dissolved, and the clerk of said court is directed to enter this order on the records of the Knox Circuit Court."

After a full examination of the very able briefs filed for appellant, we have concluded that the judgment appealed from should not be disturbed.  
Judgment affirmed.

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BARKER, &c. v. BOYD, &c.

BUTT v. KING.

GUERBACKER-GILMORE CO., &c. v. KING, &c.

SAME v. BYARS, &c.

(Filed January 22, 1903—Not to be reported.)

1. Partners—Attachment—Fraudulent conveyances—Mortgages—Subrogation—Guardian and ward—Sureties—Butt & Boyd were mercantile partners, and several creditors of the firm sued out attachments. K., a creditor of Butt, levied an attachment on a house and lot, the individual property of Butt. Prior to the attachments Butt & Boyd had sold and transferred their storehouse and stock of goods to Byars, and Boyd had assigned to Byars a mortgage then note for \$600 on Butt's property upon which K.'s attachment was levied. The creditors of Butt & Boyd attacked this transfer to Byars as fraudulent. The court decided that the transfer of the house and lot and stock of goods to Byars was not fraudulent on the part of Byars, as he paid a valuable consideration for same, and had no notice of any intent to defraud on the part of Butt & Boyd, and that the transfer of the \$600 mortgage claim was fraudulent as to creditors. In a judgment subsequently rendered in the attachment suit of King, it was adjudged that the mortgage debt had been paid and the former judgment was set aside so far as it subjected this claim to the partnership debts. Held—That the judgment finding that the transfer of the storehouse and stock to Byars was not fraudulent is approved, but as the note of \$600 secured by a mortgage on the house of Butt had been assigned to Boyd, and the amount of it paid out of his means, he was entitled to be subrogated to the lien of the original holder of the note, and the partnership creditors could subject same to their debts. The judgment for debt in favor of K. against Butt should be reversed as the evidence fails to show an indebtedness on the part of Butt to the extent claimed. Prior to the levy of any of the attachments herein Boyd, who owned the storehouse, had executed to O. a mortgage on same to indemnify him as surety on a bond as guardian for his children for the amount of \$950, the estimated amount of funds in his hands belonging to them. Byars had retained this amount of money out of the purchase money and subsequently paid it into court, and the creditors of the partnership now seeks to subject this fund to their debts. Held—That the proof shows clearly the legal obligation of O. and his co-sureties for funds received by Boyd as guardian for his children. Said fund should be applied to the payment of that debt.

2. Release of sureties on guardian's bonds—A surety on a guardian's bond can be released from liability only by pursuing the method pointed out in sections 4659-4664, Kentucky Statutes. The bond required to be executed in the circuit court under section 493, Civil Code of Practice, and the guardian's bond executed in the county court are considered cumulative securities. A renewal bond of a guardian in the county court is regarded as cumulative surety for the ward, and the sureties on all of them are equally bound unless some of them have been released in the manner provided by statute.

W. P. Sandidge for Ouerbacker-Gilmore Co., &c.

Browder & Browder for J. M. Pence, Seth Barker, J. M. King and G. H. Byars.

J. B. Grubbs for Geo. W. Boyd, &c.

W. L. Reeves for J. L. Butt, &c.

Appeal from Logan Circuit Court.

Opinion of the court by Judge O'Rear.

Butt & Boyd were mercantile partners at Adairville, Ky. They failed in business. Some fourteen of their creditors filed that many attachment suits, respectively against the firm. J. M. King was a creditor of Butt. He filed suit and procured an attachment against Butt's individual property, a house and lot in Adairville. Prior to the attachments mentioned Butt & Boyd had sold and conveyed to G. H. Byars their business house, and had sold and delivered to him also their stock of merchandise; and Boyd had assigned and claims to have sold to Byars a mortgage-lien note for \$600, and interest, which he claims he held against Butt's property, that attached by King. The creditors of the firm of Butt & Boyd attacked the transfers to Byars as fraudulent, and sought to subject this property to their debts, which aggregated something over \$1,700, exclusive of interest and costs. As a matter of fact the real property conveyed to Byars was owned by Boyd, who indeed owned all the property of the firm, Butt's interest being alone in the profits, and there were no profits. Before the sale to Byars, and before the creation of any of the debts of the complaining creditors here, Boyd had mortgaged his real property (the storehouse and lot sold to Byars) to Orndorff, to indemnify him against loss as surety for Boyd as guardian of certain of Boyd's children. The facts bearing on this mortgage will be particularly noticed later on. This appeal involves the correctness of the circuit court's judgment fixing the liabilities and marshaling the liens and equities of the parties.

The first question to be disposed of is the correctness of the trial court's finding as to the transactions between Butt & Boyd and G. H. Byars. That court found that the transfer of the \$600 mortgage note owing by Butt, transferred by Boyd to Byars, was fraudulent as to Boyd's (the firm's) creditors, and adjudged it a lien on the Adairville property owned by Butt, which was ordered to be sold, and to the extent of this note and interest applied in satisfaction of the attachment debts against the firm. The court held, however, that the transaction by which the storehouse and lot and stock of merchandise were sold to Byars was not fraudulent. Of this action the creditors complain. The facts were that Butt & Boyd were largely indebted. Their property was encumbered to a bank at Adairville for over \$3,000. The business had not been profitable. They sought Byars and offered to sell to him their business house and lot at \$2,700, and their stock of merchandise at 80 per cent. of its cost, adding carriage. It realized about \$2,100. These sums were consumed almost entirely by the Adairville bank debts. Nine hundred and fifty dollars of the consideration was not then paid, because there was a mortgage to Orndorff for that sum, and it was agreed, so it was alleged, that it was to be paid to him, or so as to relieve the property of the lien created

by his mortgage above mentioned. The evidence is that the prices paid by Byars were the fair and full value of the properties; that he did not then know of any purpose by Butt & Boyd to hinder or defraud their creditors; that he gave checks immediately for the cash (less the \$950), which were subsequently presented to and paid by his banker. In fact, though, they were not presented apparently till more than twenty days later than their date, and not till one day after the attachments had been issued against Butt & Boyd. The cause of the delay is not explained, but so far as Byars is concerned he does not appear to have known of it, or in anywise to have been responsible for it. We fail to see anything in this transaction that would charge Byars with knowledge or notice of Butt & Boyd's fraudulent purpose.

The transaction about the Butt note did not occur at the same time, though it is assumed in argument that it did. The evidence upon which the court sustained the charge of fraud in that transaction is not attacked as being insufficient. There is no cross appeal from the judgment on that score. We, therefore, merely accept the fact as one settled, that the grounds of the attachment as to that transaction are sustained, and whatever property rights Boyd owned in that note and mortgage are to be subjected to his creditors' attachments.

The transaction of this note was as follows: Butt appears to have been without means in 1892; he had formed the co-partnership with Boyd, placing his services against Boyd's capital. He was to share equally in the profits. He proposed to Boyd that he could buy the house and lot in Adairville, and by borrowing the money from a building and loan association, could pay for it as easily as to pay rent; that he be allowed to anticipate from the firm his expected profits, and draw out enough monthly to meet the installments of premiums, interest and dues to the association; that in the event there were no profits finally, Boyd was to have the house and lot, or, rather, the debt against it evidenced by Butt's note to the building and loan association. This proposal was agreed to by Boyd, and \$600 was borrowed from a Louisville building and loan association, secured by mortgage on the Adairville house and lot. The monthly installments were paid by Boyd's money, drawn from the firm by Butt under the foregoing arrangement, for several years, and until King attached, when there was some \$190-odd balance owing the building and loan association. Thereupon Boyd paid off this balance, and took an assignment of the whole note from the building and loan association. In these actions, consolidated, by the fourteen creditor firms of Butt & Boyd, against Butt, Boyd, Byars and the building and loan association, the fact was decided by a decree of February 23, 1900, that Butt's liability to the building and loan association had been assigned to Boyd; that it was \$600 and interest; that the alleged transfer of it by Boyd to Byars be set aside as fraudulent, and that Butt's property in mortgage to secure it be sold and, to the extent of the \$600 and interest and costs, that it be subjected to the payment of Boyd's attaching creditors.

Prior to the institution of the attachment suits by the creditors of Boyd (i. e., the firm of Butt & Boyd) J. M. King had filed a suit in the Logan Circuit Court against Butt on a note for \$923.77, credited by \$18.50 as of September 1, 1891, and \$492.50 as of November 24, 1891, and procured an

attachment against Butt's property, which was levied on the house and lot encumbered by the building and loan association mortgage above named. To this suit in time Butt, Boyd, Byars and the building and loan association were made parties defendant. A number of issues were joined (which form the subjects of decisions further along in this opinion), among them being the claim by King that the mortgage debt to the building and loan association had been paid by Butt, and denying any title therein in either Boyd or Byars.

Sussequent to the decree of February 28, 1900, the suit of King v. Butt, &c., was consolidated with the various suits of the creditors of Butt & Boyd, styled then "Overbacker-Gilmore Co., &c. v. Butt & Boyd, &c." On final hearing the circuit court decided that the \$600 Butt note and mortgage to the building and loan association had been paid by Butt before the attachment by King, and thereupon set aside so much of the previous judgment as subjected the property for that debt to Boyd's creditors.

On this branch of the appeal two questions are presented: First, was the judgment of February 3, 1900, conclusive upon King; and, second, was the debt in fact and in law paid by Butt, so that Boyd had not an equity superior to the attachment of King?

In view of the conclusion at which the court has arrived concerning the second proposition stated, it becomes unnecessary to determine the question of law involved in the first one.

The circuit court found that the debt to the building and loan association had been paid by Butt, and that, therefore, it had been discharged so that it was not susceptible of assignment by the association. It is true it had been paid, except about \$190, as stated above. But those payments, while made in the name of Butt, and probably by him, were made by the means of Boyd under the arrangement detailed. It may, therefore, be said that Boyd in reality paid the whole of this debt to the building and loan association, and although not primarily liable, nor liable at all, to the association for its payment, as between Boyd and Butt there was a manifest equity entitled to recognition by the courts. That Butt, under such circumstances, was morally and legally bound to repay Boyd the money so advanced there can be no manner of doubt. Such an agreement by a debtor to a stranger to his debt, that the latter may be subrogated to the lien which he pays, is an enforceable one. (*Treadway v. Pharis*, 18 Ky. Law Rep., 788.) The attaching creditor could occupy no more favorable attitude to the debtor's property than the debtor could in relation to equities against it. The right of J. M. King to subject the property of Butt to his attachment is questioned by Butt, because he denies that he then owed King any sum. Butt originally owned a stock of merchandise at Adairville. He sold King a half interest and took his note for \$400, dated February 1, 1888, in part payment. On a settlement had between these partners in August, 1891, the note for \$923.77 sued on was executed by Butt to King.

One of Butt's defenses was a plea of set off, on account of the \$400 note first mentioned. King claims to have paid that note to the bank, where Butt had placed it as collateral. The circuit court found in favor of King on this issue. King testified that he had paid the \$400 note to Mr. Fugate, the banker, and filed a written settlement between him and Fugate to that

effect. Butt was neither a party to nor present at this settlement. Fugate testified that in fact the \$400 note was not paid by King, but that Butt had pledged it to Fugate's ——— as collateral to secure a debt owing the bank by Butt. In a general settlement of all liabilities to this bank King desired this note included. Fugate says, and Butt corroborates it, that Butt, at Fugate's instance, gave other security upon the note upon which the \$400 note was collateral, and upon Butt's consent it was surrendered to King. Within a few days afterwards King placed a credit on the \$923.77 note for \$492.50, the amount of the principal and accrued interest on the \$400 note. In his petition King concedes this credit, as he does in his first deposition in the case. Not till the case had been at issue for some time was it claimed that this credit was a mistake. We see no escape from the conclusion that King in fact did not pay the bank anything for this \$400; but that Butt agreed for it to be surrendered, to be credited by King on his \$923.77 note, and the credit was then accordingly made. The circuit court erred in adjudging otherwise.

In the partnership agreement between King and Butt it was stipulated that King was to pay \$300 per year upon the salary of a clerk in lieu of his personal service to the firm. This clerk, who was the bookkeeper for the firm, served for over two years under this arrangement. The clerk was to receive \$500 per year, \$300 to be paid by King, the remaining \$200 to be paid by the firm. The firm paid the clerk the \$500, but in entering the transaction on the books King was charged with \$200 only each year. By these mistakes he failed to repay the firm \$304 on this matter. In the settlement in August, 1891, as the result of which the \$923.77 note was executed, the error above named was not corrected, nor then known. It is clearly proven that it existed, therefore, the circuit court should have adjudged a credit for one-half of the sum omitted upon the note sued on as of its date. Failing to do so was error. There is no complaint of the judgment disposing of the other issues on the King and Butt branch of the case.

G. W. Boyd (of the firm of Butt & Boyd) was guardian for certain of his infant children. He was appointed by the Logan County Court December 9, 1889. He then executed bond with appellant, J. M. Pence, as his surety. The guardian received little or no personal property. At any rate, if any, it is not the subject of this litigation. The wards owned an undivided one-seventh interest in certain real estate in Logan county. The whole tract of the land contained about 238 acres. On December 21, 1889, Boyd, as guardian for his children, instituted an equitable action in the Logan Circuit Court against the other joint owners of this land, praying for its sale as an entirety, and for the division of the proceeds among the joint owners. In August, 1890, judgment was duly rendered in the action, directing the sale of the land as prayed for. On the same day Boyd, as guardian, with appellants, J. M. Pence and Seth Barker, as his sureties, executed in the Logan Circuit Court the bond required by section 493, Civil Code, in which the principal and his sureties undertook that the guardian would faithfully discharge all his duties as such; would comply with the judgments and orders of the court in the action, and would account for, pay and deliver to his said wards all money or property due or belonging to them when required. This bond was required to be executed before the judgment of sale could be rendered or enforced. The

sale under these proceedings was reported to and confirmed by the court. As a result there was reported as going to Boyd as guardian for his said children \$478.85, after paying his part of the costs. This sum was paid to him the 20th of January, 1891. Previous to this sale the seven joint owners, Boyd representing his wards, had agreed among themselves, without the knowledge of Barker and Pence, so far as the record shows, that the land should go at not less than \$6,195, two of the joint owners having agreed to pay that sum for it, without reference to what they might have to bid at the decretal sale. As a matter of fact it only brought \$3,399.97 at the commissioner's sale, being bid in for that sum by the two joint owners above referred to as agreeing to pay \$6,195 for it. This last-named sum the purchasers did pay for the land, although the records of the suit failed to show anything of this agreement out of court. Boyd, as guardian, received his wards' part of the greater sum, viz., \$873.14 in all. This includes the \$478.85 reported, as shown by the circuit court records. This \$873.14 and its interest is all that the guardian reports, or that is found, to have come to his hands for his wards.

In June, 1898, Boyd appeared in the Logan County Court, and renewed his bond to his said wards, with M. E. Orndorff as his surety. The order of the county court taking and approving this bond is as follows: "On motion of G. W. Boyd it is ordered by the court that he be, and he is hereby, permitted to execute a new bond as guardian for the children, to wit: Alma Boyd, E. N. Boyd, Pearl Boyd, Maude H. Boyd, G. E. Boyd and Hattie E. Boyd. Whereupon the said G. W. Boyd executed approved bond for each of his said wards, with M. E. Orndorff as his surety, and it is hereby further ordered by the court that J. M. Pence, the surety of said Boyd on a former bond executed by said Boyd as guardian of the above-named children, be, and the said Pence is hereby, released from further liability as surety on said bond."

The bond was as follows:

"The Commonwealth of Kentucky:

"Whereas, G. W. Boyd has been appointed by the county court of Logan county, and has qualified as guardian of Maude H. Boyd, as minor, now we, G. W. Boyd, as principal, M. E. Orndorff, his surety, do hereby covenant to and with the Commonwealth of Kentucky that the said G. W. Boyd will faithfully discharge the trust of guardian to the said minors in all respects as provided by law."

It thus appears that the county court evidently believed, as perhaps did Boyd, that this bond was in lieu of his first one on which J. M. Pence was surety, and that Pence was thereby released from his liability. Boyd claims, and so testifies, that he took this action "at the request" of J. M. Pence, the surety. It is not claimed that this "request" was other than oral, and was not made by Pence to the court, nor was Pence present at the giving of the new bond. At the same time Boyd, to indemnify Orndorff as such surety, executed to him a mortgage for \$950 (that being supposedly the extent of his liability on the guardian's bonds) on the storehouse and lot above referred to as having been sold by Boyd to Byars. Byars has paid into court the \$950. This sum is attached by the creditors of Boyd (Ouerbacker-Gilmore Co. and others), and is claimed by Orndorff, J. M. Pence and Seth Barker as belonging to Boyd's wards, and as having inured to their joint benefit under the

mortgage to Orndorff. Whether this fund will belong to Boyd's wards in any event must depend upon whether Orndorff was ever bound by his bond, for if he was not, and if no liability had attached, or can attach, as against him by reason of the bond, it is manifest that the conveyance of indemnity to him is without consideration, and is not binding, and conveys nothing.

Under the first act of this Commonwealth (1797) it seems that the county courts had authority to release sureties on guardian's bonds, or to make such order for the relief of a guardian's surety "as to them shall seem just." (*Wilborne v. Commonwealth*, 5 J. J. Mar., 618.) In the various changes in this statute since made the policy has been steadfastly adhered to of giving to the county courts plenary power in exacting or taking new bonds or additional security so as to fully protect the interests of the wards. Now the county court appointing the guardian must at the time of the appointment exact a good and sufficient bond (section 2017, Kentucky Statutes), and may require him to renew his bond, if the court deems that it is no longer sufficient. (Section 2026, Kentucky Statutes.) If a surety becomes uneasy, and desires to be released from further liability on the bond, or indemnity for that already incurred, either or both, he must pursue the method pointed out by the Statute. (Sections 4659-4664, Kentucky Statutes.) In this way only may a surety now be released or indemnified by a bond in court. The order releasing Pence as surety on the first bond was, therefore, void. He remained bound as if that part of the order had not been made. When the county court permitted the guardian to execute the new bond with Orndorff as surety, it was equivalent to that court's requiring a new bond, or additional security to be given by the guardian. And it has been repeatedly held by this court that the effect of such renewal bonds is cumulative security for the ward, and that the sureties on all of them, so far as the ward is concerned, are equally and jointly bound for all the estate coming into the guardian's hands. (*Abshire v. Rowe*, 28 Ky. Law Rep., 1854, and cases there cited.)

As Orndorff was bound by this bond, the validity of the mortgage to him is fixed. Under familiar principles indemnity taken by one surety inures to all jointly bound. Therefore, the mortgage to Orndorff was for the benefit of Pence and Barker, and ultimately for the wards. In these cases the wards of Boyd (by their present guardian, Boyd having been removed), litigated with Pence and Barker their liability; and same was adjudged. Pence and Barker have appealed. It, therefore, becomes necessary to consider their liability to the wards of Boyd.

It has heretofore been held by this court that the effect of executing the bond required by section 498, Civil Code, to procure the sale of an infant's land, is but cumulative security; and that the sureties upon the guardian's original bond made in the county court and those upon the one executed in the circuit court, as to the fund realized by the sale of the land, stand as co-sureties and joint obligors for the faithful application by the guardian of the proceeds of such sale. (*Elbert v. Jacoby*, 8 Bush, 545; *Taylor v. Taylor, & Co.*, 6 B. Mon., 560; *Withers v. Hickman*, 6 B. Mon., 392.) The sureties on the guardian's bond executed in the county court bind themselves for every class and kind of the wards' estate that may come, or should have come, to the guardian's hands, including his misfeasanances and nonfeasance. But



the sureties in the bond executed in the circuit court, while supplementary to the county court bond, should be considered as contracting alone with reference to the subject-matter of the suit in which it is executed. That record constitutes notice to the surety therein of the nature and extent of the estate for which he becomes bound. The very letter of his bond should be the limit of his liability. It is executed with reference to that certain described land, to enable its sale, and guarantees the faithful application of its proceeds only.

Whether the outside agreement of the guardian, Boyd, in that case, not reported to the court, should enlarge the liability of his surety in the court, any more than a similar agreement for giving some part of the reported consideration could diminish the surety's liability, is a question now unnecessary to decide, as it appears that the fund in court subject to the Orndorff mortgage is sufficient to pay the wards in full. The circuit court adjudged these two sureties liable for \$221.25 each. It will be seen that the judgments against them are more favorable than either of them was entitled to. The court, therefore, considers that the personal judgments of the guardian of the Boyd heirs, and of Sarah A. Boyd, against Seth Barker and J. M. Pence should be affirmed; but that the judgment refusing to subject the \$950 fund to the payment of the liability of Boyd as guardian to the wards should be reversed. The judgments in favor of J. M. King v. J. L. Butt should be reversed; the judgment denying the various appealing creditors of Butt & Boyd (Ouerbacker-Gilmore Co. and others) the right to subject the J. L. Butt house and lot for the \$300 note and interest, should be reversed; that the judgment denying the same creditors the right to subject the \$950 fund balance arising from a sale of the storehouse and lot to Byars should be affirmed on the creditors' cross appeal, if any surplus of that fund; after paying the Boyd heirs as herein indicated, it may be subjected to the creditors' attachments. The judgment in favor of G. H. Byars upholding the sale to him of the storehouse and lot and the stock of merchandise by Butt & Boyd should be affirmed.

In so far as the judgments are reversed these causes are remanded, with directions to enter judgments in conformity to this opinion and for proceedings therein not inconsistent herewith.

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FOSTER, &c. v. FOSTER, &c.

FOSTER'S EX'OR v. SAME.

(Filed January 22, 1903—Not to be reported.)

1. Decedents' estates—Personal representative—Statute of limitation—Estoppel—Res judicata—F. died in 1875 testate, leaving three children, E., J. and M. In March, 1875, E. qualified as executor of his father's will, and took charge of the estate. The personal estate amounted to about \$20,000, which was devised equally to the three children. The executor filed no inventory appraisement or sale bill or report of any kind until about a year after the first suit was brought. In 1896 the heirs brought suit against the executor, charging, in general terms, his failure to pay over the money. The action was referred to the commissioner to make a settlement with the executor. About a year after the action was filed the executor made a re-

port to the commissioner of what he had received and paid out. The report was based on the recollection of the executor. He subsequently made an additional report. From these reports the commissioner made out a report showing a balance in the hands of the executor of \$1,533.05. The report was filed in 1898. After this report was filed the executor offered to file an amended answer, pleading lapse of time and the statute of limitation in bar of the action. The court refused to permit this answer to be filed. In 1899, and before judgment, E. died, leaving three children, G., J. and H. G. administered on the estate of his father, and the action was revived against him, and he offered to file the plea of the lapse of time and the statute of limitation. The court refused to permit this plea to be filed and judgment was rendered on behalf of plaintiffs against the administrator. Before this judgment was rendered plaintiffs instituted this suit against G., as administrator and against him individually, and against the other two heirs of the executor, alleging that a few days before he died the executor had given his children all his personal estate, leaving nothing but a tract of land, containing about 200 acres, and worth \$40 or \$50 per acre, and asked the court to sell so much of the land descended to the children as would pay their claim. The case was referred to commissioner for report of claims against the estate. Afterwards the commissioner reported, and allowed this claim and one or two other small claims. The defendants filed exceptions to the claim of plaintiffs and pleaded lapse of time, the statute of limitation and the former action between the same parties then pending in the same court as a bar to the action. After the judgment in the former action against the administrator had been rendered and execution issued and returned no property found, plaintiffs filed an amended petition setting out said facts. On the trial of this last action the court adjudged that the plea of the statute of limitation by J. was a good defense and released the property which descended to him from his father, continued the case as to H., who was a nonresident, and adjudged that the plea of the statute of limitation did not protect G. from liability as he was a party to the former action as administrator, and adjudged that his interest in the land descended from his father be sold to satisfy said claim. Appeals have been prosecuted in both cases, and by consent are heard together. Held—That the plea of a former suit pending was in effect a special demurrer, and failure to have the lower court pass on it before trial was a waiver of it. Besides, the second action was instituted under section 428, Civil Code of Practice, which authorizes a personal representative, legatee, distributee or creditor to bring a suit for settlement of a decedent's estate, while the first was a suit against the personal representative alone, and he was the only party to the action. The lower court did not err in refusing to allow the executor to plead the statute of limitation in the first suit and his son his administrator. The action had been pending two years against the executor; the pleadings made up the proof heard and the commissioner's report filed, and after he was brought out in debt he for the first time offered the plea. The court erred in sustaining the plea of the statute of limitation by J., brother of appellant, for the reason that by the conduct of their ancestor he was estopped from entering the plea, and they, as his descendants, stood in no better attitude. They took the property by descent from him with the burdens he left upon it.

2. Negligence of personal representative—Compensation—The personal representative was properly held liable for a debt he failed to collect and permitted the statute of limitation to bar the recovery. The court properly refused to make the executor an allowance on account of his failure to perform his duties.

3. Pleading—The failure to have the lower court pass on a plea, which is in effect a special demurrer, before trial will be considered a waiver of it.

Winfield Buckler, J. R. Ross and W. P. Ross for appellants.

J. J. Williamson and Kennedy & Williamson for appellees.

Appeals from Nicholas Circuit Court.

Opinion of the court by Judge Nunn.

On February 28, 1875, Geo. R. Foster died testate, leaving three children, viz., E. D. Foster, Jerry Foster and Mildred Secrest. On March 8, 1875, E. D. Foster qualified in the Nicholas County Court as the executor of his father's will.

From what we can gather from the record in this case the personal estate of Geo. R. Foster consisted of about \$20,000. By said will special bequests were made out of this personalty to his two sons and daughter to the amount of about \$14,000, leaving the balance of his personal estate, after the payment of his debts, to be equally distributed among his three children.

The executor, E. D. Foster, never at any time filed an inventory, appraise bill or report of any kind, showing what estate he received as such executor until about a year after the first action herein was filed. He never made a settlement with the county court at any time, and such was the condition of affairs in 1896, when this first action was instituted by Hattie M. Foster, &c. against E. D. Foster as executor of his father. By reason of there not being any record evidence or report of any kind at their command the plaintiffs necessarily filed a petition containing no specific allegations as to the amount received by the executor or the amount paid out by him. He answered in general terms, denying the general allegations, and did not disclose in his answer what he had received or paid out. An order was made, referring the case to the master commissioner to take proof, make settlement and report to the court the condition of the estate in his hands. The commissioner did not make settlement with him until about a year after the action was filed, at which time, and the first time, the executor made a report to the commissioner of what he had received belonging to the estate and what he had paid out. The report was based on the recollection of the executor, as stated by him at the time. Afterwards he filed an additional statement, giving, as his best recollection, the amounts he had received belonging to the estate and the amounts he had paid out for it. The commissioner, from these statements, made out a report and filed it in said action, showing a balance in the hands of the executor belonging to the estate of \$1,582.05. This report was filed in 1898. After this report was filed, and for the first time, the defendant, E. D. Foster, offered to file an amended answer pleading lapse of time and the statutes of limitation in bar of plaintiffs' right to recover. Objection was made to this, and the court sustained the objections.

Before judgment, and in 1899, E. D. Foster died intestate, leaving three children, viz., Geo. R. Foster, Jr., J. C. Foster and Hattie Washburn. Geo. R. Foster, Jr., administered upon the estate of his father, and the action was revived against the administrator, and he offered, as administrator, to file the plea of lapse of time and the statutes of limitation, which the court refused to allow him to do, and judgment was rendered on behalf of plain-

tiffs against Geo. R. Foster as administrator, to be levied upon the assets in his hands belonging to his father's estate. But before this judgment was rendered and after the death of E. D. Foster, and on October 18, 1899, these same plaintiffs brought an action in the same court, making Geo. R. Foster, Jr., as administrator, and Geo. R. Foster individually, J. C. Foster and Hattie Washburn and her husband defendants, setting up this claim which was being litigated in the former action, alleging that E. D. Foster had, a few days before his death, given to his children all of his personal estate, leaving nothing except a tract of land, which was set out in the last action by metes and bounds, consisting of about 200 acres, and valued at about \$40 or \$50 per acre. They asked the court to sell so much of the land descended to the children as would pay their claim, being two-thirds of the \$1,532.05, and asked that the action be referred to the commissioner for report of claims against the estate. Afterwards the commissioner reported and allowed this claim and one or two small claims. The defendants filed exceptions to the claim of these plaintiffs and pleaded lapse of time, the statutes of limitation and the former action between the same parties, pending in the same court and for the same thing, as a bar to this one. After the judgment in the former action against Geo. R. Foster, as administrator of his father, for two-thirds of the \$1,532.05, had been rendered and execution issued and returned no property found, these plaintiffs in this action filed an amended petition, setting up said judgment and executions returned no property found, and filing copies thereof. On the trial of this last action the court adjudged that the plea of the statute of limitation by J. C. Foster was available as a defense, so far as he was concerned, and released the property which descended to him from his father from the payment of it; continued the case so far as Hattie Washburn was concerned, as she was a nonresident and was before the court by constructive service only; adjudged that the plea of the statutes of limitation by Geo. R. Foster, Jr., did not avail him, because he was a party to the former action as administrator, and adjudged that his interest in the land descended to him from his father be sold to satisfy said claim, and he has appealed from said judgment to this court.

The two cases are here on appeal in this court, and by written consent of the parties filed in the record they are to be tried together.

Appellant contends that his plea in the second action, that the first suit was pending in the same county, between the same parties and for the same thing, should have been sustained. In our opinion the plea was in effect a special demurrer, and the appellant failing to have the court act upon it before trial, it is deemed to have been waived. Besides, this second action was brought by virtue of section 428 of the Civil Code of Practice, which authorizes a representative, legatee, distributee or creditor of a deceased person to bring an action in equity for the settlement of his estate. The first action was against the personal representative for the purpose of fixing the amount of the claim against the estate and he, in his fiducial capacity, was the only party to this action. The appellant also contends that the lower court erred in refusing the plea by E. D. Foster of the statutes of limitation, and also his son's plea to the same effect, as his personal representative, in the first action, and also that of Geo. R. Foster, Jr., to the same effect in the second action. The lower court did not abuse its discretion by refusing

to allow E. D. Foster to file said plea of the statutes of limitation. The action had been pending against him for two years, the pleadings made up, proof heard, and the commissioner's report filed and after bringing him out in debt in the sum named, he then, for the first time, offered the plea. (14 Bush, 494.) Likewise the court properly refused to allow the plea by his administrator and also by him in his individual capacity in the last action; but the court erred in sustaining the plea of the statutes of limitation by J. C. Foster, brother of appellant, for the reason that by the conduct of their ancestor, E. D. Foster, he was estopped from entering the plea, and they, as his descendants, stood in no better attitude than he did. They took the property by descent from him with the burdens he left upon it.

Appellant contends that the court erred to his prejudice in failing to give credit for a \$300 note and interest against A. J. Kennedy and W. J. Kennedy that his father received as executor, for the reason that he never collected it, and also for not giving him credit for an allowance as executor.

A. J. Kennedy was the principal and W. J. Kennedy the surety on said note. When the note was received by E. D. Foster, the executor, it was known by him that A. J. Kennedy was the principal and W. J. Kennedy the surety, and that the former was insolvent and the latter solvent. In his deposition he stated that he had a conversation with W. J. Kennedy; that it would be barred as to him in a few months and Kennedy begged him for further time; he granted it and after it was barred, he brought suit on it and lost. In the effort to collect that note he did not use any diligence, and, therefore, the court did right in charging him with it, and the court did right in refusing to make him an allowance as executor. From his own statement he never in any respect performed his duty as executor, and at the trial it was not known what estate he had received into his hands as executor or paid out on account thereof, except from his own recollection given twenty-one years after the estate went into his hands.

Wherefore, the judgment of the lower court is affirmed.

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CONN, &c. v. DESHA, &c.

(Filed January 23, 1903—Not to be reported.)

Chas. J. Helm for appellants.

W. H. McKoy and Ramsey Washington for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hobson.

This case seems to be on all fours with the case of *Johnson v. Smith*, 24 Ky Law Rep., 883. The appeal was filed November 1, 1899. It was continued from time to time until February 14, 1902, and then submitted. There is no brief for appellants, and the question sought to be raised is no longer of any practical importance. There is no real controversy between the parties so far as we can see, and for the reasons given in the case referred to the appeal is dismissed.

## WAGNER v. CAST, &amp;c.

(Filed January 23, 1908—Not to be reported.)

Street improvement—Alley No. 1, which runs north and south from Harvey street to Gallagher street, passes through the western part of the square 67 feet from the center, and the lots of appellant which are sought to be charged with the improvement of alley No. 1 are situate in the northwest quarter of the square, and the correctness of this burden is involved on this appeal. Held—That said property is subject to said tax, and appellant can not complain because the burden is not imposed on property owners in the northeast and southwest sections.

Lane & Harrison for appellant.

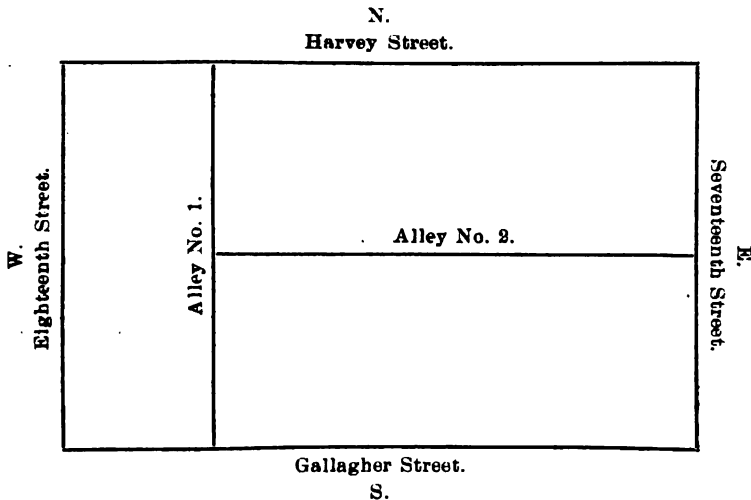
Wm. Furlong for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Paynter.

Under separate ordinances and contracts two alleys in a square, bounded on the north by Harvey, on the east by Seventeenth, on the south by Gallagher and on the west by Eighteenth streets, were improved by original construction.

The following diagram will serve to show the location of the alleys:



The alley running north and south between Harvey and Gallagher streets is wholly within the northwest and southwest quarters of the square. It is situated about 67 feet west of the center of the square. The other alley runs from Seventeenth street west to the center of the square; thence to the point of intersection with the alley described, running north and south. The lots of the appellant, Wagner, which have been assessed for part of the cost of the construction of the alleys, are situated in the northwest quarter of the

square. For convenience we will call the alley running north and south No. 1 and the one running east and west No. 2. The question here involved is the correctness of the judgment of the court below by which it was determined that the northwest quarter and the southwest quarter squares should pay the entire cost of alley No. 1, and that part of the cost of alley No. 2 running from the center of the square west to the point of intersection with alley No. 1.

Under the charter of cities of the first class, where the territory contiguous to the improved public way is defined into squares by principal streets, the tax district is made up of the quarter squares contiguous to the improved way and every square foot of the ground in the entire tax district is subjected to exactly the same charge. The rule is different where the improved public way is within the interior of the square. This court has held in *Washle v. Neham*, 97 Ky., 351, that where the alley improved lies wholly within one of the quarter squares, the other three-quarters can not be required to pay any part of the cost of the improvement. This, it will be observed, establishes an exception to the general rule stated. When an alley is improved running wholly through two quarter squares, then the expense must be borne by those quarter squares, if they alone are benefited by it.

That part of alley No. 2 running from the center line of the square west to alley No. 1 passes partly through the northwest and southwest quarter squares, and as they were benefited alone by it, the court properly held that they should pay the expense of it. The property owners in the northeast quarter and southeast quarter paid the entire cost of the construction of alley No. 2 from Seventeenth street to the center of the square. If any error was made in the assessment, it was prejudicial to the rights of the property owners in the northeast and southeast quarters of the square. In support of the conclusion we have reached we cite *Dumesnil v. Gleason*, 99 Ky., 652; *Dumesnil v. Shanks*, 97 Ky., 354; *McHenry v. Selva*, 99 Ky., 232; *Barrett v. Falls City Stone Co.*, 21 Ky. Law Rep., 670.

Perceiving no error prejudicial to the appellant the judgment is affirmed.

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LOUISVILLE & NASHVILLE R. R. CO. v. REYNOLDS.

(Filed January 23, 1903—Not to be reported.)

Railroads—Negligence—Personal injuries—Pleading—Evidence—Appellee, with other gentlemen, arrived at Glasgow Junction for the train at night for the purpose of going to his home in Louisville. Upon arriving at the station the waiting room was closed, and they went to the hotel office near to wait. Soon afterwards they were informed that their train was coming, and they went to the station to take it. It proved to be a freight train, and while they were still on the platform waiting a southbound passenger train passed without stopping. Appellee was standing about three feet from the corner of the depot and about fifteen feet from the track on which the passenger train was running. A large lump of coal fell, or was thrown, from the tender and struck appellee, inflicting severe, painful and permanent injuries, for which he instituted this action and recovered a verdict for \$9,166.66 damages, from which this appeal is prosecuted. The petition stated that said injuries caused great mental and physical suffering, and he was,

For a long time, rendered incapable of attending to his business. Appellant, after testifying that he was a practicing physician, making a specialty of diseases of the eye, ear, nose and throat for something like thirty years, was permitted to testify, against the objection of appellant, that from March until the end of June is the best time of the year for his business, and that for the first six months of the year he earned more than an average of \$100 per day. There was evidence showing that appellee was not able to sit up for seventeen or eighteen days in April. Held—That appellant owed to appellee the duty of protection as a passenger. It was the duty of appellant to run its trains through this station without throwing coal from them upon the platform used by the passengers, and if a block of coal was thrown from the train, and thereby appellee was injured, the law presumes negligence on the part of appellant. Where special damages are not such as the defendant would naturally anticipate from the injury, they must be pleaded with sufficient particularity as fairly to apprise him of the charge which he is to meet. The petition in this case was not sufficient to admit the evidence in question under the above rule. The fact that this was the best season of the year for the plaintiff in the practice of his specialty, and that the time he lost was so valuable, was not to be inferred from his injury, or the bare allegation that he lost time, and to justify a recovery of items so unusual the fact should have been specially pleaded. Said evidence was prejudicial.

J. A. Mitchell, Edward W. Hines, H. W. Bruce, W. D. Hines and B. D. Warfield for appellant.

B. H. Young, L. R. Yeaman, Logan Porter and Luther James for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Hobson.

Appellee, Dudley S. Reynolds, in company with a friend, drove to Glasgow Junction, a station on appellant's road, for the purpose of taking the train there and returning to his home in Louisville. They reached the station a little after 11 o'clock at night, and the waiting room not being open, were taken to the hotel office near by. Soon after this they were informed that the train was coming, and went out on the platform to take it. The train which was approaching turned out to be a freight, and while they were still on the platform a southbound passenger train, running very rapidly, passed the station without stopping. Appellee was standing by the side of the depot, and three or four feet further from the track than the corner of the building. A friend was standing near him. Just as the engine passed appellee was heard to groan, and his companion turned to him, finding him bending over, apparently suffering much, and asked him what was the matter. He answered that he had been struck by a missile from the train. They took him to the hotel. There were several physicians in the party on the platform. He insisted that his bladder was ruptured, but after examination the physicians found that this was not true, but he was bruised in the region of the pubic bone. It turned out that the spermatic cord was injured; also one of the testicles, which swelled up very large, and finally atrophied, shrinking until it was very small. He filed this suit against the railroad company to recover for the injury. His testimony on the trial was to the effect that the train ran through the station at the rate of sixty or



seventy miles an hour; that just a little before the cab of the engine got directly opposite him he saw a large black object leave the tender, between the middle and rear end of the tender; that he had no thought of its coming to him, but in less time than one could think it struck him, crushing the whole front surface of the left side and rupturing the wall of the abdomen; that the bruised muscles and nerves of the left side relaxed and grew together on the top muscles; that he had lost complete knowledge of the movement of the left leg after standing a little while or walking a little bit, and that he can not walk more than two or three squares without stopping. He said that the thing which struck him was a lump of coal, which was crushed into small fragments. He suffered very greatly from his injury, and lost something like fifty pounds in weight. The proof for the defendant tended to show that the train was not running so fast, but only about forty miles an hour, and that appellee had been informed before he was struck that his train was an hour late, and that he was remaining on the platform for the reason that it was supposed that, perhaps, the southbound train would stop, and his companion in that event wished to take it. He, however, testified that he did not know that his train was late. The proof also shows that the point at which he was standing was fifteen feet from the track, and it is earnestly insisted for appellant that it was a physical impossibility for a lump of coal thrown from the train to have struck him at this distance from the track, and in support of this contention we are referred to the *C., C. & St. L. Railroad v. Berry*, 46 L. R. A., 83; but under the evidence we think this was a question for the jury.

Appellee was, in any view of the evidence, rightfully on the platform, and sustained the relation of passenger to the appellant, for he was there to take the train, and, the waiting room being closed, had a right to be on the platform. It was train time, and so he had a right to come to the station at this time to take the train, and if it be true that he was told that the train was late, being at the station, he had a right to remain there and wait for it. Being three feet further from the track than the corner of the depot, it can not be said that he was imprudent in standing where he was. It was the duty of the carrier to use the utmost care and skill which prudent men are accustomed to use under like circumstances for the protection of its passengers on its trains. (*Louisville City Railway v. Weams*, 80 Ky., 430; *Louisville Railway Co. v. Park*, 96 Ky., 580.) It was also its duty to take reasonable or ordinary care to keep its station and premises in such a state that those whom it invited there should not be unnecessarily exposed to danger.

"The reasonable care which the law imposes upon the carrier in this respect may not after all be essentially different from the duty of exercising the exact degree of care which the law puts upon him in protecting the passenger after entering his vehicle, because in either case the law demands no more than that the carrier shall do what is reasonable in view of the fact that human life is committed to his custody and protection." (3 *Thompson on Negligence*, section 2679, 2680.)

It was the duty of appellant to run its trains through this station without throwing coal from them upon the platform used by the passengers, and if a block of coal was thrown from the train, and thereby appellee was injured,

The law presumes negligence on the part of appellant. In *Gulf, &c., Railroad v. Wood*, 63 S. W., 164, a section hand standing near the track was struck by a block of coal thrown from a passing train. The company was held responsible under the rule that when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if proper care is exercised, the mere happening of the accident will be regarded as sufficient to warrant the submission of negligence to the jury. (21 Amer. & Eng. Ency. of Law, 513.) The court said: "The lump of coal which fell from appellant's tender or train was under the management of appellant's servants. In the ordinary course of things it would not have fallen or been thrown from the train if those servants had used proper care to keep it in place. That the tender was properly loaded with coal, and it was carefully handled by appellant's servants, afford no explanation of how the lump that injured appellee happened to fall or be thrown from the passing train. The thing itself speaks negligence." \* \* \*

To same effect see *Howser v. C. & P. Railroad*, 27 L. R. A., 154; *Gleeson v. V. N. Railroad*, 140 U. S. 435; 3 *Thompson on Negligence*, section 2754-2761.

The allegation of the plaintiff's petition in regard to the damages is in these words: "By all of which plaintiff was badly bruised and injured in his person, and his health and vitality permanently impaired and his ability to walk with ease and comfort permanently and greatly decreased, and he was also caused great mental and physical suffering and for a long time rendered incapable of attending to his business, whereby he has been damaged in the sum of \$10,000, for which amount he prays judgment and all proper relief."

The plaintiff stated that he was a practicing physician, making a specialty of diseases of the eye, ear, nose and throat for something like thirty years. Then, over the objection of the defendant, this evidence was admitted:

"Q. I will get you to state to the jury in April, when you received this injury at that time, what relation that bears to the best part of the year, and what would be your income for that period of days that you were sick?"

"A. Well, from March until the end of June is the best time of the year for me. I earn something more than on an average \$100 per day during the first six months of the year."

The injury occurred on the 18th of April. Appellee was not able to sit up for seventeen or eighteen days, and at the end of three months was not able to ride in a street car. The jury returned a verdict for \$9,166.66, under an instruction of the court allowing them to find, among other things, such an amount as would fairly and reasonably compensate appellee for the value of time lost. Where special damages are not such as the defendant would naturally anticipate from the injury, they must be pleaded with sufficient particularity as fairly to apprise him of the charge which he is to meet. In 3 *Greenleaf on Evidence*, section 254, after a statement of the rule as to general damages, it is said: "But where the damages, though the natural consequences of the act complained of, are not the necessary result of it, they are termed special damages, which the law does not imply; and, therefore, in order to prevent a surprise upon the defendant, they must be particularly

specified in the declaration or the plaintiff will not be permitted to give evidence of them at the trial." (Donnell v. Jones, 48 Am. Dec., 59; 5 Ency. Pl. & Pr., 750.)

The petition in this case was not sufficient to admit the evidence in question under the above rule. The fact that this was the best season of the year for the plaintiff in the practice of his specialty, and that the time he lost was so valuable, was not to be inferred from his injury or the bare allegation that he lost time; and to justify a recovery of items so unusual the fact should have been specially pleaded. In view of the size of the verdict, the peculiar facts of the case, and the admission of this evidence, we are of opinion that a new trial should be granted.

Judgment reversed and cause remanded for proceedings consistent herewith.

Whole court sitting.

#### CARDWELL, &c. v. HARGIS.

(Filed January 23, 1903—Not to be reported.)

Sureties—Contracts—Sales of land by the county—County courts—Lands belonging to C., who was surety of a defaulting sheriff, were sold to satisfy the indebtedness due the State and Breathitt county, when the county purchased the land. A. was treasurer of the county. An order was subsequently entered by the fiscal court, directing A., as commissioner of the county, to sell and convey all lands which had been purchased by the county, under executions against the sheriff and others, and directing that no lands be sold for less than the amounts paid by the county, including interest. Pursuant to this order the commissioner sold the lands purchased from C. to appellee for the amount paid by the county, with interest, and gave him a title bond therefor. Appellee paid the amount of the purchase money to the county treasurer. Afterwards the fiscal court accepted the proposition from the wife of C. to purchase the land at the same price that appellee paid for it, and she paid the purchase money to the county, and the commissioner conveyed the title of the land to her. The county has never repaid to appellee the purchase money, but ratified the settlement of the treasurer, showing the acceptance of the purchase money from appellee. Appellee instituted this action for a specific performance of the contract of sale. Held—That he is entitled to a conveyance of the land purchased by him from the commissioner, and said commissioner had full authority to make the sale, besides, the fiscal court ratified the sale.

J. J. C. Bach for appellants.

Pollard & Redwine for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Paynter.

Breck Combs, sheriff of Breathitt county, defaulted in the payment of public dues, including the sums coming to Breathitt county. The appellant, T. P. Cardwell, was one of the sureties on one of his bonds. A. H. Hargis was county treasurer, and the fiscal court of the county directed him to collect the money due the county from the sheriff. Combs failed to pay it, and the fiscal court directed Hargis, treasurer of the county, to institute

suit against him and sureties therefor. Accordingly, he instituted suit and obtained judgment, among others, one against the appellant, T. P. Cardwell, and others for the revenue due the county for 1895, which amounted to something over \$4,000. An execution was issued in January, 1899, against Cardwell, placed in the hands of the sheriff, who levied it upon a certain tract of land in Breathitt county, located in what is known as the "Pan-bowl," and at the following March term of the county court it was sold, Breathitt county becoming the purchaser at the price of \$1,700, \$100 more than the value placed upon it by the appraisers. It having brought more than two-thirds of the appraised value, the sheriff, on March 21, 1899, conveyed it to Breathitt county; on the 25th of the same month A. H. Hargis, commissioner, claiming to act under an order of the fiscal court, sold it to the appellee, James Hargis, for \$1,705.38, the \$5.38 being the accrued interest upon it from the time of the sale by the sheriff to the date of the sale to the appellee. The appellee, James Hargis, paid A. H. Hargis the money, and received from him, as commissioner of Breathitt county, title bond for the land, in which it was covenanted that the county would make the purchaser a deed for the land. At the following April term of the fiscal court, to wit, on the 4th day of April, A. H. Hargis reported to the fiscal court that he had collected \$1,705.38, proceeds of the T. P. Cardwell farm; the record shows that the report was examined, approved and confirmed; this report stated the balance in his hands due the county, which the court subsequently ordered paid to its treasurer, who succeeded Hargis.

On the same day this report was approved and confirmed, but afterwards the appellant, Ellen Cardwell, came into court and offered to purchase from Breathitt county the same tract of land which had been sold to the appellee. The court then, over the objection of appellee, decided that it would accept the offer, and on the following day directed Bach, as commissioner, to convey the land to her, which was accordingly done, she on that day paying into court exactly the same amount which the appellee had paid for the land, the court directed that the same go into the hands of the treasurer of the county, where it seems to now remain.

The appellee, James Hargis, instituted this action to enforce the specific performance of his contract; he claims that under an order of the Breathitt County Court A. H. Hargis was authorized to sell the land, and if it is not clear that the order conferred such authority upon him, the subsequent ratification of the action of A. H. Hargis vested him with the equitable title to the property and the right to have specific performance of the contract.

It may be stated that Ellen Cardwell is the wife of T. P. Cardwell; that A. H. Hargis is the brother of appellee, James Hargis. There is no claim in this record that the land was sold to the appellee for less than its value, and as evidence that the fiscal court did not think so, it attempted to convey it to Mrs. Cardwell for exactly the same amount of consideration which the appellee had paid for it; in fact the Cardwells sought to show, in the cross-examination of witnesses, that Hargis was anxious to acquire the land, and had paid for it perhaps more than it was worth. This case must be disposed of upon the law and not upon sentimentality. If the county had acquired title to the property from the sale under the execution, it had the right to sell it to whomsoever it pleased. If it exercised that right by dis-

posing of the property, it parted with that right and the property, notwithstanding any desire the fiscal court may have had to let Mrs. Cardwell have the property.

The order under which A. H. Hargis was acting in the sale of the property reads as follows:

**"CLAIM ORDER BOOK BREATHITT COUNTY COURT OF CLAIMS.**

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"April Term, April 8, 1897.

"Ordered, That A. H. Hargis be, and he is hereby, appointed this court's commissioner, to sell and dispose of all the lands purchased by Breathitt county, under executions in favor of Breathitt county, against Breck Combs and others, raised from the Breathitt Circuit Court. He shall not take less than the purchase price for said land than the same amount that was paid by the county for it, with accrued interest to the day of sale.

"He will use his sound discretion in taking in as payment for said land any outstanding indebtedness of Breathitt county."

The county was badly in need of money to meet its outstanding obligations, hence directed Hargis, as treasurer, to collect by suit the money due it from Combs and his sureties. To facilitate the getting of money and converting the property which it purchased under the execution on the judgment against Combs and his sureties, it appointed Hargis commissioner to sell the lands purchased in satisfaction of these judgments. The only restriction placed upon him was not to sell them for an amount less than the amount which the county had paid for them.

In construing contracts it is done in the light of the circumstances surrounding the parties to them. The situation of the parties at the time, and of the property, which is the subject-matter and the object in view in making the contract, will aid materially in construing contracts. Courts endeavor to give to contracts a rational and just construction. The order directs him to sell and dispose of all of the lands purchased by Breathitt county under the executions in favor of Breathitt county against Breck Combs and others raised from the Breathitt Circuit Court. The order does not state that the commissioner should sell lands previously purchased or those to be subsequently purchased, but says that he should sell all of the lands purchased under such executions.

Under a fair interpretation of the order Hargis, as commissioner, was vested with power to sell and convey such lands as might be purchased in satisfaction of the executions issued against Combs and his sureties. If that is correct, then the sale which he made to the appellee is valid. If there was any doubt upon this question in our minds, then when the fiscal court of the county approved the report of its treasurer, A. H. Hargis, in which he reported in his hands the proceeds of the sale of the Cardwell land, it approved the disposition which he had made of it, that was a ratification of the contract; the contract being once ratified, it was not within the power of the court to withdraw its ratification or to alter the rights of the parties. The money has never been returned to the appellee and, so far as this record shows, no order has been made directing that it should be done. The county has received its money from appellee, still holds it and, over his objection and protest, conveyed the land to the appellant, Mrs. Cardwell. If

there could be any doubt as to whether the order conferred upon the commissioner the power to sell the land, his principal accepted the proceeds, and has never tendered the return thereof, which amounts to a ratification. This would amount to a ratification of a contract between individuals, and the action of the county court is an effectual ratification of the act of its agent.

Had a stranger appeared in court under the circumstances under which Mrs. Cardwell appeared and sought to deprive Hargis of the purchase which he had made, neither this court nor any other court for one moment would have approved the action of the fiscal court in its attempt to do so. Mrs. Cardwell, so far as the law goes, had no greater right than a stranger to deprive the appellee of the benefit of his purchase, nor had the fiscal court the right to repudiate the authority which it had given to its agent, especially in view of the fact that it had approved his act.

It has been suggested in brief that as Hargis has not sustained any damages for which action would lie, he is not entitled to a specific performance. The county has attempted to deprive him of the land conveyed to him, and has the money which he paid for the land, and most certainly he is entitled to a specific performance of his contract.

Judgment is affirmed.

Judge Burnam dissenting.

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COOK v. COMMONWEALTH.

(Filed January 23, 1908.)

1. Criminal law—Continuance—Absence of counsel and witnesses—Appellant was indicted for murder by the grand jury of Letcher county, and a change of venue granted to Bell county. One continuance was granted in Bell county, and on the calling of the case for trial a motion for a continuance was made on the ground of absence of counsel and of witnesses. The motion was overruled and the affidavit was read as the deposition of absent witnesses. A trial resulted in a conviction and sentence to life imprisonment, from which this appeal is prosecuted. Held—That the refusal to grant a continuance on account of absence of witnesses was not prejudicial, as defendant was given the benefit of their testimony. The counsel whose absence was urged as a ground for a continuance lived in Letcher county, and had never appeared in the case, and it was not stated in the affidavit that defendant expected him to be present at a subsequent term of court, and the affidavit discloses no peculiar reason why this attorney could represent him more efficiently than other lawyers who could be obtained. The court did not err in refusing a continuance on the ground of absence of counsel, as he had the services of a capable, honest and painstaking lawyer, who rendered him every service that could have been rendered, and produced all the evidence to support the defense of an alibi that could have been produced. This court has adopted the rule that cases should not ordinarily be continued on the sole ground of absence of counsel.

2. Evidence—It was not prejudicial to appellant, even if erroneous, to permit the detail to the jury of circumstances of a difficulty previous to the one in which appellant was engaged, between third parties, where appellant was in no way connected with it.

N. B. Hays for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Barker.

The appellant, George Cook, and a number of other persons were indicted by the grand jury of Letcher county, Kentucky, charging them with the murder of one Jemima Hall. Subsequently a change of venue was had, and the case transferred to Bell county, Kentucky, for trial.

Appellant's case was called for trial at the May term, 1902, of the Bell Circuit Court, and appellant was convicted of willful murder, and his punishment fixed at confinement in the penitentiary for the term of his natural life. The motion for a new trial having been overruled, and the defendant sentenced, he has appealed to this court for a reversal of the judgment against him. In support of his contention that this case should be reversed, appellant's counsel urges but two grounds: First, that the court erred in overruling appellant's motion for a continuance of the case; and, second, that the court erred in admitting incompetent testimony during the trial. The second objection is based upon the fact that the court permitted Robert Johnson and Bury Toliver to detail to the jury the circumstances of a difficulty between Maok Yontz and Samuel Vanover some time before the killing of Jemima Hall, in which they stated to the jury that Yontz said to Vanover that "he would kill him."

We fail to see how the admission of this testimony prejudiced appellant, or in anywise affected him, conceding it to have been incompetent; it in nowise connected appellant with the quarrel<sup>in</sup> question, and, therefore, could not prejudice the minds of the jury against him. The first ground, that the court erred in refusing to grant appellant a continuance because of the absence of his counsel, Judge S. E. Baker, is the one upon which appellant's counsel really rests his hopes of a reversal.

Upon the calling of the case for trial appellant announced that he was not ready for trial, and filed his affidavit in support thereof, in which he set out two grounds of continuance: One because of the absence of certain witnesses, and the second because of the absence of his counsel, Judge S. E. Baker. The first ground is immaterial, because the Commonwealth's attorney permitted the affidavit to be read as a deposition. The second ground in the affidavit, so far as it relates to the absence of appellant's attorney, is as follows: "That prior to this term of court he employed Judge S. E. Baker, who lives in Letcher county, Kentucky, as one of his counsel, and paid him part of his fee to defend him in the trial of this case; that said Baker is a good lawyer and a skillful practitioner, and is thoroughly acquainted with the evidence in this case, and he is the only lawyer he has employed, or to whom he has confided his defense, or relied upon to defend him; that there are two other counsel in the case, and they were feed by the other defendants to make their defense; that he can not safely go to trial without the services of said Baker; that he is absent without the procuring or consent of this affiant, and against his will, and he believed and relied upon him to be present, and expected him to be there; that said Baker is now more than 139 miles from this place, most of the distance to be traveled

horseback or afoot; that he makes this affidavit not to delay the case, but to procure justice and a fair trial."

In support of the first ground for a reversal appellant relies upon the cases of *Bates, &c. v. Commonwealth*, 13 Ky. Law Rep., 135; *Leslie v. Commonwealth*, 19 Ky. Law Rep., 1201, and *Cornellius v. Commonwealth*, 23 Ky. Law Rep., 771.

In the case of *Bates v. Commonwealth* the appellants were indicted, tried, convicted and sentenced within twenty-four days, and in that case the affidavit for a continuance showed that their attorney was necessarily detained by his duties as an officer of the United States, and that while he could not be present on the day fixed for the trial, he could be present by the second day thereafter. Under these circumstances the court properly held that the trial judge abused his judicial discretion in failing to afford appellants the opportunity of having their counsel present; and Judge Holt, who delivered the opinion of the court, said: "We do not of course mean that the trial court has no discretion in the matter of continuances. It is, however, a legal one, and if it be so exercised as to deprive the accused, when not in fault, of a fair trial, justice requires that he should not be remediless. \* \* \* While a speedy transaction of judicial business is to the interest of the public, yet it should never be had at the expense of justice, which must always be regarded as the paramount purpose of judicial investigation. It is true cases should not ordinarily be continued upon the sole ground of absence of counsel."

In the case of *Leslie v. Commonwealth*, 19 Ky. Law Rep., 1203, Judge DuRelle, after showing in his opinion several sufficient reasons for reversal of the case, seems to have thrown as an additional weight in the scales this expression: "Moreover, the unexpected absence of appellant's local counsel on the morning of the trial, without any notice to him, would appear to afford ample reason why a continuance should have been granted." It does not appear that this case would have been reversed alone for the reason that appellant's local counsel was unexpectedly absent. And in the case of *Cornellius v. Commonwealth*, 23 Ky. Law Rep., 771, Judge White, after stating several good and sufficient reasons for the reversal of the case, adds the additional one that "appellant was entitled to a continuance on the ground of the unexpected and unavoidable absence of his principal counsel."

In no case that we have been able to find, or which has been cited to us by counsel, has this court ever reversed alone upon the ground that the trial judge refused a continuance because of the absence of counsel, and Judge Holt, in his well-considered opinion in the case of *Bates v. Commonwealth*, *supra*, states the rule to be that "cases should not ordinarily be continued upon the sole ground of absence of counsel."

In the case of *Steven v. Commonwealth*, 9 Ky. Law Rep., 742, it is said that the absence of one or two or more of the counsel employed by the defendant in a criminal prosecution can not be sufficient reason for continuing the trial until the next term, especially when it does not clearly appear that a fair trial can not be had without his presence. Such a practice would frequently result in an indefinite postponement of criminal trials.

In the case of *Brown v. Commonwealth*, 7 Ky. Law Rep., 751, it is



said: "To authorize a continuance on the ground of the absence of one of several attorneys there should be some assurance that he will be present at the next term, and a continuance should never be granted on that account unless it appears that the ends of justice require the presence at the trial of that particular person selected by the defendant and his counsel, and a fair and impartial trial can not be had without him."

In the case at bar there had already been one continuance, as shown by the affidavit of appellant, and it nowhere appears that the absent counsel was on hand when the case was called for trial at that time; and it is a significant fact that the absent counsel so necessary, according to the language of the affidavit, has never appeared in this case, except in the affidavit for the continuance.

The record shows that the counsel who is representing appellant in this court also represented him on the trial in the court below, and it shows, moreover, that appellant's defense was conducted in a most thorough and masterly manner. We do not believe that the absent counsel could have done anything for appellant that was not done for him by the learned counsel who appears for him at this bar.

Appellant's defense was an alibi, and he introduced no evidence in support thereof but his own testimony. There is nothing in such a defense that the present counsel could not have understood as well as the absent counsel, and we are not willing to say that, under all the circumstances, appellant has not had an impartial trial. The learned judge who presided upon the trial is eminently distinguished for impartial fairness and a love of justice; he was in a position to understand, from all the surrounding circumstances, better than this court, the merit of the motion for a continuance, and we will not say that he has abused the large discretion intrusted to him by the law, unless it is apparent from the record that appellant has been deprived of a fair and impartial trial by the ruling upon this question.

The evidence in this case abundantly justifies the verdict of the jury, and fully warrants the assumption on our part that nothing additional could have been done for appellant by his absent counsel. It is not necessary to state the evidence in detail, but it convinces us that appellant was guilty of one of the most heinous, cruel and wanton murders that has ever disgraced the criminal calendar of this Commonwealth. The Commonwealth has been forced, at great expense, to bring the witnesses from a long distance. Appellant had already had one continuance, and we do not think that the lower court erred, under all the circumstances, in overruling the motion for a continuance.

Wherefore, the judgment is affirmed.

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READ, &c. v. COCHRAN.

(Filed January 23, 1903—Not to be reported.)

Executions—Fraudulent conveyances—A. obtained a money judgment against B. in the Metcalfe Circuit Court, and execution was issued thereon and levied on a tract of land belonging to B, and A. became the purchaser of the land at the sale and transferred his purchase to his son, who entered upon the record of the court a notice that he would enter a motion for pos-

session of said land. On the same day appellants, as the widow and infant child of a son of the debtor, filed their petition, denying that B. owned the land at the time the execution was levied on same, as he had previously sold and conveyed it to his son. The plaintiff filed an answer to this petition, alleging that said transfer of land was voluntary and fraudulent. Issue was joined and proof taken thereon, and on the trial of the issue the lower court adjudged that the transfer was fraudulent and the land was in lien to satisfy the execution debt, and directed a sale to be made to satisfy it. On appeal, Held—That the judgment was more favorable to appellant than if the court had awarded the writ of possession, and the proof amply sustained the action of the court in declaring the deed from father to son as fraudulent.

W. L. Porter for appellants.

Basil Richardson for appellee.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Judge Barker.

E. J. Cochran obtained a money judgment in the Metcalfe Circuit Court against Jonathan Read, upon which she caused to be issued an execution, which, coming into the hands of the sheriff of said county, was levied upon a tract of land, which is correctly described in the notice hereinafter mentioned, as the property of Jonathan Read. Thereafter the sheriff sold said land under said execution, and it was purchased by said E. J. Cochran for her debt. Afterwards E. J. Cochran, by writing, transferred her purchase of said land to appellee, George A. Cochran, her son, who, on the 5th day of July, 1900, entered upon the docket of the Metcalfe Circuit Court the following notice:

"METCALFE CIRCUIT COURT.

"Geo. A. Cochran, Plaintiff, }  
"v. } Notice.  
"Jonathan Read, Defendant. }

"Jonathan Read, Esq. :

"You are hereby notified that I will, on the 5th day of July, 1900, enter a motion on the docket of the Metcalfe Circuit Court for a judgment for the possession of a certain tract of land situated in said county, and State of Kentucky, near the village of Antioch, which land is described as follows, to wit (Here follows a description of the land in question); and being the same land bought by E. J. Cochran at a sale duly held under an execution which issued from the office of the clerk of the Metcalfe Circuit Court in favor of the said E. J. Cochran, plaintiff, against Jonathan Read, defendant, No. 2,689.

"The said E. J. Cochran having on the 24th day of November, 1899, sold, assigned and transferred her bid of the purchase to the said Geo. A. Cochran by a writing duly executed and delivered to him by the said E. J. Cochran.

(Signed) "GEO. A. COCHRAN,

"By Attorneys."

On the same day the appellants, Mary L. Read and Erminie Read, an infant, suing by R. H. Barton, her next friend, filed their joint petition in said action, asserting an interest in the land in question, and praying to be made parties thereto, and that their petition be taken as their answer. In

said petition appellants stated that Mary L. Read was the widow of Joe A. Read, and that Erminie Read was his only child and heir at law. They state, in substance, that Jonathan Read was not the owner of the property in question at the day of the pretended levy of the execution in favor of E. J. Cochran against him, but that he had theretofore, for the sum of \$300, sold and transferred said property, by deed in writing, to Joe A. Read, and put him in possession of the same; that the said Joe A. Read was dead, and that at his death the land in question descended to appellants, his widow and child, as aforesaid, who were then the owners of same.

Upon the filing of this petition, which was made appellants' answer, Geo. A. Cochran filed a reply, alleging that the deed from Jonathan Read to Joe A. Read was a voluntary conveyance as to his debt, and was fraudulent and void. A rejoinder by appellants put in issue the allegations of the reply, and thus the issues were made up as between appellee and appellants. A good deal of testimony was taken on the question as to whether or not the deed from Jonathan Read, the execution defendant, to his son, Joe A. Read, the husband and father of appellants, was, or was not, voluntary and fraudulent as to appellee. It is a significant fact that while the deed from Jonathan Read to Joe A. Read was dated on the 15th day of April, 1898, and was acknowledged by the grantor and his wife on the 24th day of June, 1898, it was never lodged for record until the 5th day of July, 1900, the very day upon which appellee had given notice that he would enter his motion for a writ of possession.

Jonathan Read was Joe A. Read's father, and we think that the evidence in this case is abundantly sufficient to warrant the chancellor in concluding that as to the debt of appellee the conveyance was fraudulent and void; and it was manifestly to the interest of appellants that the court below should, instead of awarding a writ of possession for the land in question, have adjudged that the appellee had a lien upon the land, and ordered a sale to satisfy the same. In regard to appellants' contention, that the execution with the officer's sale thereunder was not filed with the notice or put in evidence, it may be said that the notice of the motion for the writ of possession was against the execution defendant, Jonathan Read, who allowed judgment, so far as he was concerned, to go by default, and he is not complaining here of the insufficiency of the notice, or the invalidity of the proceedings against him.

Appellants came into the case by petition, and set up what claim they had to the land in that petition and upon the issues thus formed upon their petition we think the evidence warrants the conclusion that the chancellor reached, and we can not see what interest appellants have in the regularity of the proceedings against Jonathan Read; they have had their day in the court, upon issues made by themselves, and upon which, as we have already said, the chancellor held adversely to them. The cases of *McGee v. Sutherland*, 84 Ky., 198; *Phelps v. Jones*, 91 Ky., 244, and *Kennedy v. Weber*, 23 Ky. Law Rep., 879, clearly establish that in a proceeding such as was instituted by appellee against Jonathan Read it is only necessary that the blank form of notice given in section 1689 of the Kentucky Statutes be followed. This appellee seems to have done, and we do not see that appellants have been injured in any of their substantial rights.

Wherefore, the judgment is affirmed.

## LOUISVILLE &amp; NASHVILLE R. R. CO. v. DAVIS.

(Filed January 27, 1908.)

Railroads—Negligence—Damages—Instructions—Appellee was a track walker on appellant's road in its employ, and while engaged in his duties saw a train approaching, and when over two hundred yards off heard a noise and saw it throwing out rocks from the roadbed, evidently done by an iron rod dragging, and before he could get out of the way was struck by rocks and seriously and permanently injured. This suit to recover for injuries resulted in a verdict for \$3,000 damages. On this appeal it is insisted that the verdict was excessive, and that the court erred in not giving a peremptory instruction to find for defendant. Held—That the verdict is not excessive. It was the duty of the railroad company to exercise a reasonable care in providing appellee a safe place to work and to keep it safe. Appellee was in no way connected with the running of the train. He was in his proper place, and in the discharge of his duty. He is not chargeable with the negligence of those in charge of the train for they were in a separate and distinct service from him. The court did not err in refusing to give a peremptory instruction to find for appellant at the close of appellee's testimony. The acts complained of were prima facie negligent, and there was proof to show that the engine and tender were not inspected just before the accident.

J. A. Mitchell and E. W. Hines for appellant.

B. F. Proctor and G. H. Herdman for appellee.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Hobson.

Appellee, W. E. Davis, on December 22, 1900, was a track walker in the service of appellant, on its section near Rocky Hill Station. As he was going along the track in the discharge of his duty he saw a train coming, and got to one side, as usual; when the train was something like two hundred yards from him he heard a rattling and saw rocks throwing out; he then aimed to get further away and as he turned around the rocks hit him in the side, on the leg and up in the back before he had time to get away. The train was going south, running something like fifty miles an hour; the rocks were thrown out by a rod or something of that sort under the bottom of the train, which was dragging against the ballast and ties. Appellee had been south to the end of his section and was returning. As he went down there were no dents upon the ties or ballast, but from the point where he was struck, for something over a mile back, there were dents in the ties and in the ballast, evidently made by the object which threw the rocks out. These dents continued for a mile or more beyond the point where he was hurt, and at the point where they stopped an iron rod was found six feet long or more and nearly an inch in diameter. In some places it struck the cross ties and at others it struck the ballast. It is shown by the proof that when anything gets down under a train it will throw out the ballast in this way. Appellee had seen it happen before, but not so bad as this. It is also shown by the proof that, although these dents upon the track continued for something over two miles, no one on the train, so far as the proof shows, knew anything of the trouble or took any steps to right it; the proof for the defendant shows that the cars of the train were inspected at Bowling Green,

and were there found to be all right; also that they were inspected at Louisville before it left there and was then found to be all right. As to the extent of appellee's injury the proof is very conflicting, although there seems to be no doubt under all the evidence as to the fact of his being injured as above stated. The proof on his behalf shows that shortly afterwards he was taken very sick, and for two or three weeks was out of his head; that there was a hard place in his back, and he passed from his bladder a quantity of pus and blood; that after this his capacity to labor was substantially destroyed, and that his injury was probably permanent. The proof for the defendant shows that appellee did not regard his injury as serious at first, and that he had no trouble until he had a violent attack of colic. This, however, would not account for the pus and blood passed from his bladder, nor for other symptoms shown by the evidence. The extent of the injury was a question for the jury, and their verdict fixing the compensation for appellee therefor at \$3,000 is not excessive or palpably against the evidence, if he was entitled to recover. It is earnestly maintained for appellant that no negligence on its part is shown, as all the facts established are as consistent with the hypothesis of unavoidable accident as that of negligence, and that the burden being upon the plaintiff to show negligence he has failed to make out his case.

While it is true that the train might have picked up a rod or beam and dragged it along the track, knocking out the rocks, without the knowledge of those in charge of the train, we are doubtful if they would be excusable for not finding this out in two miles and a quarter, as the proof shows that when anything gets loose, scattering the ballast under the car, some of the rocks will hit the bottom of the car, and a noise is made so that those running the train know of it when it occurs. Appellee was in no way connected with the running of the train. He was in his proper place, and in the discharge of his duty. He is not chargeable with the negligence of those in charge of the train, for they were in a separate and distinct service from him. It was the duty of appellant to exercise reasonable care in the operation of its trains for the protection of those in its service along its tracks, discharging the duties necessary in the maintenance of the track and the security of traffic. It could not, under this rule, allow its trains to run along, throwing out rocks from it, as this one did, endangering the life and limb to all within its reach. If a train is properly managed and properly run no such danger is to be apprehended by those near the track, and when anything so unusual occurs to such an extent as was shown here the thing itself is *prima facie* evidence of negligence. Thus in the case of *Gulf, & Co., R. R. Co. v. Wood*, 68 S. W., 164, the plaintiff, a section hand, was struck by a block of coal thrown from a train which passed him, and it was held that he could recover. This case is stronger than that, for there only one lump of coal fell off, while here the rocks were flying for something like two miles. The court said: "There are instances in which the circumstances surrounding an occurrence and giving a character to it are held, if unexplained, to indicate the antecedent or coincident existence of negligence as the efficient cause of the injury complained of. This phrase, which, literally translated, means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon the accident are of

themselves of such a character as to justify a jury in inferring negligence as the cause of that accident. There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or its servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by defendant, that the accident arose from want of care."

In *Barnowski v. Helson*, 15 L. R. A., 88, a roof, which was being raised by jack screws, tipped and fell, and it was held that this created a presumption of negligence, and in the absence of explanatory proof was sufficient to sustain a recovery for the death therefrom of an employe. So in *Howser v. The Cumberland, & Co., R. R. Co.*, 27 L. R. A., 154, the falling of a cross-tie from a railroad car, injuring a person walking over a footway, running beside the roadbed, was held to create a presumption of negligence, and in this case a number of authorities are collected.

It was the duty of the railroad company to exercise a reasonable care in providing appellee with a safe place to work, and to keep it safe. This obligation to him is not fairly to be distinguished from the case of a person walking on a way beside the roadbed, as in the case last cited, and seems to us to rest on the same principle. We, therefore, conclude that the court did not err in refusing the peremptory instruction asked by appellant at the conclusion of the plaintiff's evidence. While it might happen that, although proper care was exercised in the inspection of the train before it started, a rod might get down from some defect not discoverable by ordinary care, the evidence before us does not present this state of case. So far as appears there was no inspection of the engine or tender; at least, the proof shows no inspection of these, as we understand it, and there was proof that rods such as that referred to were in use under the engine and tender. There was no effort to show that the train picked up the rod as it ran along, and we do not well see that such a thing was at all probable. We think the proof fairly shows that this train made the marks on the cross-ties and ballast, and that it was throwing out the rocks as it went along. The evidence for the defendant failed to account for this, or to show the absence of negligence, and we, therefore, conclude that the verdict is not so palpably against the evidence as to justify us in disturbing it.

In the case of *Brooks v. Louisville & Nashville R. R. Co.*, ante, 1818, decided at this term, we held that a section hand who was injured by reason of the breaking of the short lever, which is underneath the body of a hand car connecting the lever with the axle, could not recover merely on proof that the lever broke; that decision rests on the ground that the master who furnishes tools to his servants for them to use in their work is not an insurer of the tools, and is not responsible for a defect, unless he might, by ordinary care, have discovered it. There was no proof in that case that there was any defect in the short lever, or that there was any neglect of the master in regard to it. The hand car was furnished to the section men to use in their work, and was run by them. The principle upon which that case rests has no application where the servant receives an injury from the premises of the master being unsafe by reason of matters beyond the sphere of his employment, and over which he has no control.

One of the grounds for new trial relates to a conversation had by some bystanders in the presence of two of the jury after the case was submitted to them while they were permitted to separate under the order of the court. But the proof shows that this occurred from the fact that the man who made the remark did not think at the time of any of the persons present being on the jury, and in view of the statements of the jurors, we do not think that this was sufficient to warrant a new trial.

Judgment affirmed.

Judge Settle not sitting.

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BURGER v. ALLEN.

(Filed January 27, 1903—Not to be reported.)

Contracts—Instructions—Agents—Appellee brought this action against appellant to recover for services due in running a farm for appellant; also for commissions in procuring a lease of said property to a gas and oil company. The answer sets up a counterclaim for a large amount of money and the suit involved a multiplicity of accounts, the decision of which was submitted to the jury, and a verdict resulted in favor of appellee, from which this judgment is prosecuted, and it is urged as error that the court improperly instructed the jury as to the claim for commissions in making the lease. Held—That the court erred to the prejudice of appellant in instructing the jury that they could find for appellee if they believed that he made a contract with an agent of appellant, whether the agency was for the purpose of making this lease or for any other purpose.

E. W. Hines and A. M. J. Cochran for appellant.

Kirk & Kirk and Hager & Stewart for appellee.

Appeal from Martin Circuit Court.

Opinion of the court by Judge Barker.

This was an action by appellee against appellant in the Martin Circuit Court for the recovery of money alleged to be due appellee for services in caring for a large farm, known as the Warfield estate, belonging to appellant, and for money advanced by appellee in caring for said estate, and for commission for procuring the lease of said property to the Triple-State Natural Gas and Oil Co.

The petition contains three paragraphs, and sets forth with great particularity, the various items constituting the alleged indebtedness from appellant to appellee, and also the various sums alleged to be due appellant, and credits on same. The answer admits some part of the indebtedness claimed to be due appellee, but puts in issue a larger part of same, and sets up a counterclaim against appellee for a large sum of money alleged to be due appellant from appellee. Various amended and responsive pleadings were filed until the issues were finally made up. It is not necessary to notice further the pleadings herein, except to say that they plainly show that the action should have been transferred to equity and referred to a commissioner to state the account between appellant and appellee, as, in our opinion, the items in dispute between them were entirely too numerous and complicated to be submitted to a jury; but no motion seems to have been made to trans-

for the action to the equity side of the docket, and at the May term of the court, 1900, the case was tried by a jury, which rendered a verdict in favor of appellee for the sum of \$1,019.50. The court overruled the instructions offered by appellant, and gave one instruction on its own motion, and of this instruction appellant is complaining here.

The largest single item constituting appellees' claim against appellant in the court below was for 10 per cent. commission alleged to be due him for effecting a lease of the property known as the Warfield estate to the Triple-State Natural Gas and Oil Co., which he alleges appellant had agreed and promised to pay him for effecting said lease. This employment of appellee appellant denies, and the evidence shows that the employment of appellee to make the lease in question was not made by appellant himself, but by one Brigle, whom appellee claimed was the agent of appellant for the purpose named. This appellant denied, and, therefore, the validity of appellee's claim for said commission turned upon the authority of Brigle to make the contract in question. Upon this subject the court said: "And if the jury believes from the evidence that the defendant (appellant) or his agent employed the plaintiff (appellee) to procure the Triple-State Natural Gas and Oil Co. to take a lease upon the property of defendant (appellant), and agreed to pay him a per cent. thereon for so doing, they will find for the plaintiff (appellee) the amount of commission thereon, with what time he is entitled to from the evidence in this case."

We think the instruction of the court upon this question was clearly erroneous and prejudicial to the substantial rights of appellant. Appellant could only be held responsible under the contract of his agent, provided the agent was duly authorized to make the contract in question.

The instruction authorized the jury to hold plaintiff liable under the contract in question, if made by an agent of appellant, whether the agency was for the purpose of making this lease or for any other purpose. It was clearly misleading, and the case is, therefore, reversed, with instructions that, upon the return to the court below, it be transferred to equity and referred to a commissioner to state the account between the parties hereto, and for proceedings consistent with this opinion.

#### BAILEY v. COMMONWEALTH

(Filed January 27, 1903—Not to be reported.)

Criminal law—Venue—Instructions in absence of defendant—The evidence failing to show that the offense of malicious cutting and wounding was done in Magoffin county, the conviction can not be sustained under section 124 of Criminal Code of Practice. The court erred in bringing the jury into the court room after submission of the case and explaining to them the meaning of the words "malice aforethought" in the absence of the accused.

James P. Adams for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Magoffin Circuit Court.

Opinion of the court by Chief Justice Burnam.



This is an appeal from a judgment of the Magoffin Circuit Court sentencing the appellant, Shimbo Bailey, to imprisonment in the penitentiary for one year for having maliciously cut and wounded Lee Arnett with the intent to kill him. The first ground relied on for reversal is that the venue of the offense charged in the indictment is not shown by the proof in the case.

Subsection 8 of section 124 of the Criminal Code provides that the indictment must be direct and certain as regards the county in which the offense was committed, and the evidence, equally with the allegation, must show the county in which the offense was committed. A very full and interesting discussion of these questions is found in chapter 24, volume 1 of Bishop's New Criminal Procedure. There is no evidence in the bill of exceptions in the case that the crime for which appellant was convicted was committed in the county of Magoffin, and as said in *Wilkie v. Commonwealth*, 20 Ky. Law Rep., 580: "It would be going too far to sanction a verdict based upon the existence of an indispensable fact, which the jury could not find from the evidence before them to exist."

And we think the trial court erred to appellant's prejudice in another step in the trial. After the jury had considered the case for some time, they returned into court and announced that they had not agreed upon a verdict, and requested the court to explain the meaning of the term "malice aforethought," which the court proceeded to do in the absence of the defendant. The jury then retired, and in a short time returned and announced their verdict. Section 183 of the Criminal Code requires that upon the trial of an indictment for a felony that the defendant must be present during the trial.

In *Meece v. Commonwealth*, 78 Ky., 586, it was held error to instruct the jury in the absence of the accused. The court said: "When instructions are given by the court, or when the jury, returning from their room, desire to be further instructed, the presence of the accused is of the greatest importance, as he may be able to suggest to the court or his counsel some information that would throw some additional light on his defense. He should also be present that he may except to the rulings of the court, and the record must show affirmatively that he could in nowise have been prejudiced by it, else this court will reverse the judgment."

The testimony as to the facts which must determine the guilt or innocence of the accused is very conflicting, and we are not prepared to say that either of the errors pointed out supra were not prejudicial to the substantial rights of the accused.

For reasons indicated the judgment is reversed and cause remanded for a new trial consistent with this opinion.

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BOARD OF TRUSTEES OF ELIZABETHTOWN DISTRICT PUBLIC SCHOOLS v. MORRIS, &c.

(Filed January 27, 1903—Not to be reported.)

Schools—Taxation—Division of taxes between white and colored schools—A recovery of taxes from the railroad company was had by the trustees of the white public schools of Elizabethtown. This action was instituted by the trustees of the colored school, claiming a pro rata distribution of said fund

between the two schools, under section 4101, Kentucky Statutes. The suit is resisted on the ground that the money was collected under a special act of 1878, and that under said act the property of colored persons were not subject to tax for the support of the school, and that this school is excepted out of the general law by section 4483, Kentucky Statutes, which provides that no local or special law shall be modified or repealed by the general law. Held—That the corporation created by the special act of 1878 remains, but its power to levy a tax on railroads is modified by the general law contained in section 4101, Kentucky Statutes, and said tax should be distributed pro rata between the schools. The finding of fact by the chancellor is approved.

Sprigg & Chelf for appellant.

R. L. Stith and J. D. Irwin for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Hobson.

Appellants, the board of trustees of the Elizabethtown Graded School, recovered a judgment against the Louisville & Nashville Railroad Co. for \$2,087.05 on account of school taxes levied by appellants in that school district. Appellees, who are the trustees for the Elizabethtown Colored School District, filed their petition, claiming a pro rata distribution of the fund between the white and colored school under section 4101, Kentucky Statutes. On final hearing the court adjudged the fund pro rated between the two districts, and of this appellants complain.

Section 4101, Kentucky Statutes, which is a part of the chapter on revenue and taxation, is in these words: "The provisions of this law shall not be construed to apply to any colored school district: Provided, That the same rate of taxation assessed against the real estate of any railroad company or corporation in any graded common school district, or common school district, in any year, shall be assessed against all of the taxable property in such district, and the railroad tax, when collected, shall be paid over to the county superintendent of the county in which the district schoolhouse wherein the tax assessed shall be situated, and shall constitute and be held by the county superintendent as a graded or common district school fund; and the said fund shall be apportioned and distributed by the county superintendent between the white graded common school or white common school district wherein said tax shall be collected, and any colored common school district which shall be located over the same boundary; the distribution shall be in the ratio that the whole number of white children of pupil age and the whole number of colored children of pupil age residing in the district shall bear to the whole number of children, white and colored, residing in the district wherein such tax shall be collected."

It is earnestly insisted for appellant that the money in controversy was collected under and by virtue of a special act of the legislature, approved March 29, 1878, by which, among other things, it is provided that the county superintendent shall have no control over the Elizabethtown Graded School, and that the fund arising from the taxes levied under the act shall be paid to the treasurer of the board of trustees by the sheriff. (Acts 1878, volume 1, page 214.) It is also urged that under that act the property of negroes can not be taxed, and that the school in Elizabethtown is maintained under

this act, and has never been changed by taking the steps indicated in section 4488, Kentucky Statutes.

Section 4488, Kentucky Statutes, which is a part of the chapter on schools, provides that this law is not to affect, modify or repeal any local or special law theretofore passed relating to the public schools, such as the act of 1878, above referred to. In *Hickman College v. Trustees Colored Common School*, 28 Ky. Law Rep., 1271, this court had under consideration the proper construction of these statutes. Hickman College was created by a special act similar to the act of 1878 for Elizabethtown, and much the same argument was there made as is made for appellants here. Similar controversies had several times before been before this court from other towns under similar special statutes, and the court uniformly held that the money collected must be divided between the white and colored districts. The previous cases are collected in that opinion which only reiterates what the court had before decided. Section 4488, Kentucky Statutes, being a part of the chapter on schools, its excepting out of the operation of that chapter such special acts as the one in question has no reference to section 4101, as that is a part of the act on revenue and taxation. While precisely the question made in this case was not made there, the reasoning of the court there is equally applicable to this case as to that. The decision is based upon the ground that the Constitution contemplated a system of general uniform laws throughout the State, and although a private or special act relating to a certain common school district remains in force until repealed, if the general assembly should attempt to exempt this district from the operation of the general law on taxation, although in conflict with the special act, this would be in effect to provide by special act for a railroad tax by the common school in question. The corporation created by the special act of 1878 remains, but its power to levy a tax on railroads is modified by the general law contained in section 4101, Kentucky Statutes. Were the rule held otherwise the constitutional mandate, that all taxes shall be levied and collected by general law, would be ignored (Constitution, section 171), and notwithstanding the constitutional provision, the railroad company would be taxed in some districts under the general law, and in others under special acts.

It is true no tax has been levied upon the property of the colored people, but of this appellants are in no condition to complain. In *Harrodsburg Educational District v. Trustees of Colored School District*, 20 Ky. Law Rep., 1487, this court, in answer to this very objection, said: "A careful search of the statutes and acts will disclose the fact that no power is given to any school district to tax any property save that belonging to colored people, and this section under consideration by its express terms provides that no colored school district can levy and collect a tax from a railroad company. The right to tax a railroad company for school purposes is exclusive to the white school districts, and when this right is exercised by the white district it is provided that there shall be a pro rata distribution of the tax with the colored district. If the white district levies no tax, no tax is paid by the railroad, although the colored district may levy on the property of the colored people a tax; but if the white district does levy a tax the railroad tax collected is distributed ratably to the colored district regardless of

whether it levies a tax or not. This is the plain and clear meaning of the statute. Its wisdom or policy is for the legislature, not the courts."

The law and facts having been submitted to the court, his special findings of fact must be treated as the verdict of a properly instructed jury, and can not be set aside unless clearly and palpably against the evidence. Under this rule the findings of fact made by the circuit court can not be disturbed. While the colored district embraced a larger territory than the white district, and the boundary is not clearly established by the evidence, still it is established that the colored district included all the white district and more besides. The circuit court made the apportionment upon the basis of the number of white and colored children within the school age living in the boundary covered by the white district, and his conclusions as to the number of each seem warranted by the testimony.

Judgment affirmed.

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LARRABEE v. LARRABEE.

(Filed January 27, 1903—Not to be reported )

Judicial sales—Parties to actions—Guardian and ward—Infants—A. died intestate leaving B., his wife, and C. and D., two adult children, and E. and F., two infant grandchildren, as his only heirs at law. B. qualified as administratrix of decedent and guardian of his infant grandchildren. A part of the estate of decedent consisted of two lots in the city of Louisville. The personal representative and guardian united with E. and F., the infant grandchildren, in a suit to sell the two lots as indivisible on account of their being unimproved and yielding no income. Pending the action C. died, leaving G., his wife, and two infant children, surviving. C. had previously conveyed his estate to B., his mother. Answers were filed by the original parties joining in the prayer of the petition, the widow of C. was made a defendant, and it was alleged that she made no claim to the property lately owned by her husband. A decree of sale was rendered and the commissioner filed his report of sale. After this report was filed D. died unmarried and childless, having devised her estate to B., her mother. A supplemental petition was filed, to which E. and F., the grandchildren, were made defendants; also the widow and two infant children of C. were made defendants, and a guardian ad litem for all of said infant defendants was appointed, and reported that the children of C. had no interest in the property and filed exceptions to the report of sale for the infant defendants, E. and F. One of the exceptions was on the ground that no revivor of the judgment had been entered. Held—That no revivor of the judgment was necessary. It was urged as exceptions that the property could have been divided without materially impairing its value, and that the price was inadequate. Held—That the proof shows that the property was not susceptible of division, and that the sale will not be set aside on the sole ground of inadequacy of price. Another exception was that when the plaintiff became the purchaser he was the guardian of said infants. Held—That the court having given the guardian permission to bid there was no error in his bidding. Another exception was that the infants were plaintiffs by their guardian, and that said infants were not represented other than by plaintiff as their guardian. Held—That it was not necessary for the infant plaintiffs to have representation other than by their guardian.

Chas. H. Stuart for appellant.

Tyler Barnett for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Barker.

In 1898, Dr. John A. Larrabee died intestate at his residence in Louisville, Jefferson county, Kentucky, leaving a widow, Harriet B. Larrabee, and two children, Hattie Lee Larrabee and Joseph B. Larrabee, and two infant grandchildren, Marguerite B. Larrabee and John Henry Larrabee, whose father, John Henry Larrabee, had died in the year 1888, these four being his only heirs at law.

After the death of the said Dr. John A. Larrabee his widow, Harriet B. Larrabee, was duly and legally appointed by the Jefferson County Court, on the 1st day of July, 1898, administratrix of said John A. Larrabee, and she qualified as such by giving bond and taking the oath required by law; and on the same day she was duly and legally appointed, by order of the Jefferson County Court, statutory guardian of her infant grandchildren, Marguerite B. Larrabee and John Henry Larrabee, who were infants under the age of fourteen years.

Part of the estate left by Dr. John A. Larrabee consisted of two pieces of real property situated in Louisville, Ky., the first being 60x180 feet, on the northeast side of Baxter avenue, and the second being 100x150 feet, on Park avenue. This land was unimproved and nonproductive of income. Whereupon Harriet B. Larrabee, as statutory guardian of her two grandchildren aforesaid and in her own right, instituted this action in the Jefferson Circuit Court, Chancery branch, first division, against Hattie Lee Larrabee and Joseph B. Larrabee and Fanny K. Larrabee, his wife.

The petition in this case describes the land herein involved by metes and bounds, and states that it is indivisible without material injury to the interest of the various persons owning the same; that Harriet B. Larrabee, the widow, is willing, and consents, that her dower interest in same should be paid to her out of the proceeds of the sale, and prays that said land be sold as provided by section 490 of the Civil Code of Practice. To this petition Hattie Lee Larrabee, Joseph B. Larrabee and Fanny K. Larrabee filed their joint answer, in which they confess the allegations of the petition, and admit all of its statements, and join in the prayer for the sale and division of the proceeds, and waive the setting at rules, and consent that the action might be submitted.

On the 27th day of October, 1900, the court entered a judgment in said action in accordance with the prayer of the petition, and ordered a sale of the property herein involved.

On the 1st day of October, 1901, the plaintiff, Harriet B. Larrabee, filed an amended and supplemental petition, stating that after the judgment, but before the order of sale therein provided could be executed, Joseph B. Larrabee, one of the defendants, had departed this life, a resident of, and domiciled in, the city of Louisville, Ky., leaving a last will and testament, wherein and whereby he devised all of his estate, real, personal and mixed, to his wife, the defendant, Fanny K. Larrabee, which will had been duly and legally probated by order of the county court of Jefferson; and further stating that, pending this litigation, said Joseph B. Larrabee had, by writ-

ten contract, sold, assigned and conveyed to the plaintiff, Harriet B. Larrabee, all of his interest in his father's estate, whether real, personal or mixed, which said writing had been lost or misplaced, but alleging that the defendant, Fanny K. Larrabee, the widow and sole devisee of Joseph B. Larrabee, knew of and approved said conveyance by said Joseph B. Larrabee, and makes no claim to any part of said estate, and praying that the former order of sale herein made may be executed, and the lots described in the original petition sold on terms as directed in the former judgment of this court, and that said Harriet B. Larrabee be adjudged to own the interest which would have gone to Joseph B. Larrabee.

On the 14th day of January, 1902, the action was again submitted, and on the 8th day of February, 1903, the court entered a supplemental judgment, decreeing the sale of said property, and a distribution of the proceeds in accordance with the prayer of the supplemental petition.

On the 28th day of June, 1902, came the commissioner and filed his report of sale under the judgment and supplemental judgment aforesaid, by which it appears that said property had been sold by said commissioner, and purchased by appellee, Harriet B. Larrabee, in her own right; the lot 50x180 feet on the northeast side of Baxter avenue being purchased at the price of \$1,500, and the property fronting 100x150 feet on Park avenue was purchased for the sum of \$800.

On the 23d of September, 1903, the plaintiff again filed an amended and supplemental petition, in which is stated, among other things, that on the 3d day of May, 1903, Hattie Lee Larrabee had departed this life, testate, a resident of, and domiciled at the time of her death in, Louisville, Ky.; that she was unmarried and without issue, and by said will she devised all of her estate to her mother, the plaintiff, Harriet B. Larrabee, and that she therein nominates and appoints said Harriet B. Larrabee the executrix of her will, without security. The said will was duly and legally probated by order of the Jefferson County Court on the 31st day of May, 1902, on which said day said Harriet B. Larrabee was duly and legally appointed by said court as executrix of said will and duly and legally qualified as such.

Said last supplemental petition states that Joseph B. Larrabee, deceased, left surviving him his widow, Fanny K. Larrabee, and two infant children, John Allen Larrabee and Joseph B. Larrabee, both of whom were infants under the age of fourteen years, and without any statutory guardian in the State, but who are in the care and custody of their mother, Fanny K. Larrabee.

Said petition further states that, since said sale and purchase by her of said property she had an offer for one-half of the Baxter avenue lot the sum of \$1,250.

In this last supplemental petition, the infant plaintiffs, Marguerite B. Larrabee and John Henry Larrabee, are made defendants, and the court appointed Charles K. Stewart, a member of the Louisville bar, as guardian ad litem of all the infant defendants. On the 2d day of October, 1902, Charles K. Stewart, as guardian ad litem for John Allen Larrabee and Joseph B. Larrabee, infants under fourteen years of age, reported that the father of said infants, Joseph B. Larrabee, deceased, by his will, dated June 30, 1898, and probated June 4, 1901, devised all of his estate, except a few small items

of personal property as mementos, to his wife, defendant, Fanny K. Larrabee, and that said Fanny K. Larrabee, by her deed, dated September 20, 1902, conveyed all of her rights, title and interest in, and to, the said two tracts of land, to Harriet B. Larrabee, and neither of said infants have any interest in or claim to said two tracts of land; that he has thoroughly examined the case and the records thereof, and, after such an examination, reports that he is unable to make a defense to this action of said John Allen Larrabee and Joseph B. Larrabee; and on the same day said Charles K. Stewart, as guardian ad litem of Marguerite B. Larrabee and John Henry Larrabee, filed his report, in which he makes exceptions to the commissioner's report of sale, and asks that the same be set aside and held for naught for the following reasons:

1st. Because Hattie Lee Larrabee died on May 3, 1902, at which time she was the only defendant except Fanny K. Larrabee, widow of Joseph B. Larrabee, and there has not been any revivor of the judgments herein.

2d. Because the lots herein involved could have been divided among the owners without materially impairing their value, or the value of the interest of the infants and the plaintiff herein.

3d. That the price bid by the plaintiff for said Baxter avenue lot, \$1,500, was wholly inadequate, as evidenced by the fact that plaintiff had contracted to sell, and would have sold, one-half thereof for \$1,250, but for the fact that the Kentucky Title Co. refused to insure the title for reasons herein stated.

4th. When the plaintiff became the purchaser of said two tracts of land she was the guardian of said two infants.

5th. The said infants were plaintiffs by their guardian.

6th. The said infants were not represented herein other than by plaintiff as their guardian.

All of the proceedings of the sale herein involved have been taken with great care, and all parties in interest have been properly brought before the court, and all of the title papers required by law to be filed have been filed and made a part of the record, and this record is free from any doubt or confusion arising from carelessness of preparation. There was no necessity for the order of revivor after the death of Hattie Lee Larrabee because her mother, Harriet B. Larrabee, was the sole devisee under her will. The object of an order of revivor is to bring before the court parties in interest who are not already before the court, and as the only person interested in the estate of Hattie Lee Larrabee was already before the court, in the vigorous prosecution of the case, the law does not require the doing of a vain and useless thing. The evidence sufficiently shows that the property could not have been divided without materially injuring the interest of the owners of same, and the court below having so adjudged upon the evidence before it, we will not interfere with that ruling.

The inadequacy of price is not a sufficient ground for the setting aside of the judicial sale, where the proceedings have been regular; and where there is no allegation, or evidence, of any fraud, overreaching or sharp practice, and while the court will look keenly into the acts of a guardian who becomes the purchaser of her ward's estate, yet when, as in this case, the guardian has first obtained the permission from the chancellor to become a bidder at the sale, we will not, alone upon the ground of inadequacy of price, set

aside a sale to said guardian. A guardian who bids by permission of the chancellor stands with reference to the sale as any other purchaser. It was not necessary for the infant plaintiffs to have representation other than that of their guardian; they were co-plaintiffs with her, and it was not necessary for them to have any other representation in this proceeding.

Fanny K. Larrabee, the widow of Joseph B. Larrabee, has no dower in the lots in question; she being *sui juris*, has filed her answer herein, disclaiming all right to dower or other interest in the property in question.

We are not able to see any error in this record, and the judgment of the chancellor is affirmed.

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McCARTY v. COMMONWEALTH.

(Filed January 28, 1903.)

1. Criminal law—Insanity—Instructions—Appellant was convicted of the murder of his wife, and the death penalty fixed. The only defense was insanity, and appellant alone gave testimony on this point, stating that his wife had been unfaithful to him, and that seeing her in the company with a man produced such mental excitement that he was powerless to prevent killing her, which he did by following her and shooting her in the back. The court specifically charged the jury as to all of the evidence concerning previous assaults and threats by the accused that it was admitted solely for the purpose of showing the state of appellant's mind, if it did not show it, and of his motive; and that the jury should not allow same to influence their verdict in fixing the punishment if they should, from the other evidence in the case, find the defendant guilty of the crime for which he was then being tried. Held—That this instruction was more favorable to appellant than he was entitled to. The counsel for appellant contend that any impulse that at the time may be irresistible will excuse homicide. This is not the law. The court properly instructed the jury as to the law of insanity that would excuse the homicide. The proof sustains the conviction.

2. Misconduct of Commonwealth's attorney—The misconduct of the attorney for the Commonwealth in his closing argument to the jury can not be considered on appeal as his remarks are not part of the record and no exceptions were taken to same.

W. G. Dunlap for appellant.

W. P. Kimball for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was tried, indicted and convicted of the crime of willful murder, and sentenced to death. He was found guilty of having maliciously and feloniously killed his wife by shooting her in the back. His defense, and the only defense, was that of insanity.

There is no evidence in the record of any taint from this malady in appellant's family, or in him previous or subsequent to the killing. No witness testified that in his opinion appellant was, or ever had been, insane. Appellant claimed that he had reason to believe that his wife had been unfaithful to him, and that at numerous times during several weeks and months prior to the killing information to that effect had come to him; that he had fre-



quently discussed the matter with his wife. On the fatal occasion he claimed that he saw her at the home of a Mrs. Swigert in the company of some unknown man, and that Mrs. Swigert's house had a bad reputation. As to these occurrences, including the killing, appellant testified as follows: "I thought I would go down and ask Mrs. Swigert where she was; and Bert Miller said, 'come on, I ain't going to wait here all night for you,' and I went on, and as I got to the corner of the kitchen there, I commenced coughing, and I heard a noise at the other end of the little passway, and I looked up and saw Lucy (appellant's wife) and a man standing inside the gate, between the houses; and they immediately commenced to run, the man first, and Lucy second, but as they opened the gate I saw the plain figure of a man; but Lucy got between us and I did not see where he went, but when I thought of the past and all that had been told me, these things all came up before me, and I felt, well, I do not know how I did feel, to think of all these things that had been told me, and to think that they were true, and I opened the gate, and I heard Mrs. Swigert say, 'run, my God, run,' and Lucy run in the front door into the front room, and was in the act of going through the middle door and I shot her twice, and run out right quick to see if I could find the man that was with her. I went around the house to see if I could catch him or not, but I could not see anything of Bert Miller or the man, or anybody else, but when I came to myself and thought about what I had done I thought I had better see my mother; I thought I had better see her first myself and tell her what had happened, and I thought I would then give myself up."

Instead of giving himself up, appellant hid himself under a house in the neighborhood, where he was found and arrested by the officers. That quoted above is the only evidence that in any way tends to establish appellant's claim of his being of unsound mind at the time of the killing, if it does. The only other witness to the transaction, except Mrs. Swigert, is Bert Miller. He testified that appellant was drinking and was somewhat under the influence of whisky; that the killing occurred at 7 o'clock in the evening, after dusk. The witness and appellant were together, hunting for Mrs. Lucy McCarty, the deceased. As to what occurred just before and at the time of the killing this witness said:

"We got about fifteen feet away from the gate, somewhere along about that distance, and saw his wife standing there talking to a woman."

"Where?"

"A. At a lattice gate."

"Q. Between the two houses?"

"A. Yes, sir." \* \* \*

"Q. Who did you see?"

"A. This woman and his wife."

"Q. Which woman?"

"A. I do not know who she was."

"Q. Saw Mrs. Swigert and a woman?"

"A. Not Mrs. Swigert, Mrs. McCarty."

"Q. What took place then?"

"A. He broke and run towards her."

"Q. Run in what direction?"

"A. Toward Main street; when he run she slammed it too and he jerked it open, and followed her into the front door."

"Q. Did you follow them?"

"A. Yes, sir: I got as far as the front porch, and as she run he run right behind her and shot her twice, and as he shot her she hallooed: 'Oh, Lord God, help,' and he had his arm around her and let her down and run out."

"Q. You say his wife and this woman were standing at the lattice gate?"

"A. Yes, sir."

Mrs. Swigert referred to did not testify in the case. It was shown that shortly after this tragedy she became violently insane from the fright and shock, and was, and has since been, confined, under verdict and judgment of the Fayette Circuit Court, in the Eastern Lunatic Asylum at Lexington.

Evidence was admitted that on the previous evening, and on numerous occasions before, running back for several months, appellant had abused and beat and otherwise mistreated his wife. The motive for this conduct was shown to be because she did not give him money, and some witnesses intimate because she did not give him money to buy whisky. Appellant was without means, idle and dissipated. He had done little or no work for a number of months, while his wife had been at work as a domestic. Numerous threats are proven in which appellant had said he would kill his wife. The court specifically charged the jury, as to all of the evidence concerning previous assaults and threats by the accused, that it was admitted solely for the purpose of showing the state of appellant's mind, if it did show it, and of his motive; and that the jury should not allow same to influence their verdict in fixing the punishment, if they should from the other evidence in the case find the defendant guilty of the crime for which he was then being tried. Certainly this action of the court was as favorable to appellant as could be expected, indeed more favorable, probably, than he was entitled to.

Whether appellant's wife had in fact been unfaithful to him, or had given him cause to believe or suspect it, is not at all clearly shown by the proof. And even if it had been, it was also shown conclusively, and by appellant's own testimony, that he continued for weeks to live with her after having been told of her alleged wrong. His subsequent act of killing her can not then be reasonably attributed to the supposed jealous frenzy aroused by a sudden and unexpected revelation of his wife's infidelity. Rather, though it be conceded that he had the suspicion claimed, and reasonable grounds therefor, it appears that he was executing a determination previously and coolly formed, and announced in numerous threats, to himself execute upon her a dire vengeance. Appellant complains of the instructions given by the court to the jury on the subject of insanity. They are in the identical language, excepting names, used by the same court on the trial of Portwood. Portwood's defense was insanity. He was convicted and sentenced to death. On appeal this court held that the instructions given fairly presented the law, and the judgment was affirmed. (Portwood v. Commonwealth, 104 Ky., 496.)

The instructions as to insanity are as follows:

"8d. If the defendant did shoot Lucy McCarty, but at the time he shot her the defendant did not have mental capacity sufficient to enable him to

know and understand that it was wrong to shoot said Lucy McCarty, the defendant was of unsound mind; or if the defendant did shoot said Lucy McCarty, but at the time he shot her the defendant was prompted to do such shooting by an impulse, resulting from a diseased mind, of such violence that it overcame the will of the defendant and constrained him to shoot said Lucy McCarty when he did not wish to shoot her, the defendant was of unsound mind.

"3d If the defendant did shoot Lucy McCarty, but at the time he did so the defendant had mental capacity sufficient to enable him to know right from wrong, and if at the time he had will power sufficient to enable him to choose between shooting and refraining from shooting said Lucy McCarty, the defendant was of sound mind; and if the defendant did shoot Lucy McCarty, but at the time he did so the defendant had mental capacity sufficient to enable him to know right from wrong, and if his mind was free from disease, then no impulse to shoot said Lucy McCarty, no matter how violent, and no matter how completely it dominated the will of the defendant, was unsoundness of mind."

The argument is directed principally against the expression at the close of the third instruction: "If his mind was free from disease, then no impulse to shoot said Lucy McCarty, no matter how violent, and no matter how completely it dominated the will of the defendant, was unsoundness of mind." It must be the contention of appellant's counsel that any impulse that at the time may be irresistible will excuse homicide. Happily for society this is not the law. Otherwise an ungovernable temper, or violent, brutish passion, or frenzy caused by indignation, or anger or drunkenness or altercation would excuse such one. Only persons insane, or who have never reached years of discretion, are not accountable for the commission of crime. Even then the insanity that excuses is such as deprives the person committing the act of his reason or will in that particular transaction. The irresistible impulse recognized by the law is that only resulting from mental disease, from the derangement of the mind caused by a disease of the mind. It is not material how recently the derangement may have occurred. A person acts under an insane, irresistible impulse when by reason of the duress of mental disease he has lost the power to choose between right and wrong, to avoid doing the act in question, his free agency being at the time destroyed. (1 Bishop's Criminal Law, section 887; *Parsons v. State*, 81 Ala., 577; 60 Am. Rep., 193; *Portwood v. Commonwealth*, supra; *Graham v. Commonwealth*, 16 Ben Monroe, 557; *Brown v. Commonwealth*, 14 Bush, 398; *Moore v. Commonwealth*, 92 Ky., 637.)

Another and final complaint is that the attorney for the Commonwealth exceeded his authority, and abused his privilege in the closing argument to the jury. The remarks complained of are not shown in the bill of exceptions, nor does it appear from the record that there was objection or exception thereto. We can not, from the record, say that anything was said by the prosecuting attorney in his argument that is the subject of review by this court. Counsel for appellant files with his brief what purports to be a newspaper report of a portion of the Commonwealth attorney's argument. It must be plain that the court could not take notice of such an objection thus presented.

An unobjectionable jury of the community, selected fairly, under the duty alike of enforcing the criminal laws of the State in this case and of determining under proper instructions and guarded legal procedure the fact of the defendant's guilt, have found him guilty of the crime charged. We can not say that the evidence does not support their verdict. In their discretion they have inflicted the severest penalty.

There appears to us to be no error in the record, wherefore, the judgment must be affirmed.

## SCOTT, &amp;c. v. PENDLEY, BY, &amp;c.

(Filed January 28, 1903.)

Schools—Employment of teacher—A., B. and C. were trustees of a common school district, and on the 1st day of July, 1901, A., while in jail, signed a contract with B., employing appellee as teacher of said school, in the absence of C., the other trustee, who had no notice of the meeting. On the 3d day of July, 1901, A. resigned as trustee and D. was appointed his successor. On the 5th day of July, 1901, after notice had been served on B., a meeting was held, at which B. did not attend, C. and D. made a contract of employment of appellant as teacher. Appellee obtained a temporary restraining order against appellant and the trustees, C. and D., restraining appellant from teaching the school, and appellee taught the school, and this appeal involves the question as to whether appellee was legally elected as teacher. Held—That she was not legally elected teacher. No meeting of the trustees can be held unless all are present, or unless the absent member had notice, provided the absent member is in the county and with reasonable effort and diligence the notice could have been served on him.

N. T. Howard, W. B. Gardner and J. W. Harrelld for appellants.

Guffy & Whalin and Taylor & Borah for appellees.

Appeal from Butler Circuit Court.

Opinion of the court by Judge Nunn.

On the 1st day of July, 1901, Thomas Baxter, G. W. Doolin and W. T. Blanchett were the trustees of school district No. 71 in Butler county, Kentucky, and on that day, in the county jail where Blanchett was confined on a charge of felony, the said Blanchett and Doolin made and executed a written contract with appellee Pendley to teach the school for that district for that school year. It is agreed that no call was made for this meeting, held in the jail, nor did Baxter, the other trustee, have any notice of same. On the 3d day of July Blanchett resigned as trustee and one Galloway was appointed and qualified. On the 5th of said month, and after notice had been served on Doolin, the other trustee, a meeting was called for the purpose of employing a teacher, and at said meeting, Doolin not attending, Baxter and Galloway entered into a written contract with appellant Scott to teach the school. Both appellant and appellee had notice of the contract of each other. On the 25th of July thereafter appellant Scott commenced to teach the school and appellee filed this action, setting forth her contract, and obtained a temporary restraining order against appellant and trustees Baxter and Galloway, prohibiting Scott from teaching the school and the trustees from preventing her the use of the schoolhouse, and the appellee entered

and taught the school. The only question necessary for the court to determine is, was the appellee entitled to teach the school under her contract?

The Kentucky Statutes, section 4445, in so far as applicable, reads as follows: The trustees, in their corporate capacity, at a meeting called for that purpose, shall employ a qualified teacher, agree with him as to compensation, etc.

We have not been cited to, nor have we been able to find, any decisions of the Court of Appeals of Kentucky construing this part of said statutes. We have been referred to an opinion of the Supreme Court of Arkansas, in which case the same question was involved. In that case this language is used: "It is necessary that a contract, to be binding on the district, should be executed at a board meeting at which all the directors are present, or at which the one absent had notice. We appreciate the practical importance of this question, but entertain no doubt as to its proper solution either on reason or authority. The different members of a board scattered in the pursuit of their several avocations are not the board. Duties are cast upon boards composed of a number of persons, in order that they may be discharged with efficiency and wisdom arising from a multitude of counsel. This purpose can not be realized without reference to the matters intrusted to them before they take action thereon. After conference the board will often escape unwise measures, to which each of the members acting separately would have committed themselves, either from haste, immature discretion, or an unwillingness to shorten the allotted span of life under the entreaties of an importunate agent or teacher. The public select each member of the board and is entitled to his services; this it can not enjoy if two members can bind it without receiving or even suffering the counsel of the other. Two could, if they differed with the third, overrule his judgment and act without regarding it; but he might by his knowledge and reason change the bent of their minds, and the opportunity must be given him. We conclude that two directors may bind the district by a contract made at a meeting at which the third was present or of which he had notice; but no contract can be made except at a meeting, and no meeting can be held unless all are present or unless the absent member had notice. We do not decide that the members of a board may not act separately and without meeting in a matter which involves no exercise of discretion."

This court is of opinion that this part of the above quotation, "no meeting can be held unless all are present or unless the absent member had notice," should be qualified by adding thereto these words: "Provided the absent member is in the county, and with reasonable effort and diligence the notice could have been served on him."

It is the opinion of this court that the contract of appellee with Doolin and Blanchett was made contrary to the statute, and that she had no right to teach the school thereunder. It is stated that Baxter had previously expressed himself in opposition to contracting with appellee and Doolin with appellant, and Blanchett had promised both, and appellee claims for this reason that notice to Baxter was unnecessary and useless. If these statements be true, it more clearly shows the necessity of bringing the board together, or at least giving all an opportunity of coming together, and exchanging reasons and arguments before entering into a contract with a

teacher. Certainly Baxter should have had an opportunity, if he desired, in connection with Doolin, to reason with and try to convince Blanchett that the contract with appellee should not have been entered into.

For these reasons the judgment of the lower court is reversed and cause remanded, with directions to dismiss appellee's petition.

Judge Settle not sitting.

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WESTERN UNION TELEGRAPH CO. v. HERNING.

(Filed January 28, 1903—Not to be reported.)

Telegraph companies—Delay in delivering message—Measure of damages—A telegram was sent from Clarksville, Tenn., directed to appellee at Clinton, Ky., announcing the death of his mother. Appellant delayed the delivery to appellee until it was too late for him to arrive in Clarksville before the burial. He went on the first train after receiving the message, but arrived too late. This action for damages for the delay resulted in a verdict for \$700 for appellee, from which this appeal is prosecuted. Errors in instructions are relied on for a reversal. Held—That the court erred in giving the first instruction, which authorized the jury to find for plaintiff if they believed that appellant was guilty of negligence in the delivery of the telegram, but did not fix any measure of damages. The second instruction authorized them to find as directed by the first instruction, and that they might enhance this sum by considering appellee's mental suffering. The court should, in substance, have said to the jury that if they find for the plaintiff upon the evidence and instructions they should find a sum that will compensate him for the injury to his feelings and mental anguish, if any, shown by the evidence, as the result of his failure to be present at the burial of his mother.

Richards & Ronald and George H. Fearons for appellant.

Robertson & Thomas and Evans & Dear for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Nunn.

This action was brought in the Hickman Circuit Court against the appellant by the appellee for damages for the failure to deliver to him a telegram sent from Clarksville, Tenn., May 8, 1900, announcing the death of his mother, and for negligence in not delivering said message in a reasonable time, thereby preventing him from attending the burial of his mother. The message read: "Come at once; your mother is dead," and was directed to appellee at Clinton, Ky., in charge of George Martin, who lived just across the street from the office of the appellant. Appellee lived one and one-half miles in the country. The message was received at the Clinton office at 12.51 p. m. and was not delivered to George Martin until about 4 p. m., and was at once sent out by him (Martin) to appellee. The appellant made no attempt to show any reason for the delay in the delivery of the message. As soon as he received the message he took the first train thereafter and started for Clarksville, but did not reach there until the afternoon of the next day, which was about two hours after the burial of his mother.

Evidence was heard, the jury instructed and they returned a verdict against the appellant for the sum of \$700. Appellant filed reasons, and moved the court to set aside the verdict and judgment. The court overruled the motion for a new trial, and the case is here on appeal. The appellant cited many reasons why this case should be reversed, but we perceive no error prejudicial to appellant, except instructions one and two given by the court to the jury, which read as follows:

"No. 1. The court instructs the jury that if they believe from a preponderance of the evidence that the defendant, the Western Union Telegraph Co., by its officers, agents and servants failed to deliver to the plaintiff or to G. W. Martin, within a reasonable time after its reception, the telegram dated May 8, 1900, informing plaintiff of the death of his mother, then the law is for the plaintiff, and they will so find, and say how much the defendant shall pay not exceeding \$1,000, the amount claimed in the petition. If they believe from the evidence that by reason of the failure by the defendant to deliver the message the plaintiff was prevented from attending the burial of his mother, and to look upon her face before she was buried.

"No. 2. The court further says to the jury that if they find for the plaintiff, they have the right to take into consideration, in making their verdict, mental suffering of the plaintiff in failing to attend the burial of his mother, or to look upon her face before her interment."

We are of the opinion that the court erred in the instructions in not fixing the criterion upon which the appellee was entitled to recover. The jury were told that they might find for the plaintiff and say how much the defendant shall pay, not exceeding the amount claimed in the petition; and in the second instruction that they had a right to take into consideration the mental suffering of the plaintiff in failing to attend the burial of his mother. The jury were authorized in the first instruction to fix their own criterion of recovery, and say how much the defendant should pay; by the second instruction the court, in effect, said that, in addition to what they thought the defendant ought to pay, they might, to enhance the sum, consider appellee's mental suffering.

In the case of *L. & N. R. R. Co. v. Sanders*, 19 Ky. Law Rep., 1944, this court reversed the case mainly for the reason that the following language was used: "The jury will find for the plaintiff such damages as they may deem proper from all the evidence and circumstances in the case."

The court, in that case, said that this instruction left the jury at liberty to find punitive damages. The court should, in substance, have said to the jury that if they find for the plaintiff upon the evidence and instructions, they should find a sum that will compensate him for the injury to his feelings and mental anguish, if any, shown by the evidence, as the result of his failure to be present at the burial of his mother, etc.

For these reasons the judgment is reversed and the case remanded for further proceedings consistent with this opinion.

#### JONES v. COMMONWEALTH.

(Filed January 28, 1903.)

Criminal law—Filing away indictments against objection of defendant—Appellant was indicted for the crime of murder, and he came into court

and his case was set for trial for a day during the term and was he admitted to bail in the sum of \$3,000, but the case was, on motion of appellant, continued until the following term, and set for trial on a fixed day. On the calling of the case for trial appellant was in court with his attorneys and witnesses and ready for trial, when the attorney for the Commonwealth moved to discharge the witnesses and appellant from his bond, and to file away the indictment with leave to reinstate on motion of attorney for the Commonwealth. Appellant objected to said motion and demanded a trial. The court overruled the objection and sustained the motion, to which appellant objected and has prosecuted this appeal. Held—That the practice of filing away indictments with leave to reinstate is approved, but section 11 of the Bill of Rights of the Constitution provides that "in all criminal prosecutions the accused has the right, to be by himself and counsel, to demand the nature and cause of the accusation against him and to meet the witnesses, and to have compulsory process for obtaining witnesses in his favor. \* \* \* and in prosecutions by indictment or information he shall have a speedy trial by an impartial jury of the vicinage." These guaranties are for the protection of the citizen, and no rule of practice, however ancient or sacred, should deprive him of them. The lower court abused this rule of practice, and the court declares that an indictment should never be so disposed of when the accused, being present, objects thereto and in good faith demands a trial.

Smith & Ingram and Wm. Low for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Hiram Jones, was indicted by the grand jury of Bell county for the murder of one James Shumate, resulting, as alleged, from the willful, wanton and malicious act of the appellant in placing obstructions on the railroad track, whereby an engine and cars of which Shumate had charge, as engineer, were derailed and wrecked, and he crushed and wounded to such an extent that he at once died. The indictment was returned and filed in the Bell Circuit Court October 18, 1901. On the same day appellant appeared in court and the case was, by order of the court, set for trial on the 17th day of the term in progress. Thereafter (and presumably on the 17th day) a continuance of the case was granted the appellant, and by consent of parties it was set for trial on the 18th day of the succeeding May term. The appellant was thereupon allowed bail in the sum of \$3,000.

On the 16th day of the May term, 1902, the cause was called for trial and appellant being again in court, answered that he was ready for trial, but the Commonwealth's attorney announced that the prosecution was not ready for trial, and moved the court, to discharge the witnesses, and the appellant from his bond, and to file the indictment away, with the right to reinstate it on motion of the Commonwealth, to which motion appellant objected, and insisted that the case be dismissed, or that he be granted a trial, but notwithstanding his objection the motion of the Commonwealth's attorney was sustained, and the indictment by order of the court was filed away, with leave to redocket upon motion of the Commonwealth's attorney. To the order thus disposing of the indictment, and to the refusal of the court to grant him a trial, appellant excepted at the time and prayed an appeal to this court, which was granted.



The practice of filing away indictments, though never authorized by legislative enactment, has long obtained in this State. It either came to us as a part of the common law, or was devised by some one or more of the pioneer jurists of our Commonwealth to whose wisdom we are indebted for much that is good in our present system of jurisprudence. At any rate the long continuance of the practice, and its convenience as well, admonish us that it would be unwise to abrogate it altogether. We think it the better policy, therefore, in determining whether this practice should have been followed in the case before us to lay down some general rules which will indicate to the circuit courts the limitations that should be observed in the future attempts to follow it.

This court has, in two instances, decided that the filing away of an indictment, with leave to reinstate, did not operate as a dismissal thereof, but only as a discontinuance of the case for the time being. The first case in which the court so held was that of *Ashlock v. Commonwealth*, 7 B. M., 44. *Ashlock* was indicted in the Fayette Circuit Court for maintaining a faro bank. At the next term of the court, no process having been served on the defendant, the following order was entered in the case: "On motion of the Commonwealth's attorney it is ordered that this case be stricken from the docket with leave to reinstate it hereafter by motion."

Subsequently process issued upon the indictment and was served upon the defendant, and at the succeeding term of the court, the case, on motion of the attorney for the Commonwealth, was reinstated upon the docket, after which there was a trial, resulting in the conviction of the defendant. In considering the exception taken to the orders of the circuit court filing away and redocketing the case this court said: "An order striking a suit from the docket made on motion of the plaintiff, and without reservation or qualification, we should be inclined to regard as a voluntary dismissal, or discontinuance, and as placing the case, after the term when the order was made, beyond the power of the court. But here the right to reinstate the case on the docket being expressly reserved, the order, we think, should not be construed as a dismissal or discontinuance, but as a mere removal, or omission, of the case upon the docket. If right in this construction of the order, the case was still in court, and the issuing and service of process before it was replaced on the docket was not unauthorized or invalid. The order is, however, in our opinion, unusual, and we would not be understood as approving such a rule of practice, perceiving no necessity nor sufficient reason for it, and it may have the effect to delude and entrap litigants."

The second case that came before this court, in which the practice of filing away indictment, was called in question, was that of *Commonwealth v. Bottoms*, 21 Ky. Law Rep., 1159, and involved a construction of an order entered in the Adair Circuit Court, whereby eight several indictments pending in that court against one Joe Bottoms for the unlawful selling of spirituous liquors were filed away, with leave to reinstate without notice, with the consent, and upon the promise, of Bottoms that he would not again sell such liquors. But later Bottoms was again indicted, tried and convicted for a similar offense, and thereafter the eight indictments were, by direction of the Commonwealth's attorney, redocketed by the clerk of the court and process issued thereon against Bottoms, who appeared in court and filed a

written motion to strike the indictments from the docket, which motion was sustained by the court. In reversing the judgment of the lower court in thus disposing of the indictments this court said: "Where the defendant is before the court and the case stands for trial we are not aware of any rule of practice that would authorize the attorney for the Commonwealth on his own motion to file the indictment away on conditions and hold the prosecution in terrorem over the defendant, and we do not approve of such practice. However, such was done in this case, and with the consent of the appellee, and upon terms, and it being shown that the terms had been violated by the appellee, he should not complain if the attorney for the Commonwealth prosecutes the indictments to trial as the agreed order recites he may do, nor is there anything in the order itself or its effect that forbids such action by the Commonwealth. The legal effect of such an order was simply a continuance indefinitely and an exoneration of any bail for appearance unless the contrary should appear in the order, and upon reasonable notice being given to the accused the case might stand for trial at any term of court. We think this might be done without showing a violation of the promise to abstain from further violations."

The facts of the case before us are in many respects unlike those of the two cases mentioned. In the first case the accused, Ashlock, had not been served with process, and was not in court when the order taking the indictments from the docket with leave to reinstate was entered. In the second, Bottoms was in court in obedience to its process when the order was taken and gave his consent thereto, but in this case the appellant, Jones, was under bond for his appearance, and upon the calling of the case for trial he was present with his witnesses, and demanded a trial, which was refused, and the indictment, over his objection and protest, was stricken from the docket, with leave to the Commonwealth's attorney to have it reinstated at his will. We regard this action of the lower court as an abuse of the rule of practice in question, and we do not hesitate to declare that an indictment should never be so disposed of, when the accused, being present, objects thereto, and in good faith demands a trial.

The Constitution of our State provides that "in all criminal prosecutions the accused has the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. \* \* \* And in prosecutions by indictment, or information, he shall have a speedy trial by an impartial jury of the vicinage." (Constitution, section 11, Bill of Rights.) These guaranties are for the protection of the citizen, and no rule of practice, however ancient or sacred, should deprive him of them. We do not hold that in no case should the "filing away" of an indictment be allowed, for it is permissible when done before the arrest of the defendant, or before service of process upon him, and it should certainly be allowed where the defendant is present in court, and consents, or fails to object thereto. It is contended for the Commonwealth that the order appealed from is not final, and if so that the appeal should be dismissed.

In a sense the order does not be final, for it does not prevent the Commonwealth's attorney from redocketing the case and renewing the prosecution at any time, but in a much more important sense, and as it

affects the appellant, the order must, we think, be treated as final for the purposes of an appeal, for while it stands he is powerless to secure a trial, however innocent he may be, yet all the while resting under a grave charge, affecting his reputation and endangering his life or liberty. What remedy has he if refused the right of appeal? If he were to move the lower court to redocket the case and dismiss the indictment, the order of that court overruling the motion would be no more final than the one appealed from. Neither mandamus nor injunction will lie to control a court in the exercise of its judicial discretion, and the writ of prohibition can only be employed to prevent an inferior court of limited jurisdiction from proceeding in a matter out of its jurisdiction.

We are of the opinion, therefore, that the court has the jurisdiction to entertain the appeal, and that to hold otherwise would amount to a denial of justice. The judgment or order appealed from is reversed and the cause remanded, with directions to the lower court to set it aside and to redocket the case that the appellant may have as speedy a trial as will be consistent with the ends of justice.

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BONE v. BLANKENBAKER.

(Filed January 28, 1903—Not to be reported.)

New trial—Unavoidable casualty or misfortune—Appellant was sued by appellee, and immediately employed A. and B., partners in the practice of law, to make defense for her. The arrangement was made with A., and she had no communication with B. about the matter. A. immediately went to the clerk's office and found that no return had been made on the summons. He then went to the sheriff's office and made diligent inquiries, and failed to find that the summons had been served. On the calling of the case at the July rules, no defense having been made, judgment by default was given, as the process had been served in time. This suit was then brought for a new trial, as provided in section 518, Civil Code of Practice. The court overruled the motion, from which this appeal is prosecuted. The petition set up the facts above stated, besides, that A., the attorney, was, under the advice of his physician, compelled to leave the city for his health, and did not return for several months; that owing to the facts he learned concerning the service of the process and the fact that the court was about to adjourn, and that he reasonably concluded that the case would not be called for trial before September; that neither he nor appellant knew of the judgment having been entered until more than sixty days afterward. Held—That under the circumstances a new trial should have been granted, as there was no lack of diligence on the part of either the appellant or her attorney. While the neglect of the attorney furnishes no grounds for a new trial, the facts alleged show that the attorney exercised due diligence.

Pryor & Sapinski for appellant.

Fairleigh, Straus & Eagles for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge O'Rear.

Appellant was sued by appellee in the Jefferson Circuit Court (Law and Equity division) upon a note. Judgment was rendered by default. This

suit was brought by appellant against appellee for a new trial of the first-named action, under section 518 of the Civil Code, on the ground of "unavoidable casualty or misfortune, preventing the party from appearing or defending."

Appellant employed a firm of attorneys to prepare and present her defense. The duty of looking up the status of the case and preparing and filing the answer within the time required by the statute and the rules of the court was devolved upon and undertaken by Mr. Pryor of the firm so retained. The firm was spoken to by appellant about the middle of June, she having informed them that she had just been sued by appellee, and informed them of the nature of her defense to the action. Mr. Pryor directly, and with due diligence, went to the court, examined the files of the case, and found that the summons had not been returned. He then went to the sheriff's office, and failed to find there, after diligent inquiry, when it had been executed, or that it had been executed. But from the time in the month when the client came to him, and from the absence of the return upon the summons, he assumed, and not unreasonably, under the facts shown, that the case would not stand for answer at the rules about the first of July, as the court was preparing to adjourn for the summer vacation immediately after the calling of the docket at the July rules mentioned. Mr. Pryor assumed that the cause would not, and could not then be called for answer until the reconvening of the court in the fall. However, he was prevented by a severe illness from looking further into the matter at that time, and under the direction of his physician was required to leave the city for a period. In the meantime the case was called at the rule day of 1st of July, and it then appearing that the summons had been served a sufficient length of time to entitle the plaintiff to judgment by default, and no one answering for the defendant (Mr. Pryor having been called out of the city by his illness), judgment was rendered in favor of the plaintiff against appellant for the full amount of the note sued upon. Neither appellant nor counsel knew of this proceeding until more than sixty days after the judgment was entered. Thereupon this suit was brought to vacate that judgment upon the grounds stated. It is proper to say that it does not appear, nor is it suggested, that appellee's counsel knew, or had notice, of the fact that appellant contemplated a defense to the note, or that she had retained counsel for that purpose.

The question is whether, under this state of case, appellant has made such a showing as entitled her to the relief of a new trial under the section of the Code quoted. It is a familiar rule of law that a new trial will not be granted on account of neglect of parties or their attorneys. (*Patterson v. Mathews*, 3 Bibb, 80; *Payton v. McQuown*, 97 Ky., 763.) It has always been held that a mistake by counsel as to the day a case is set for trial is not ground for a new trial. The court is of opinion, however, that this case does not present a state of negligence either on the part of appellant or her counsel, nor is it the result of a mistake on their part.

From the facts shown we are satisfied that appellant's counsel took every step to present her defense that an ordinarily prudent and careful practitioner under similar circumstances would have taken. And we are equally satisfied that but for the misfortune of the serious illness of appellant's at-

torney having this matter in charge, he would have presented the defense in due time, and would have been present so as to have prevented the default judgment when it was taken. The question then is, whether the illness of one of a firm of attorneys, who is specially charged with, and who has undertaken the defense of a suit in court, is such a misfortune and unavoidable casualty as is contemplated by subsection 7, section 518 of the Code. If it had been shown that the other members of the firm of attorneys had known of the circumstances, or had been put upon inquiry with reference thereto, it would, of course, follow that the sickness of one of them would not excuse the nonaction of the others. But the court is of opinion that under the facts stated above, and shown in the record, the case is brought within the fair meaning of the section of the Code quoted. The appellant, without fault upon her part, and by the casualty of the sickness of her counsel, who alone had the matter of her defense in hand, and upon whom she was relying, was prevented from presenting the defense now set forth in this case, and which is conceded to be a valid one.

The new trial should have been granted, and to that end the judgment is reversed and cause remanded for proper proceedings consistent herewith.

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ARNETT v. COMMONWEALTH.

(Filed January 28, 1903.)

1. Criminal law—Indictment—Appellant was convicted of voluntary manslaughter under an indictment for murder, and on appeal complains that the indictment is defective in failing to state that the offense was committed feloniously. Held—That as appellant failed to urge this objection on the trial it is too late to raise it the first time in the Court of Appeals.

2. Continuance—The court did not err in refusing a continuance on account of the absence of witnesses as the affidavit for a continuance was defective, in failing to state that the witnesses were not absent by his consent or procurement, or where they were at that time, or what grounds existed for the expectation that their testimony might be procured if the case was continued, besides, the facts proposed to be proven would not have been competent.

3. Evidence—Dying declarations—It is urged that the court erred in permitting the wife of the deceased to testify as to a dying declaration of her husband, because the wife was incompetent to testify to said declaration of her husband, and said declaration was incompetent because it was not made under a consciousness of impending death. Held—That the facts and surrounding circumstances show that the statement of the dying man was competent as a dying declaration, and it was competent for the wife of the deceased to prove the dying declaration.

J. A. Scott, A. H. Stamper, D. D. Sublett and B. G. Williams for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Magoffin Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Elliott Arnett, was convicted of voluntary manslaughter

In the Magoffin Circuit Court under an indictment charging him with the murder of S. B. Salyer, and his punishment fixed at confinement in the penitentiary for a term of five years. He complains upon this appeal that a number of errors prejudicial to his substantial rights occurred upon the trial, and for which he asks a reversal: First, it is insisted that the indictment under which he was tried and convicted is fatally defective, in that it fails to allege that the killing of Salyer was feloniously committed, and in support of this contention refers us to *Kalin v. Commonwealth*, 84 Ky., 354. It was held in that case that the lower court erred in overruling the demurrer filed by the defendant to the indictment. But in this case the sufficiency of the indictment was not called in question in the lower court by the defendant in any way. But, on the contrary, the jury were instructed on the theory that the offense was feloniously committed. We think it is too late after the case has been tried out in the lower court for a defendant to raise this question for the first time in this court.

Appellant next complains that the trial court erred in overruling his motion for a continuance. The affidavit filed in support of this motion fails to state that the witnesses whose testimony defendant desired to avail himself of were not absent by his consent or procurement, or where they were at that time, or what grounds existed for the expectation that their testimony might be procured if the case was continued. Besides, the alleged facts which he recites he would prove by these absent witnesses would not have been competent, if they had been present.

The next, and most important, ground relied on is that the court erred in permitting Mrs. Jane Salyer, the widow of the deceased, to prove an alleged dying declaration which was made to her a short time previous to his death by her husband. It is insisted that this testimony was incompetent, both because it did not sufficiently appear that the dying declarations were made under a sense of impending death, and for the additional reason that under section 606 of the Civil Code "the wife was incompetent to testify even after the cessation of the marriage relation to any communication made to her by her husband during marriage." The facts relied on to show the admissibility of the dying declaration as testified to by the witness are that her husband said to her several times after he was wounded that he could not get well; did not expect to live; and that he made the declaration offered in evidence on the day he died; that he said in the same conversation that his time was short; that perhaps it was best; that previous to making the declaration he had been gradually sinking for several days. To render the statements of a person admissible as dying declarations, such person need not in express words declare that he is about to die, or make use of equivalent language. The essential preliminary fact to be proven to render it competent is that they were made under a consciousness of impending death. And this may be determined not only by what he declares on the subject, but also by his evident danger and surrounding circumstances. The testimony on this point leaves no room to doubt that the deceased realized that he was about to die, and, in our opinion, there was sufficient foundation for the dying declaration. (*People v. Commonwealth*, 87 Ky., 487; *Commonwealth v. Mathews*, 89 Ky., 287.) In the case of the *Commonwealth v. Minor*, 89 Ky., 555, this court had before it a question which involved sub-

section 8 of section 606 of the Civil Code, which provides: "No prisoner in the penitentiary of this State, or of any other country, shall testify, nor shall any person testify for himself against such prisoner."

And it was held that a convict in the penitentiary was competent to testify as a witness in a criminal proceeding unless he had been convicted of some one of the offenses referred to in section 8 of chapter 29 of the General Statutes. The court said: "It seems to us that the section can not be made applicable to criminal procedure, for the two Codes are wholly and necessarily distinct, and in every instance where it seems to have intended a section in one of them should be treated as a part of both, it has been so expressly provided. Moreover, the language of and reason for that section shows it was intended to apply to the testimony of, nor of others, against convicts in criminal cases."

And this case was referred to and approved in *Hilbert, Jr. v. Commonwealth*, 21 Ky. Law Rep., 538, where the court said: "On grounds of public policy the wife can not testify against the husband as to what came to her from him confidentially or by reason of the marriage relation, but this rule does not apply to a dying communication made by the husband to the wife on the trial of the one who killed him. The declaration of the deceased made in extremis in such cases is a thing to be proven, and this proof may be made by any competent witness who heard the statement. The wife may testify for the State in cases of this character as to any other fact known to her."

Greenleaf on Evidence, section 337, in stating the reason for the rule at common law, says: "The great object of the rule is to secure domestic happiness by placing the protecting seal of the law upon all confidential communications between husband and wife, and whatever has come to the knowledge of either by means of the hallowed confidence which that relation inspires can not be afterwards divulged in testimony, even though the other be no longer living."

But in section 342 the same author says: "But though the husband and wife are not admissible as witnesses against each other where either is directly interested in the event of the proceeding, whether civil or criminal, yet in collateral proceeding not immediately affecting their mutual interest, either evidence is receivable." The same rule is announced in *Wharton on Criminal Evidence*, section 427 (8d edition).

It can not be contended that the dying declaration testified to by the witness was a confidential communication made to her; on the contrary, it was evidently made in the furtherance of justice, for the express purpose that it should be testified to in the prosecution of the defendant. The rule announced in *Scott v. Commonwealth*, 94 Ky., 511, is not in conflict with this view of the law. In that case the husband was on trial for murder, and the court held a letter written by him to his wife, while he was confined in jail, to be a confidential communication, and, therefore, not competent evidence against him. We are, therefore, of the opinion that it was competent for the wife of the deceased to prove the dying declaration.

The instructions fairly submit the law, and upon the whole we see no error in the record. The judgments must, therefore, be affirmed.

Whole court sitting.

## LEXINGTON RAILWAY CO. v. FAIN'S ADM'R.

(Filed January 28, 1903—Not to be reported.)

**Electricity—Negligence—Instructions**—This action was brought to recover damages for the death of a boy fourteen years of age who touched a pulley wire which extended down a pole, and which, by coming in contact with the main wire, became charged with electricity. There was no insulation of the wire at the point that the boy touched it to prevent the injury. The instructions given to the jury on the degree of care required of appellant were more favorable to appellant than the law and evidence authorized, for they in substance told the jury that appellant was only required to use such means as would prevent the escape of the current, instead of which they should have been instructed that it was appellant's duty to know the condition of the wire, and to use the utmost care to keep it safely protected by proper insulation, in order that those exposed to likelihood of contact with it might escape injury. The law is well settled in this State that those who manufacture or use electricity for private advantage must do so at their peril, and the only way to prevent accidents where a deadly current is used is to have perfect protection at those points where people are likely to come in contact with it. It is doubtful whether there was any proof of contributory negligence on the part of the boy, but that question was properly submitted to the jury. The verdict allows only reasonable damages for the loss of life, and the instructions as to the measure of damages, although objectionable, were not prejudicial.

R. C. Stoll, Morton & Darnall and Breckinridge & Shelby for appellant.

Allen & Duncan for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Settle.

One Eastin Fain, a boy fourteen years of age, was killed in the city of Lexington, December 18, 1899, by an electric shock received from one of the wires of appellant. His father, the appellee, A. J. Fain, having qualified as administrator of his estate, brought suit against appellant in the Fayette Circuit Court, and upon the trial recovered a verdict and judgment for \$4,500. A new trial was refused by the lower court, and appellant asks a reversal of that judgment by this court. It appears from the record that appellant at the date mentioned was operating an electric light plant in Lexington and furnishing electric light to the city, by means of arc lamps located at various places therein. One of the arc lamps was suspended over the center of the intersection of Chestnut and Sixth streets, and was attached to a wire rope strung between two poles, one erected on the southwest corner of Sixth and Chestnut streets, and the other on the corner diagonally opposite. To this wire, called the "span wire," was fastened a pulley wire which ran from the top of the arc lamp; then passed through a pulley fastened to the suspension wire at the center of the street; thence to a pole situated on the southwest corner of Chestnut and Sixth streets; there through another pulley at the side of the pole; thence down the street side of the pole to a reel which was located on the side of the pole about four feet six inches from the ground. To this reel the pulley wire was attached, and by means of the reel the pulley wire was wound and unwound and the arc lamp raised and lowered. The pole to which the reel and pulley wire were



thus attached was in the pavement or sidewalk, about thirty inches inside of the curb intersection of the sidewalk of the streets.

The main wire connected with the power house, and over which the electric current is conveyed, runs along the east side of Chestnut street. Two wires make connection with the main wire at the pole located on the northeast corner of Sixth and Chestnut streets and these two wires, passing diagonally across Chestnut street in manner as the span wire, were attached to the pole on the southwest corner of said streets, and thence taken back and connected with the lamp. These wires, called feed wires, conduct the electric current through the lamp and produce illumination at the carbon points. The span and pulley wires are between the feed wires and a few inches apart from the feed wires at a point where attached to the pole, and even closer at other points.

It is alleged in the petition, and we think conclusively established by the evidence, that on the date named, and for some time prior thereto, the appellant negligently permitted the pulley wire mentioned to be and remain without any or proper insulation, and to become at frequent intervals, if not continuously, heavily and dangerously charged with electricity.

While passing along Chestnut street about 7 o'clock in the evening, and evidently without knowing that the pulley wire was charged, or likely to become charged, with electricity, appellee's intestate touched or took hold of it with his hand, whereby he received the charge of electricity which caused his death. The intestate was in company with his brother Elmore at the time of the catastrophe, who was a year or more his junior in point of age. The brothers were on their way to a temperance lodge not far from their home.

In his testimony given on the trial Elmore said in reference to what happened to his brother: "We got to Chestnut street and the light wasn't burning, and my brother said it was mighty dark along here; that light wasn't burning; we went on down the street, I went on the right side and he went on the left side (of the pole), and as he got to the pole he caught hold of the wire, and as soon as he touched it, it got to dangling and throwing him around, and directly threw him out in the street about six or eight feet."

The question was then asked the witness: "Did he shake the wire himself?" To which he replied: "No, sir."

The contention of appellant's counsel seems to be that Eastin Fain deliberately pulled and jerked the pulley wire, and that his death was caused by the pulley wire being thus forced into contact with one of the feed wires at a point where the insulation was defective. In support of this contention the testimony of Robert Clardy is cited, who testified to having seen two or three flashes at the lamp, appearing before the flame came out on the wire between the lamp and the pulley. Clardy's wife, and the negro, Reuben Edwards, testified in some sort to the same effect, but the reliability of this testimony is by no means conclusive. On the other hand, Elmore Fain, who is an intelligent boy, and the only eye witness in position to know and speak as to the conduct of Eastin Fain, testifies that the instant his brother took hold of the wire his body began to dangle, and was jerked from side to side of the pole, and finally cast into the street. No other witness claims to have seen Eastin Fain at the time except the negro Edwards, and ac-

according to his admission, upon cross-examination, the pole was between him and the boy. So what he says, and what was said by Clardy and wife, in regard to the disturbance of the wires, and flashes at the lamp, is explained by what was said by Elmore Fain, and is consistent with the theory that Eastin Fain was being jerked by the wire, rather than that he was jerking it.

In the light of the evidence there were but two ways by which the current could be communicated to the pulley wire, either by coming in contact with one of the feed wires, or by receiving it directly from the lamp. The insulation of the feed wire, according to the evidence, was manifestly imperfect; the night was dark, the weather wet and blustering; the jury doubtless believed, and were warranted by the evidence in finding, that the pulley wire met the pole within a few inches of the feed wire; that such nearness was a faulty and dangerous construction; that the insulation of the feed wire was imperfect and defective, and that these wires contained so much slack that in stormy or windy weather they were blown against the pulley wire, thereby permitting the escape of the electricity when the wire came in contact with anything furnishing a ground connection, which connection was provided when Eastin Fain took hold of the pulley wire.

It is not unusual for persons of mature age and judgment, when standing near a tree or post, to lean against it, nor is it unnatural for a boy to touch any object that he may pass in walking along a street or sidewalk. The pulley wire when it was attached to the reel was within four and one-half feet of the ground, and, therefore, convenient to the touch of man or boy, and there being nothing in its appearance to excite alarm or suspicion, it is hardly probable that a boy would know its dangerous character, or appreciate the necessity of avoiding contact with it in passing.

We think it a self evident proposition that it was the duty of appellant in using the streets of the city of Lexington, by permission of the municipal authorities, for purposes of private gain, to so conduct its business as not to injure persons passing along such streets, and to keep the highways occupied by their apparatus in substantially the same condition as to convenience and safety as they were in before such occupancy. The law applicable to this case has been well settled in Kentucky in the several cases that have been brought to this court for final adjudication. It is that those who manufacture or use electricity for private advantage must do so at their peril, and the only way to prevent accidents, where a deadly current is used, is to have perfect protection at those points where people are likely to come in contact with it. (*McLoughlin v. Louisville Electric Light Co.*, 18 Ky. Law Rep., 759; *Schweitzer, Adm'r v. Citizens General Electric Co.*, 21 Ky. Law Rep., 608; *Thomas' Adm'r v. Maysville Gas Co.*, 23 Ky. Law Rep., 1879; *Macon, By, & Co. v. Paducah Street Railway Co.*, 23 Ky. Law Rep., 46.)

It is not deemed necessary to discuss in detail the instructions given in this case by the lower court. In so far as they attempt to set forth the degree of care required of appellant, they were more favorable to it than the law and evidence authorized, for they in substance told the jury that appellant was only required to use such means as would prevent the escape of the current; instead of which they should have been instructed that it was appellant's duty to know the condition of the wire, and to use the utmost care

to keep it safely protected by proper insulation in order that those exposed to likelihood of contact with it might escape injury.

The instruction as to contributory negligence complained of by appellant was certainly as favorable to it as the law allowed, as by it the jury were told that "if said Fain purposely took hold of said pulley wire, and by so doing caused it, or any wire, to come in contact with another wire charged with an electric current, this was negligence on the part of said Fain."

The Supreme Court of North Carolina, in *Haynes v. Gas Co.*, 114 N. Y., 308, which was an action to recover damages for the death of a ten-year-old boy by coming in contact with a live electric wire on the ground, said: "A child is held to such care and prudence as is usual among children of his age and capacity. The defendant contends that the deceased was ten years of age, a very healthy, intelligent, moral and industrious boy. Let us assume this to be true. As he returned to his home the morning of his death, passing along the streets of the city, he was trespassing on no one's property. He was walking where he had a right to walk, not by mere permission or invitation, but because he as one of the public had an absolute right so to do. The wire was on the sidewalk; only one witness saw him when he took hold of the wire, and the wire threw him in the ditch.' That witness testified that 'he did not have to reach for it; he just reached out his hand and took it; he did not have to stoop.' No witness testified that there was anything from which even an adult could have inferred that this wire was carrying a deadly current of electricity, or, indeed, any current at all. \* \* \*

"We should be very loath to declare an adult guilty of negligence for grasping a wire such as this one under circumstances such as the defendant contends surrounded the deceased. We certainly can not declare that this boy, whose conduct must be judged with due regard for his boyish nature and habits, negligently caused his own death. The instruction that 'upon the evidence the plaintiff's intestate was not guilty of contributory negligence' should have been given."

It is rare, indeed, that two cases can be found, the facts of which are so nearly alike as in the case before us and the North Carolina case *supra*.

The boy Fain was, when killed, traveling on the sidewalk, where he had a right to be. The deadly wire was in easy reach; he, boy like, inadvertently, or purposely, touched or took hold of it, without knowing of the danger of so doing, as there was nothing in its appearance to give him warning of the presence of the mysterious and deadly current with which it was charged. Under such circumstances it may be doubted whether there was any proof of contributory negligence to go to the jury, but the question of whether he was guilty of negligence in thus taking hold of the wire was properly submitted to the jury by the instructions of the lower court, and we think the conclusion of the jury, that he was not guilty of such negligence, is fully sustained by the evidence.

We do not approve of some of the phraseology of the instruction as to compensatory damages given by the lower court, but as the verdict allows only reasonable compensation to the decedent's estate for the loss of his life, and it is manifestly evident that the jury were uninfluenced by passion or prejudice in fixing the amount thereof, we are convinced that appellant was not

prejudiced, nor its substantial rights injured, by the giving of the instruction.

Being of the further opinion that the lower court did not err to the appellant's prejudice in the giving or refusing of instructions, nor in refusing it a new trial, the judgment is affirmed, with damages.

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ILLINOIS CENTRAL R. R. CO. v. GLOVER.

(Filed January 29, 1908—Not to be reported.)

1. Railroads—Negligence—Appellee took an accommodation train from Central City to Leitchfield, and paid his fare. There was a passenger train following the accommodation and running faster, and the conductor promised to transfer appellee to the passenger train if it approached. At the station where appellee expected to make the transfer appellee got off the train and requested the conductor to give him his transportation, but he failed to do this, and just then the train started and the conductor told him to get on, but as he attempted to do so the train gave a sudden jerk, which threw him down, inflicting painful and severe injuries to his knee. This action was brought to recover damages, and a verdict was rendered giving appellee \$500 damages. Held—That the instructions given the jury were fair, and the jury having decided in favor of appellee as against the statements of the conductor, it will not be disturbed.

2. Jurisdiction—After entering a demurrer to the petition which the court passed on it was too late to interpose objection to the jurisdiction.

J. D. Atchison, C. S. Walker, J. M. Dickinson and Pirtle & Trabue for appellant.

Lawrence P. Tanner for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Hobson.

Appellee Glover took appellant's accommodation train at 6.30 on the morning of May 6, 1901, at Central City, to go to Leitchfield, and paid the conductor the fare. It was a slow train; there was a passenger train behind it which made better time, and finding that his train would not get into Leitchfield as soon as he wanted to get there, he asked the conductor if he would give him a ticket or the money back he had paid in order that he might get on the passenger train. The conductor told him to ride on with him, and if that train overtook them he would give him the money that he might get on the other train, but he believed the accommodation would beat the passenger to Leitchfield. When they got to Goff appellee, learning that the passenger train was coming close behind, got out of the car and went to where the conductor was to see him about getting his transportation on the other train. Just as he got to the conductor and named the matter to him he signalled the engineer to go ahead, and said to appellee he did not have time to give him his transportation. As the train started appellee asked him what he must do, and the conductor told him to get on the train. As he went to get on at the front end of the cabooses, where the conductor had gotten on, the brakeman told him to get on the rear end. He did this, and just as he went to get on the train it

gave a sort of lunge, and he was jerked down and rolled over on the ground, by reason of which his left knee was severely hurt. The conductor was standing on the back end and halloed to him to catch the next train, which he did, and at the next station the conductor gave him his grip, and also arranged with the conductor of that train for his transportation to Leitchfield. He was confined to bed eight or ten days; was on crutches five or six weeks, and was lame for about four months. On the trial the knee was exhibited to the jury, and they found a verdict for appellee in the sum of \$500. The testimony is conflicting as to what took place between him and the conductor, and also as to the speed of the train. The conductor says he told him not to get on the train, and that it was running at a rapid rate; while appellee says that the train was running about three miles an hour, and that he would have had no trouble in getting on but for the sudden lunge of the train. The proof for appellant showed there was no sudden jerk of the train, but only that it was running fast. Under instructions that seem to us substantially to have submitted the issue to the jury, the jury followed or took as true appellee's version of the transaction, and, therefore, the question in the case is, was he entitled to recover on the facts stated by him? The court told the jury that if the speed of the train was such that persons of ordinary judgment should have perceived the danger of attempting to board it, they should find for the defendant, although they believed from the evidence that the conductor told him to get on. He also told the jury that although appellee did not perceive the danger himself, still if he was told by the conductor, or warned by others, and persisted in the attempt, and so received his hurt, when but for his own negligence he would not have been hurt, they should find for the defendant. Under the instructions of the court, taken as a whole, the jury could not have found for the plaintiff unless they believed from the evidence that the train was running at such a slow speed as that a person of ordinary judgment and discretion might have deemed it safe to get upon the train, and the conductor told him to get on, and he made the attempt, believing it safe to do so; for he and the conductor agree that there was a conversation between them as to his getting on the train, the conductor saying he told him not to get on, and appellee saying he told him to get on. The jury were, therefore, bound to believe either that the conductor told him not to get on, or that he told him to get on. Their verdict was thus a finding that the conductor told him to get on the train. While numerically the preponderance of the testimony is against the plaintiff, there are circumstances sustaining his version of the transaction, and the verdict is not so palpably against the evidence or so excessive as to warrant us in disturbing it.

While there is some conflict in the authorities, the later cases sustain the rule that where a passenger gets off his train at an intermediate station and then undertakes to board it while moving slowly, by the direction of the conductor, or servant in charge, he is not per se guilty of negligence, but it is a question for the jury whether, considering the speed of the train, the direction he received, and other circumstances, he exercised proper care. (2 Thompson on Negligence, section 2995-2998; *L. & N. R. R. Co. v. Eakin's Adm'r*, 20 Ky. Law Rep., 736; *I. C. R. R. Co. v. Whitaker*, 28 Ky. Law Rep., 898; *Carr v. Eel River, &c., R. R. Co.*, 21 L. R. A., 364.) The case

of *Hunter v. Cooper's Town, & Co., R. R. Co.*, 12 L. R. A., 431, and others like it, differ from this case, in that here appellee had paid his fare on this train; his baggage was on the train; the conductor had agreed to transfer him to the other train; so appellee had a right to be carried on this train.

The fact that it was a freight train did not change the rule of law applicable in such cases, although appellee was required to use such care as was proper in view of its being a freight train. The fact that it was a freight train was simply a circumstance to be considered in connection with the other facts in the case on the question of negligence. (3 *Thompson on Negligence*, sections 2901-2903; *Ohio Valley R. R. Co. v. Watson*, 63 Ky., 654.)

The objection to the jurisdiction of the Davless Circuit Court was waived by the filing of a general demurrer to the petition and obtaining the judgment of the court as to its sufficiency, for the defendant could not, without objection to the jurisdiction of the court, submit the case for a judgment on a general demurrer, and then after failing thus to defeat the action, plead to the jurisdiction of the court to which it had submitted. (*McDowell v. C., O. & S. W. R. R. Co.*, 90 Ky., 364; *Georgetown Water Co. v. Central Thompson-Houston Co.*, 16 Ky. Law Rep., 125.)

On the whole case we see no error to the prejudice of the substantial rights of the appellant.

Judgment affirmed.

#### CHESAPEAKE & NASHVILLE RY. v. SPEAKMAN.

(Filed January 29, 1903.)

Railroads—Negligence—Statute of limitation—Estoppel—Appellee was a brakeman on appellant's road, and was injured by the car falling through a trestle on account of rotten timbers. In this action he recovered \$1,500 damages for his injuries, from which this appeal is prosecuted. The statute of limitation of one year was relied on as a defense. The reply alleged as a matter of avoidance that appellee's failure to bring the action until after the expiration of one year from the injury was caused by the fraudulent conduct and misrepresentation of the officers of appellant company, who promised appellee if he would not bring suit that it would pay him full wages while he was sick and continue him in its employment, besides, would compensate him for his injuries as soon as time should develop the extent of them; and that, relying on these promises of appellant, he delayed bringing the suit until after one year, when appellant discharged him and refused to compensate him for his injuries. It had paid him full wages until he was discharged. Held—That the plea avoiding the statute of limitation was valid as an estoppel against appellant to prevent it from pleading the statute, and it was properly presented in the reply.

W. C. Goad, Humphrey, Burnett & Humphrey and Dismuke & Baskerville for appellant.

L. McQuown for appellee.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Hobson.

Appellee, Charles Speakman, was a brakeman in the service of appellant,  
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and while thus engaged was injured on July 23, 1899, by reason of a trestle giving away, precipitating the train some thirty feet to the ground below. The giving away of the trestle was due to the fact that the timbers had become rotten. While there is some conflict in the evidence as to the extent of his injuries, the verdict of the jury for \$1,500 is not excessive, or palpably against the evidence. The instructions fairly submitted the questions of fact to the jury, and there is but one matter that we deem it necessary to notice at length. The action was not filed until January 5, 1901; the defendant pleaded limitation of one year; the plaintiff replied in substance that he had been prevented from bringing the action by the fraud of the defendant, and that it was estopped to plead limitation. We see no objection to the form in which the issue was raised. The matter set up in the reply was in avoidance of the plea of limitation made in the answer, and was properly pleaded in the reply. The court by an instruction aptly submitted to the jury the truth of these facts, and they having found for the plaintiff, the question is, were the facts sufficient to stop the running of the statute? For while the evidence was conflicting, the verdict in favor of the plaintiff is not palpably against the evidence. The facts referred to are as follows, the plaintiff's testimony being taken as true: Shortly after he was hurt, and while he was sick, appellant's superintendent represented to him that if he would not sue appellant his time should be allowed to run on and his wages paid until he recovered; also that he would be paid by appellant for his injuries when time showed what their extent was, and he should have in its service a permanent position as long as he lived, or as long as the superintendent remained on the road. These promises were renewed from time to time until after the end of the year from the time he was hurt, and then he was told that they would pay him nothing, and that his claim was barred by limitation. It is shown by the proof that the company did keep him on its pay roll from the time he was injured until he left its service shortly before the bringing of the suit, and paid him full wages for the time he was sick. It was charged in the pleading that these representations and promises were falsely and fraudulently made for the purpose of inducing him to bring no action within the year, and that he was induced by them not to bring the action, believing that the promises were made in good faith, and would be kept. Appellee testified that shortly before the year ran out the promises were renewed, and he was requested to get up proofs for the payment of his claim, which he did, and submitted to the superintendent. These proofs are produced, but the superintendent says they were gotten up for a different purpose.

It is earnestly insisted for appellant that a promise to pay can only revive a contract debt, and that an acknowledgment of liability for a tort that is barred by limitation can not revive it. This is true, but the promises and representations here relied on were made before the claim was barred by limitation, and the question is, may the defendant be estopped by conduct like this from relying on the lapse of time during which, by such means, it prevented the bringing of the action? Section 2592, Kentucky Statutes, is as follows: "When a cause of action mentioned in the third article of this chapter accrues against a resident of this State, and he, by departing therefrom, or by absconding or concealing himself, or by any other indirect means,

obstructs the prosecution of the action, the time of the continuance of such absence from the State or obstruction shall not be computed as any part of the period within which the action may be commenced."

In *Newton v. Carson*, 80 Ky., 309, about the time the petition was filed the surety in a note went to the plaintiff and told him that if he would not sue on the note and save the defendant any further cost he would, during the next term of court, confess judgment. He thus procured the plaintiff not to issue summons on the petition, and by some feigned excuse or other protracted the matter until the last day of the term, when, the statute having run, he pleaded limitation. The court held the plea bad, and said that to countenance such chicanery was to make the court a secure means for perpetrating frauds. This rule was followed in *Reed v. Hamilton*, 98 Ky., 619. In *Wood on Limitation*, section 66, the rule as relied on by appellant is fully stated, but in note A. to this section, 3d edition, it is said: "While an action of tort can not be based upon or revived by a promise, yet if the defendant's conduct induces the plaintiff to refrain from bringing an action of tort within the period fixed by the statute, the defendant may be thereby estopped to rely upon the statute."

In *Armstrong v. Levan*, 109 Pa., 177, which was an action of tort like this, where there was a plea of limitation, and a similar matter in avoidance relied on, the court said: "The plaintiff in error has given us an elaborate argument to show that a promise to pay after the statute has run will not revive a tort, and has cited numerous authorities in support of this proposition. We concede his law to be sound; his authorities fully sustain his point. The difficulty in his way is that they do not meet his case. It was not the question of the revival of a tort by a promise to pay made after six years. The conversation referred to occurred before the statute had run, and it was a distinct promise to pay in consideration that the plaintiff below would not sue. If, therefore, she relied upon this promise; if she was thereby lulled into security, and thus allowed the six years to go by before she commenced her suit, with what grace can the defendant now set up the statute? The promise operated not to revive a dead tort, but as by way of estoppel. It has all the elements of an estoppel. The plaintiff relied and acted upon it; she has been misled to her injury; but for the defendant's promise she would have commenced her action before the six years had expired."

This case was followed and approved in *Renackowsky v. Board of Commissioners*, 122 Mich., 618. *Hofferton v. L. & N. R. R. Co.*, 17 Ky. Law Rep., 1822, is rested on the ground that the reply there was insufficient, as the plaintiff had no right to consult his adversary as to when the statute would run, and could not be allowed to plead ignorance of the law, even if wrongfully advised by counsel; but the court added: "This averment, however, as coupled with the promise to keep the plaintiff in its employ if he would not sue, might be held sufficient if there had been an averment that he had been retained in accordance with the promise and then discharged from the service, it being the inducement for him to forbear bringing his action."

What follows in the opinion in regard to the propriety of an amended petition has reference to the case of the plaintiff's recovering damages for a



breach of the contract, and not on his original cause of action. In the case before us appellee was retained in the service, in accordance with the promise; this was the inducement for him to forbear from bringing his action; and after the end of the year he was discharged from service. The suit here was brought on the original cause of action. The defense of limitation could not be presented by demurrer, and it was, therefore, unnecessary for the plaintiff to anticipate this defense in his petition, for the defendant might have chosen not to plead the statute. When it did plead it, it was proper for the plaintiff to reply and set up the matter in avoidance of the plea, showing that the statute had not run. No matter need be set up in an amended petition, which might not properly be put in the petition in the first place, and it was improper for the plaintiff in this case to have set up the matter relied on in the reply in his petition unless he sought damages for the breach of the contract.

Judgment affirmed.

Judge Settle not sitting.

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WALLS v. HOME INSURANCE CO. OF NEW YORK.

(Filed January 28, 1903.)

1. Insurance—Waiver of forfeiture of policy—Appellee issued a policy of fire insurance on appellant's house for a term of years, the premium to be paid in annual installments of \$7.50 each, and a note for the entire premium was given, and it was provided in said note that in the event of failure to pay any installment of premium to the agent at the office in Chicago should authorize a cancellation of the policy and a termination of the liability of the company until it should be reinstated by order from the home office. The premium due June, 1900, was not paid. Appellee retained the note and appellant retained the policy. In July following the note was sent to its agent in Springfield for collection, and he sent three notices to appellant to pay the past due premium. He retained the note until the following January and returned it to the home office. The company took no further steps in the matter until after the fire occurred. Appellant, a few days before the fire, sent a check for \$7.50 to the Chicago office, but it was not received or paid. In this action to recover the loss under the policy appellee claims that its liability under the policy ceased by reason of the failure of appellant to pay the premium due. A waiver of the forfeiture of the policy is relied on by appellant. Held—That the parties had the right to make any contract it chose, and impose such conditions as they saw proper, and that appellee had the right to waive any conditions made in its favor, and that, under the circumstances shown in this case, the jury were authorized to find that appellee had waived its right to deny the liability for the loss.

2. Evidence—Payment—While the check sent in March was not sufficient to establish payment of the premium, it was relevant as tending to show that appellant had not abandoned his contract, and that he considered himself bound thereon.

John W. Lewis for appellant.

W. C. McChord for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant Walls effected a contract of insurance upon his dwelling house and contents with appellee insurance company for a term of years upon the plan of paying the premiums in annual installments. The first premium was paid in advance for the first year's insurance. Appellant, when taking the insurance, executed to appellee a note for \$30, for the aggregate of the four remaining years of the term. An equal part, to wit, \$7.50, was to be paid the 1st day of June of each year, and in advance for the insurance for that year. The note contained this additional stipulation: "And it is hereby agreed that in case any one of the installments herein named shall not be paid at maturity, or if any single payment promissory note (acknowledged as cash or otherwise), given for the whole or any portion of the premium for said policy, shall not be paid promptly when due, this company shall not be liable for loss during such default, and the said policy shall lapse until payment is made to this company at the Western Farm Department at Chicago, and in the event of nonsettlement for time expired, as per terms on short rates, the whole amount of installments or notes remaining unpaid on said policy may be declared earned, due and payable, and may be collected by law."

The policy contained an expression of the same idea, and other conditions relating thereto, in this language: "But it is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any installment of the installment note given for the premium upon this policy remains past due and unpaid; or while any single payment promissory note (acknowledged as cash or otherwise), given for the whole or any portion of the premium, remains past due and unpaid. Payments of notes and installments thereof must be made to the said Home Insurance Co. at its Western Farm Department office in Chicago, Ill., or to a person or persons especially authorized to collect the same for said company. \* \* \* The company may collect, by suit or otherwise, any past due notes or installments thereof, and a receipt from the said Chicago office of the company for the payment of the past due notes or installments must be received by the assured before there can be a revival of the policy, such revival to begin from the time of such payment. \* \* \* This company reserves the right to cancel this policy, or any part thereof, by tendering to the assured the unearned pro rata premium, after due notice to that effect, either by mail addressed to the assured at his, her or their postoffice address as named in this policy, or otherwise; the assured may also cancel when the premium or note or obligation given for such premium has been actually and fully paid in cash, in which case the company shall retain the expenses of writing, procuring and taking the risk, and the usual short rates from the date of the policy up to the time it is received for such cancellation."

There is contained in the policy this further expression: "This contract being based upon the mutual good faith of the parties hereto, it is agreed," etc.

The installment due June, 1900, was not paid. Appellee retained the note. Appellant retained the policy. Appellee wrote appellant to pay the installment after it was due and default had been made. In the following July appellee had sent the note to its agent at Springfield, near appellant's post-office address, with instructions to collect the note. The agent sent appellant three notices. The agent's evidence on this point is as follows:

"Q. Did you notify Mr. Walls?"

"A. I sent him three notices."

"Q. What was the substance of them?"

"A. That his installment due on the 1st of June, 1900, was in arrears, and that if he would send me the money I would have the company send him a receipt. That is about the way I sent the first two notices usually. I always used about the same form. I don't remember the words exactly. In the last notice I sent him in January, I reckon, I notice that I turned the note back into the company about the latter part of January (I have the receipt for the note, I wrote them that I could not collect it), I told him that he would have to pay it or I would send it in to the company, and let them put it out for collection."

Appellant failed to respond to these notices until March 19, 1901, when he mailed to appellee's agent at Springfield a check on the Peoples Deposit Bank of Springfield for \$7.50. It seems to be pretty clearly established that this check was mailed at appellant's postoffice, but that it was not received by the agent. Certain it is that it was not presented to the bank nor paid.

On the 28d of March, 1901, the insured house was destroyed by fire, and the contents destroyed or badly damaged. Upon this state of facts the court, at the conclusion of the evidence, ordered a verdict for appellee. The correctness of these instructions depends upon whether appellee had waived the conditions of its policy and of the note, that the policy should lapse, and the company not be liable for loss during default in the payment of the premium. It will be observed that the insurance company not only retained the note executed by appellant for the premium after it was due, but that it unconditionally requested the payment in full of that part of the note which represented the whole premium for the year beginning June 1, 1900. Nothing was said at the time concerning the company's claim that the policy was lapsed, or that the company's liability thereon was suspended during such time as the premium was unpaid. Nor was there coupled with the demand any statement by the company limiting its liability to future insurance, and denying its liability for the time intervening since the default in the payment of premium.

In *Moreland v. Union Central Life Insurance Co.*, 104 Ky., 129, there had been default in the payment of the insurance premium past due, evidenced by the note of the assured, the policy containing a provision that the failure to pay any of the first three installments, or notes or interest upon the notes given for any of said premiums, on or before the days on which they became due should avoid and nullify the policy without action on the part of the company. The company in that case retained the premium note after its maturity, and made an unconditional demand for its payment, and indeed placed it in the hands of its attorney for collection. The court formulated these two questions in that case as the propositions between which the law must make choice in giving construction and effect to such act on the part of the insurance company, namely: "The question is, can the company insist on payment of the note, and at the same time consistently say that the policy, having been forfeited by its nonpayment, remains forfeited? Or, will not the real intention of the parties be effected by holding that, although the policy was forfeited by this nonpayment, yet as the retention of the note

and demand for its payment after maturity are acts inconsistent with an intention to insist on a continued forfeiture, therefore, the forfeiture is to be deemed waived."

The court chose the latter, not being able to find satisfactory legal principle upon which the company might "insist on the one hand on the insured complying with his part of the contract, and on the other insist that the contract is a dead one." The court held, too, that all the insured was required to do after the default in premium under such condition, if it did not wish to continue its liability under the policy, was to so act that its conduct would not be inconsistent with the claim of nonliability.

Counsel for appellee here puts the question: Can not these parties make such contract as is suitable to themselves, and may it not be enforced according to its terms? Their right to contract is not limited in respect to the terms of the insurance. While parties may contract with reference to insurance, they may also waive conditions of their contract. The question here presented is, has the insurer waived that condition of its contract of insurance providing for lapsing of the policy upon default in payment of the premium? That the insurer could not be compelled to carry this liability under the contract without payment in advance is not to be doubted. On the other hand, if it saw proper to carry the liability without the payment of the premium in advance, it could do so. Here the premium had been in default from June until January following, when the company was insisting upon the payment of the whole of the premium for the current year. Nothing would be owing the company for the time from June 1, 1900, until the dates of the respective demands for the payment of the premium thereafter if, as a matter of fact, the policy had lapsed, and the company was not bound thereon, because manifestly, if the company was not bound for the loss in case of fire the insured was not bound for the payment of the premium during such time. On the other hand, if the insured was bound for the payment of the premium, and was so treated by the company and acceded to by the insured, then it must follow that the company was bound upon its policy, for that, and that alone, could uphold as a consideration the promise and obligation of the insured to pay the premium.

As said in the Moreland case *supra*, the action of the company in demanding unconditionally the payment of the note was an act inconsistent with the idea that the policy had lapsed, and that it was not bound thereon. The same principle was approved and applied by this court in *Moore v. Continental Insurance Co.*, 21 Ky. Law Rep., 977.

We are of opinion that the conduct of appellee amounted to a waiver of the conditions of the policy providing for the suspension of its liability after default in the payment of the premium until the premium should be paid. It is claimed by appellant that the mailing of the \$7.50 check heretofore referred to was in law a payment of the premium due June 1, 1900. It was shown by the testimony of appellant, and by the postmaster at whose office the letter was mailed, that the check was filled out and signed and placed in an envelope, properly addressed, and that it was placed in the mail pouch. It is claimed that after the necessary time had elapsed for it to have reached the addressee in due course, its receipt and acceptance will be presumed, and it will be adjudged that the facts stated constituted a payment. This

contention can not be sustained in this case for the following reasons: First, it was not pleaded that the premium had been paid; second, it was not shown that appellee's agent received or accepted the check in payment; third, the check was not in fact paid, nor presented to the bank upon which it was drawn, nor, fourth, did appellant have at the time, or any time thereafter, before the fire, enough funds in the bank to his credit to have paid the check. However, the fact that appellant sent the check under the circumstances stated by him was relevant as tending to show that he had not abandoned his contract, and that he considered himself bound thereon.

But for the reasons indicated the judgment must be reversed and the cause remanded for a new trial under proceedings not inconsistent herewith.

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WILSON v. DUPREE, &c.

(Filed January 28, 1908—Not to be reported.)

Practice—Dismissal of action without prejudice—At the conclusion of the evidence for plaintiff the court announced that it would have to give a peremptory instruction for defendant. Plaintiff then moved to dismiss the action without prejudice, claiming said right under section 371, Civil Code of Practice, but his motion was overruled and the peremptory instruction given for defendant. Held—That the court erred in overruling plaintiff's motion to dismiss without prejudice.

Shelbourne & Kane for appellant.

J. M. Nichols & Son for appellees.

Appeal from Carlisle Circuit Court.

Opinion of the court by Judge O'Rear.

In this suit, involving the title to a strip of land, consisting of a part of an island in the Mississippi river, the plaintiff failed to so connect his title with the Commonwealth as to authorize a submission of the case to the jury, the answer having put in issue plaintiff's title to any part of the boundary in controversy. The court announced at the conclusion of plaintiff's evidence that a peremptory instruction to the jury to find for the defendant would have to be given. Thereupon the plaintiff (appellant) moved to dismiss his action without prejudice, as permitted by section 371 of the Civil Code. This motion was overruled, and the court gave the jury a peremptory instruction to find for the defendant, which was accordingly done. This action of the court is one of the complaints made of the judgment on appeal.

This very question was presented and considered by this court in *Vertrees' Adm'r v. Newport News, &c., Co.*, 95 Ky., 314. There it was held that the plaintiff had the right to dismiss his action without prejudice at the time he made the motion, and the court erred in overruling it. The other questions made on this appeal are not so presented by the record that we feel safe in passing upon them. Upon a return of the case plaintiff should be allowed to dismiss his petition without prejudice.

The judgment is reversed and cause remanded for proceedings not inconsistent herewith.

## POTTER, &amp;c. v. SKILES, &amp;c.

(Filed January 28, 1903.)

Dower—Where property is assigned for the benefit of creditors and lands are sold in which the assignor's wife had united with him in executing a mortgage, the wife is entitled to be compensated for her inchoate right of dower out of any surplus beyond the mortgage debt arising from said lands; also the value of such right in all other lands belonging to the assignor, and where the purchaser of the land agreed to pay the wife a fixed sum in satisfaction of her claim of dower she is entitled to same as against the claims of her husband's creditors.

John M. Galloway for appellant Potter.

Lewis McQuown and John B. Rodes for appellant Mrs. Smith.

Sims & Grider for appellee Skiles.

Wright & McElroy for appellee bank.

Appeal from Warren Circuit Court.

Judge O'Rear delivered the following modification of opinion:

The opinion delivered herein November 18, 1902, in so far as it treats of the rights of Mrs. Mamie Smith, the wife of the debtor whose property was involved in this litigation, is withdrawn. A rehearing is granted to her. It will be borne in mind that the land of her husband had been sold under execution. Failing to bring two-thirds of its appraised value at such sale his equity of redemption was also sold under execution. This sale is expressly authorized by statute. The same statute also gives to such debtor the right to redeem from both sales within a year from the date of the first sale. (Sections 1684-1686, Kentucky Statutes.)

The executions under which this land was sold were against the husband alone. Any sale and conveyance of the land passed the title of the husband necessarily subject to the inchoate right of dower of the wife therein. Although a part of the land was taken to satisfy a mortgage in which she had joined, relinquishing her dower so far as the mortgage debt was concerned, yet as to the residue of the land, and as to the proceeds of the sale of such residue, where the whole tract was sold under these proceedings, she continued to have her inchoate right of dower.

Section 2135, Kentucky Statutes, is: "The wife shall not be endowed of land sold, but not conveyed by the husband before marriage, nor of land sold in good faith after marriage, to satisfy a lien or encumbrance created before marriage, or created by deed in which she had joined, or to satisfy a lien for the purchase money: but if there is a surplus of the land or proceeds of sale after satisfying the lien she may have dower out of such surplus of the land or compensation out of such surplus of the proceeds, unless they were received or disposed of by the husband in his lifetime."

The wife's claim, therefore, was a valid one, and valuable, although it was dependent necessarily upon her outliving her husband. The purchaser, Skiles, desired a title free of the encumbrance of her claim. He contracted with her to pay her \$799 for it. She refused to join in the deed conveying her potential dower unless she was first satisfied. The purchaser and she agreed that he should pay her \$799 for her interest. Whether this was ex-

cessive is not material in this case. Skiles, the purchaser, is not complaining that he has paid too much. He is not seeking to avoid his contract for any reason. Mrs. Mamie Smith is insisting upon it. We can not see why these persons, competent under the law to make a contract, may not make such one as this. Nor can we see wherein the creditors of the debtor, Smith, are affected by it.

The original opinion holds that Smith's right of redemption of the last sale, the one to the bank, was not subject to sale under the execution of his creditors; that his right of redemption of his interest sold was a personal one, which he could exercise or not, and that his failure to exercise it was not a subject of complaint at law by his creditors. If he had failed to exercise it the interest of his wife, by reason of her inchoate dower, would not have been less than it was after he had exercised it. His action or nonaction could not affect its value. Therefore, the mere fact that the purchaser of the land, who redeemed it under Smith's assignment of his right, paid Mrs. Smith more for her dower than the court might believe the dower was worth, can not affect her right to receive and retain the agreed price. Of course, if it had been made to appear that Smith had conveyed his property, which otherwise would have been subject to his creditors, to a vendee who paid the consideration to the debtor's wife, nominally as dower, but as a matter of fact for the debtor's interest, the arrangement would be a fraud, and the subterfuge would not be allowed to stay the court's remedial process. But we can not find that such was the case here.

The judgment, in so far as it subjects any sum agreed to be paid to Mrs. Mamie Smith for her dower by Skiles to the creditors of C. C. Smith, is reversed and the cause is remanded, with direction to adjudge the whole of that sum to Mrs. Smith.

Whole court sitting, except Judge Settle.

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JONES v. COMMONWEALTH.

(Filed January 28, 1903—Not to be reported.)

Smith & Ingram and Wm. Low for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Settle.

In this case appellant was indicted in the Bell Circuit Court for placing an obstruction on the tracks and switches of a railroad in operation, and thereby causing the engine and cars of a train to be upset and thrown from the track. The record presents a state of facts and questions of law identical, except as to the offense charged, with those presented by the record in Jones v. Commonwealth (the same parties), ante, 1434, this day decided, and this case is reversed for the reasons given in the opinion in that case, with direction to the lower court to proceed upon the return of the case as in that opinion ordered.

## ILLINOIS CENTRAL R. R. CO. v. DOTSON.

(Filed January 29, 1903—Not to be reported.)

Railroads—Negligence—Appellee, with three others, were in the employ of appellant as section hands, and one day when the weather was too inclement to work they borrowed the hand car from the foreman and went to a distant town on pleasure. Just as they were starting the foreman requested them to bring his mail and fifteen cents' worth of nails. As they were returning the hand car jumped the track and appellee was thrown from it, falling on the track, sustaining injuries for which he instituted this action to recover damages. At the close of appellee's evidence, and at the close of the entire evidence, the court refused a peremptory instruction to find for appellant. A judgment for \$500 in favor of appellee having been rendered, appellant prosecutes this appeal. Held—That the court should have given a peremptory instruction for appellant as the proof shows that he was injured while he was not engaged in performing duties for the company, but while on a pleasure trip, in nowise connected with his employment for the company.

Quigley & Quigley and Pirtle & Trabue for appellant.

John G. Miller for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by appellee in the McCracken Circuit Court to recover from appellant damage for injury received by him from being thrown from a hand car while in appellant's service.

Appellee, in October, 1899, belonged to what was known as bridge gang No. 9, of which A. Bernard was foreman. At said time these employees of appellant were stationed at a point on appellant's line of railroad called Hunsacker, where they were engaged in repairing a bridge belonging to appellant. It appears that one morning about 7 o'clock, the weather being too inclement to work, appellee, in company with five or six other employees of appellant, who belonged to said bridge gang No. 9, took a hand car, which belonged to appellant, and used by its employees in connection with their work of repairing the bridges along its line, and went off from Hunsacker to a small town called Dyersburg, about four miles distant. When within a short distance of the town of Dyersburg the hand car jumped the track, and appellee was thrown violently forward, falling upon one of the rails of the track, which injured him in such manner as to cause him considerable pain.

Neither appellee nor any of the men with him believed that he was seriously or permanently injured, but after the expiration of a few days he left appellant's services and returned home, and, as said before, instituted this action for the purpose of recovering damages for his injury. He alleges in his petition that he was injured while in the employ of appellant, and that the injury was caused by defects in the hand car furnished by appellant for the use of its employees, constituting bridge gang No. 9, which defects were unknown to him, but which were known to appellant, or could have been known by the exercise of ordinary watchfulness and diligence. The petition further sets forth, seemingly in aggravation of damages, the fact that ap-



pellee was entitled to go in the hospital kept by appellant for the benefit of its injured employes, but which appellant, upon application of appellee, refused him admission.

All the material allegations of the petition are put in issue by the answer, and especially the fact that appellee was injured while in the service of appellant, it being affirmatively alleged that his injuries occurred while he and some of his companions of bridge gang No. 9 were on a leisure jaunt to Dyersburg, they having borrowed appellant's hand car for making the said trip. A trial of the cause by jury resulted in a verdict for appellee, who was the plaintiff below, in the sum of \$500, upon which verdict judgment was duly entered. A motion for a new trial having been made by appellant, and overruled by the court, the case is here for review. At the close of appellee's testimony, appellant moved the court to instruct the jury peremptorily to find for appellant (defendant), which motion was overruled. At the close of all of the testimony in the case appellant renewed its motion for peremptory instruction, which was also overruled.

Having reached the conclusion that the court erred in overruling these motions of appellant for peremptory instruction, it will not be necessary to notice the other instructions given by the court, or any of the other instructions asked for by appellant. Appellee states that upon the morning he was hurt Noah Morris came to him and others of the bridge gang, who were in one of the boarding cars used by appellant's employes, and proposed that they should take the hand car and go down to Dyersburg. Appellee tried to state that Noah Morris said, in this conversation, that the boss, A. Bernard, had ordered this to be done; but the court very properly excluded this testimony as hearsay; so the sum total of appellee's testimony upon this question was that Noah Morris and appellee, and four or five others of the bridge gang, took the hand car and started to Dyersburg. He does state that after they had started the foreman, A. Bernard, told Morris while down at Dyersburg to get his mail, and also bring back 15 cents' worth of nails. To the same effect is the testimony of Jacob Edwards, one of the bridge gang, who went with appellee on the hand car to Dyersburg. Appellee was unable to show that the foreman made any orders for him or his companions to take the hand car and go to Dyersburg; and the most that he could show was that, after the trip was made up and the men started, the foreman called to Noah Morris and told him to bring back the mail and 15 cents' worth of nails.

The fact that appellee was hurt while engaged in the business of appellant lies at the very base of his right of recovery for the injury in question, and it was necessary, in order to recover damages, that he should show this to be true. We do not think that the mere request, or order, of the foreman after the party had been arranged for and started to get his mail and 15 cents' worth of nails, turned what would otherwise have been a mere pleasure jaunt into business of the company. Appellee and his companions were not, primarily, going on the business of appellant. There was nothing in Dyersburg for them to do for appellant, and the evidence shows that when they got to Dyersburg, except getting the mail and nails in question, appellee and his companions merely wandered around the town for an hour or so, and then returned to camp at Hunsacker.

It seems to us a proposition utterly incredible, that six or seven men, who were on appellant's pay roll at \$1.40 to \$2 per day, each, should have been sent with a hand car four miles for the mail and 15 cents' worth of nails, when two men would have been amply sufficient, according to the evidence, to have made the trip with the hand car. The defendant's evidence upon this point put the matter beyond question. Noah Morris, who was also introduced by appellee, testified that he received no orders from the foreman to go to Dyersburg, and that he and his companions went down on the hand car simply because they desired to go for their own pleasure, and that, for this purpose, he had borrowed the hand car from the foreman. The foreman, A. Bernard, testified that, after some hesitation, he consented to lend the hand car in question to Noah Morris and his companions to make the trip to Dyersburg; that the parties were not on the company's business, but were going of their own volition and their own pleasure, and that during the time they were not on the company's pay roll. And this is all the evidence there is in the record upon this point. It follows then, that there was no evidence whatever to sustain appellee's allegation that he was hurt while in the employ, or while doing service for, the appellant; and this being true, there was nothing to submit to the jury, and the motion of appellant for peremptory instruction should have been sustained. Appellee's claim for the right of admission to appellant's hospital must follow the merits of his case.

Wherefore, the case is reversed for proceedings consistent with this opinion.

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FICTET SPRING WATER ICE CO., &c. v. CITIZENS INSURANCE CO. OF PITTSBURG, PA.

SAME v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

(Filed January 28, 1903—Not to be reported.)

1. Insurance—Description of location of personal property—Agents—These two actions were instituted on two policies of fire insurance to recover for loss of wagons which were insured as the property of the ice company, and were issued to the company, but were afterwards transferred to its assignee for the benefit of creditors. The only defense made was that the property was not situate in the buildings stated in the policies. Plaintiff alleged that the policies, by mistake, stated that the wagons were stored in plaintiff's frame stable building and sheds adjoining, instead of in the frame wagon shed building in which they were stored at the time they were insured; that the mistake was made by the agent who wrote the policies, who had knowledge, from personal inspection of the premises, of the wagons and location of the wagon shed buildings and stables on the grounds, and asked that the policies be corrected and the loss recovered. Held—That as the proof shows clearly that the agent who wrote the policies had personal knowledge of the property insured and its location, and made the mistake in the description in the policies, and plaintiff is, therefore, entitled to a correction of the mistake and to recover on the policies.

2. Evidence—Parol evidence is admissible to correct the mistake in policy of insurance as to the location of personal property insured.

Shackelford Miller and Barnett & Barnett for appellants.

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John G. Strother and Gibson, Marshall & Gibson for appellees.

Appeals from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Chief Justice Burnam.

These two appeals are prosecuted upon one record from a judgment of the Jefferson Circuit Court rendered in the two actions which, by consent, were heard together. The petitions in both cases alleged in substance that on the 18th of May, 1895, the defendant companies issued and delivered to the plaintiff their respective policies of insurance on certain personal property owned by the plaintiff, including, among other things, twelve ice wagons stored in the frame wagon shed building of the ice company, situated on its premises between Brook, Floyd, Caldwell and Kentucky streets in Louisville; that each policy was for \$1,800, or at the rate of \$150 per wagon; that on October 7, 1895, the aggregate insurance upon the twelve ice wagons was reduced to \$1,800, of which \$650 was in the Scottish Union and National Ins. Co., and \$1,150 in the Citizens Ins. Co.; that on the 1st day of October, 1895, the ice company made a general deed of assignment of all of its property for the benefit of its creditors to S. S. Eastwood; and that the defendant companies, by written endorsement upon the policy, agreed to transfer the insurance to the assignee; and that on the 25th day of February, 1896, the ice wagons were burned up whilst in the frame wagon shed buildings in which they were stored at the time the insurance policies were issued by the defendants, who were represented by the same agent, and who went over the premises and examined the wagon shed buildings and saw the wagons stored therein, and issued the policy, well knowing that they were kept in the building in which they were finally burned up; but that in writing out the policies by mistake or inadvertence the policies erroneously recited that they were stored in plaintiff's frame stable building and sheds adjoining, and situated on their premises between Brook, Floyd, Caldwell and Kentucky streets in Louisville, Ky.; that the policies were intended to insure the twelve wagons while stored in plaintiff's wagon shed building; that both the wagon shed building and stable building were upon the ice companies premises, situated about 160 feet apart, and asked that the error in the policies describing the building in which they were stored be corrected in accordance with the facts and the contract of the parties, and for a judgment.

The defendants, in their answers, deny that the wagons covered by their policies were stored in the plaintiff's frame wagon shed building at the time the policies of insurance were taken out, or that their agent, who caused them to be insured, went upon the premises and examined the wagon shed building and saw the wagons stored therein, and knew that they were kept in this building in which they were finally destroyed; denies that there was any mistake in the description of the building in which the wagons were stored, or that they were to be insured in any other than plaintiff's frame stable building and shed adjoining, and which was not burned. No issue was raised by the proof as to the amount of plaintiff's loss. The chancellor refused the relief sought and dismissed plaintiff's petition, and it has appealed.

It is very clearly shown by the evidence that the frame stable building

and the frame wagon building were both located upon the premises of the plaintiff between Brook, Floyd, Caldwell and Kentucky streets; and that the stable was an enclosed building, with twenty stalls for horses and mules, and was used for this purpose by the ice company when the plant was in operation; that the adjoining sheds were comparatively small places, which were used by the ice company as a place for storing one or two wagons used to haul sawdust, and a buggy; that it was impossible to get a wagon of any kind into the stable, and not more than two or three at most of the large two-horse wagons could have been put under the adjacent sheds; that the place for keeping these wagons, when not in use, was the "frame wagon shed building" where they were burned, and which was expressly appropriated for this purpose. When the plant was running the wagons in actual use were left standing in the open yard, but as soon as they ceased to use them they were always stored in that building. Mr. Griswold, the president of the ice company, says that the wagon shed had been formerly used as an ice house; that it was a large building, twenty-five feet wide and seventy-five feet long, which was converted into a wagon shed for the express purpose of providing a place for storing these wagons; and that four wagons which were not in actual use were stored therein at the time the policies were taken out, and that the remaining eight, which were in daily use, were left in the open yard at night, but that as soon as the plant closed down, or they ceased to be used, they were put in this shed. "Potts," the night watchman, testifies that none of the large ice wagons which were burned were ever kept in the stable or the adjacent shed, but in the wagon shed. Hayden, the day watchman, testifies that the wagons were stored in the wagon shed when they were first purchased in 1898; that three of them were never used or taken out of the shed; that the other nine were stored therein on the 5th day of October, 1895, at the time the plant was closed down; that one sawdust wagon and some old small wagons were put in the shed. It is conceded that the description of the building in which the wagons were stored was written by the agent of the company, and the younger McPherson testifies that he knew that the building burned was used as a wagon shed. His testimony on this point is as follows:

"Q. Was there any other wagon shed on these premises at all?"

"A. There was a wagon shed across the alley that was used to be called ice house No. 6."

"Q. That was a wagon shed?"

"A. Yes, sir."

"Q. You knew that?"

"A. I knew that."

"Q. You all knew that it was a wagon shed?"

"A. Yes, sir."

"Q. You knew it all the time?"

"A. I knew it from the date of the policy there about in March."

"Q. Before the fire?"

"A. Yes, sir, before the fire."

There seems no escape from the conclusion that the agents of the insurance company knew all about this building, and that it was used as a wagon shed. Nor can there be any doubt that both parties thought that the wagons

which were burned were covered by these policies. And there is no rule of law more universal and more inflexible than that contracts are to be effectuated according to the lawful intention of the parties. In *Ætna Ins. Co. v. Jackson, Owsley & Co.*, 55 Ky., 192, where there was an ambiguity in the descriptive words of the insurance policy, this court, through Judge Marshall, said: "Common justice required that the consequence of the failure should fall upon the party who, under the circumstances, might and should have removed the ambiguity. An applicant for insurance having indicated with reasonable certainty the extent of the insurance desired, should not, after a loss has occurred, be disappointed in his just expectation of indemnity by an objection, of which the insurer was apprised when the policy was issued, while its existence and effect may have been unknown to the party insured."

And the decision in *Richardson v. German Ins. Co.*, 89 Ky., 575, was to the same effect. Innumerable authorities might be cited to support this doctrine. We do not understand the defendants to controvert the proposition that an insurance policy, like any other contract, can be corrected on the ground of mistake, and that parol evidence is admissible to show the mistake, and in what it consisted. In our opinion the testimony in this case is sufficient to justify the exercise of this power by the chancellor and to have authorized a judgment in favor of the plaintiff for the policies sued on.

For reasons indicated the judgment is reversed and cause remanded, with instruction to enter a judgment in each case in accordance with the prayer of the petition.

#### LOUISVILLE & NASHVILLE R. R. CO. v. WATKINS.

(Filed January 29, 1903—Not to be reported.)

Railroads—Negligence—Instructions—Appellee, a young man, aged about twenty years, while driving a team over a crossing of appellant's road, was struck by a train and thrown from his wagon, his shoulder broken and his wagon broken, and instituted this action to recover damages at the sum of \$5,000. He afterwards amended his petition, claiming \$150 additional damage for loss of time. On the trial, which resulted in a verdict in his favor, the court in its instruction did not limit the finding of the jury on the question of loss of time to \$150, the amount claimed in the petition on this item, but limited the whole recovery to \$5,000. Held—That this instruction was erroneous and prejudicial.

W. H. Marriott and E. W. Hines for appellant.

McCandless & James for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Barker.

Appellee, Jerome Watkins, who is a young man about twenty years of age, while driving a wagon across appellant's railway tracks, at a public crossing near Sonora, in Hardin county, Kentucky, was run into by one of appellant's trains, his wagon broken and himself thrown violently against the ground, bruising and injuring one of his shoulders. For the injury thus received he instituted this action in the Hardin Circuit Court to re-

cover damages from appellant, setting up in his petition that his injuries were caused by the reckless and wanton negligence of appellant's employees in charge of said train in failing to give proper warning at the crossing in question, so as to enable plaintiff to avoid the danger of the collision. The amount of his damage is fixed in the petition at the round sum of \$5,000. Afterwards he filed an amended petition, by permission of the court, in which he states, among other things, that he lost from work or labor, by reason of the injury set out in the original petition, five months, lacking five days, of the value of \$150. The answer put in issue all of the material allegations of the petition, and contains also a plea of contributory negligence.

The issues having been made up by reply, the case came on for trial on the 19th day of November, 1901. After the evidence was all in, and the jury instructed, in writing, the arguments of counsel heard, and the jury had retired to their room for deliberation, the court, of its own motion, in the absence of appellant's counsel, recalled the jury and added to instruction No. 3, which contains the measure of damages, the following words: "For his loss of time, if any, on account of his injury." So that the instruction, as amended, reads as follows: "If the jury find for the plaintiff they will fix the amount of his recovery at such sum in money as will compensate him for his loss of time, if any, on account of his injuries and for the mental and physical suffering he has undergone, if any, as the direct and proximate result of his injuries, and for such mental and physical suffering as it may be reasonably certain he will undergo in the future, if any, as the direct and proximate result of his injuries and for any permanent impairment of his power to earn money, if they shall believe there is any permanent impairment, and in estimating this they may consider his expectations of life and capacity to earn money, and if the jury shall believe the negligence on the part of the defendant was gross they may, in their discretion, provide in their verdict such further sum as punitive damages as they may, under all the circumstances of the case, deem proper, not, however, exceeding in all the amount claimed in the petition, which is \$5,000."

Of this action of the court appellant excepts, and is complaining on appeal. It is not necessary to decide whether or not, under the doctrine upon this question in the case of *Sears' Adm'r v. Louisville & Nashville R. R. Co.*, 22 Ky. Law Rep., 152, we could reverse this case alone upon the ground that instruction No. 3 was amended upon a material point, in the absence of the appellant's counsel, and without giving him the opportunity to discuss it with the jury. But a reference to the petition, as amended, shows that plaintiff fixes the value of his loss of time by reason of the injuries complained of at \$150, and in any instruction which the court gave on this particular item of damage it should have limited the jury to the sum fixed by appellee himself.

We think it was clearly erroneous to instruct the jury that if they find for the plaintiff they will fix the amount of recovery in such a sum of money as will compensate him for his loss of time, if any, on account of his injuries, without limiting them to the sum stated in the petition as constituting plaintiff's damage for this item. The jury did not know, perhaps, or appreciate,

their duty on this point, and as they were only limited by the whole instruction to the amount of \$5,000, they may have estimated plaintiff's damages for loss of time at far beyond the sum of \$150, although, by the pleadings, plaintiff's recovery was limited, for that item, to that sum. Having reached this conclusion it is not necessary to discuss any of the other questions raised by appellant.

Wherefore, the case is reversed for proceedings consistent with this opinion.

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BENGE, &c. v. COMMONWEALTH.

(Filed January 30, 1903—Not to be reported.)

Criminal law—Instruction—A. and B. were convicted of manslaughter for the killing of C. The killing took place at the house of D., and it is claimed for appellants on this appeal that it was done in defense of D from an assault made on him by the deceased. Errors in instructions are relied on for a reversal. Held—That the court gave for appellants an instruction authorizing the jury to acquit if they believed that the killing was done in the necessary defense of their home and those assembled there, which was favorable to them, as they did not live at the house. The instructions were not objectionable on the ground that the first instruction did not properly submit the question as to "apparent necessity," as it is not usual or necessary to embody in the first instruction generally presenting the law of murder and manslaughter the complete law of self-defense. It is customary and sufficient if the law of self-defense is correctly submitted in a separate instruction. A. was charged as an aider and abettor only, and the jury were properly instructed that before he could be convicted they should find that B., the principal, had shot and killed deceased.

C. B. Lytle, B. B. Golden and D. K. Rawlings for appellants.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge O'Rear.

Appellants, Howard Benge and Thomas Bowling, were convicted of manslaughter for the killing of Morgan Bowling. Thomas Bowling is the grandson, and Howard Benge is the son of J. C. Benge. The killing occurred at the home of the last named. It was the theory of the defense that the deceased came to the dwelling house of J. C. Benge, and without provocation began an assault upon him, and shot at him, and that appellant shot the deceased to protect J. C. Benge from death or great bodily harm, then imminent at the hands of the deceased. It is scarcely claimed, and there were but meagre circumstances tending to show, that the alleged assault was directed against appellants, or any one else but J. C. Benge. However, the court properly submitted to the jury the question also of the danger, or apparent danger, of appellants from the alleged assault.

It is argued on this appeal that there was a "feud" existing between the families of J. C. Benge and of deceased. In fact, though, Benge and appellants when testifying in this case, deny that there was, or ever had been, any ill feeling among the parties. Nor does any witness so state, except

one, another son of J. C. Benge, who said that he "had heard" of some difficulty between them. There is no complaint of any ruling of the court at the trial save as to giving instructions.

It is argued that the instructions given did not properly or sufficiently submit to the jury the right of appellants to defend their home and its inmates from assault. In fact neither of appellants was living at J. C. Benge's. They were each mere visitors there. But the court did give ample instructions on this point as if it had been their home. The self-defense instruction embodying this idea, and complained of, is as follows: "If you shall believe from the evidence that at the time the defendant, Howard Benge, fired the shot that took the life of Morgan Bowling (if you shall believe from the evidence beyond a reasonable doubt that he did so do) he believed, and had reasonable grounds to believe, that Morgan Bowling was then and there about to kill defendant or Thomas Bowling or Jim Crow Benge (J. C. Benge), or any one assembled at his house, or was about to do him or them, or either of them, some great bodily harm, and that it was necessary, or was believed by the defendant in the exercise of a reasonable judgment to be necessary, to shoot and wound deceased in order to avert said danger, real or to the defendant apparent, then you ought to find the defendant, Howard Benge, not guilty on the grounds of self-defense and apparent necessity."

The same was given, with proper changing of names, as to the other appellant. It is next complained that the idea of "apparent necessity" was not properly submitted, because under the first instruction the jury were not told that the apparent necessity was sufficient if it appeared to be so to the defendant in the exercise of a reasonable judgment. That part of the criticised instruction is: "If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, Howard Benge, in this county, and before the finding of the indictment herein, willfully and feloniously, and not in his necessary, or reasonably apparent necessary, self-defense, and not in the necessary, or reasonably apparent necessary, defense of Thomas Bowling, Jim Crow Benge, or of them assembled at his house, shot at and wounded Morgan Bowling so that he died thereby, then you ought to find the defendant, Howard Benge, guilty," etc.

It is neither usual nor necessary to embody in the first instruction, generally presenting the law of murder and manslaughter, the complete law of self-defense. It is customary and sufficient if the law of self-defense is correctly submitted in a separate instruction. In the second instruction, the one first quoted above, the jury are most explicitly told that if the defendant shot and killed the deceased in the defense either of the defendant, his co-defendant, his father or "of any of the others at his house assembled," and that such shooting was necessary, or that it appeared to the defendant in the exercise of a reasonable judgment to be necessary, to save him or the others named from death or great bodily harm then and there about to be inflicted or any of them by the deceased, the jury could not convict.

It is also complained that the court did not properly instruct the jury on the subject of reasonable doubt. That instruction is as follows: "If from all the evidence in the case the jury have a reasonable doubt of the defend-



ant, Howard Benge, having been proven guilty, they ought to find him not-guilty."

There is also an instruction, not objected to, as to their duty in event the jury should find the defendant guilty, but have a reasonable doubt as to the degree of his guilt. The criticism of the instruction just quoted is because it fails to say to the jury if they have a reasonable doubt, under the evidence, of any material fact necessary to establish the defendant's guilt they will acquit him. This expression is frequently, and not at all improperly, incorporated in this instruction, although it is, we think, necessarily included in the language quoted, for if the jury have a reasonable doubt under the evidence, or from the lack of evidence, that any material fact has been proven, which is necessary to establish the defendant's guilt, they can not believe from the evidence, beyond a reasonable doubt, that he has been shown to be guilty. This court, however earnestly invited to do so, must refuse to lay down the forms of instruction to be applied to all cases of a class. Ideal nicety of expression, however much it may be admired, can not be exacted at the expense of practical justice.

Appellant Bowling was charged as an aider and abettor only. Before he could be convicted the jury were required to find that the principal, appellant Benge, had shot and killed deceased under the instruction just discussed. In the self-defense instruction given to the jury applicable to this appellant they were limited to believing from the evidence that appellant Bowling, in aiding and abetting Howard Benge, if he did so, believed, and had reasonable grounds to believe, that either he or his co-defendant, or J. C. Benge, "or some of them assembled at J. C. Benge's house," were in danger of death or great bodily harm at the hands of the deceased then and there about to be inflicted on them, or some of them, and that "the defendant, Bowling, in the exercise of a reasonable judgment, believed it to be necessary to aid, assist, abet, advise and counsel the said Howard Benge to shoot the said Morgan Bowling in order to avert said danger, real or to the defendant, Thomas Bowling, apparent."

It is claimed for this appellant that the jury should have been told in addition that if the principal, Howard Benge, had reasonable grounds to believe, and in the exercise of a reasonable judgment did believe, himself or the others named in such danger, appellant, Thomas Bowling, had the right to aid or abet him in taking the life of deceased. Counsel overlook in this argument that the court had already required the jury to find the principal guilty before they could convict the aider and abettor in any event. At any rate, the two were tried together; the jury have found them both guilty; the instructions applicable to the principal are unobjectionable, and fully cover the point now being discussed. To have restated the same thing in that part of the instructions applicable to appellant Bowling would have been merely a multiplication of words without material enlightenment.

There is no error prejudicial to appellants and the judgment is affirmed.

## WATKINS v. MOONEY.

(Filed January 30, 1903.)

Municipal government—Authority of president of board of aldermen of second class city in absence of mayor—Vacancies in police and fire commission—Under section 3137, Kentucky Statutes, the mayor of a city of the second class may, with the approval of the board of aldermen, appoint four members of the police and fire commission, and may fill all vacancies that may occur in the board. Under section 3204, Kentucky Statutes, it is provided that in the event of the absence or disability of the mayor, the president of the board of aldermen shall act as mayor. Appellant had been appointed by the mayor to fill a vacancy in the board of police and fire commissioners, but had not been confirmed by the board of aldermen. The mayor after this left the city of Lexington and went to Frankfort on business one day and returned the next. During the day that the mayor left the president of the board of aldermen had notice of the convening of the board at an early hour the next morning served on the members. At the meeting he submitted the name of appellant as a member of the police and fire commissioners to the board, and he was rejected. The president then nominated appellee to fill said vacancy, and he was confirmed. Appellant brought this action to establish his claim to the office. Held—That the absence contemplated by the legislature in the employment of that word in said section is not merely a physical absence of the mayor from the city, but is such an absence as renders him incapable for the time being of performing the act that may be in question, which act must present such a necessity for immediate attention as to require it to be then executed. There was no such urgency, and no emergency apparent for the president of the board of aldermen to assume the duties of mayor. The law did not require that a member of said board appointed to fill a vacancy should be confirmed by the board of aldermen, and appellant is, therefore, entitled to said office.

Breckinridge & Shelby and Allen & Duncan for appellant.

Morton, Darnall & Wilson, Webb & Farrell and J. D. & G. R. Hunt for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

This suit involves the title to the office of member of the board of police and fire commissioners of the city of Lexington, appellant and appellee each claiming to be the rightful incumbent.

Lexington is a city of the second class. The statute providing a system of government for these cities creates a board called the Board of Police and Fire Commissioners, which is composed of the mayor of the city, ex-officio the chairman of the board, and four other members appointed by the mayor. This board is created by section 3137, Kentucky Statutes, which section is as follows: "The mayor, subject to the approval of the board of aldermen, shall appoint four citizens and freeholders of the city, who shall have been electors of the city for five years preceding their appointment, and who shall not be less than thirty years of age and not related to the mayor by blood or marriage, who, together with the mayor, shall compose a board of police and fire commissioners. The mayor shall be ex-officio chairman of said board. Said commissioners shall be appointed for a term of one, two, three

and four years, respectively, upon the taking effect of this act; and every year thereafter, as the terms of office of the said commissioners shall expire, respectively, there shall be one commissioner appointed for a term of four years, and the mayor shall fill all vacancies that may occur in said board. The salaries of the commissioners may be fixed by the general council. The city clerk shall act as clerk of said board."

The four members provided for by the section were originally appointed by the mayor and confirmed by the board of aldermen. One of these members was J. Soule Smith. Before this controversy arose he resigned, thus creating a vacancy in the board. Henry T. Duncan was then, and is yet, the mayor of Lexington. After the vacancy above named occurred the mayor appointed appellant, J. L. Watkins, to fill it, and he accepted it. Whether this appointment was communicated by the mayor to the board of aldermen, and by that body confirmed and approved, does not appear from the record, though it is assumed in argument that it was not so reported and confirmed.

Shortly thereafter, and on the 21st day of January, 1902, the mayor had occasion to come to Frankfort, where the State legislature was in session, for the purpose of attending to business before that body, or some committee, affecting the interest of cities of the second class. He left Lexington in the afternoon of the 21st, and did not return until the following afternoon. Lexington is about twenty-five miles distant from Frankfort, connected by railroad, and between these two cities several passenger trains are run each way each day. The cities are also connected by telegraph and telephone service, affording opportunities for constant communication by these means.

Section 3204, Kentucky Statutes, reads as follows: "In the event of the absence or disability of the mayor, the president of the board of aldermen shall act as mayor, and in event of the absence or disability of both the mayor and the president of the board of aldermen the president of the board of councilmen shall act as mayor."

W. H. McCorkle was the president of the board of aldermen. After the mayor's departure for Frankfort McCorkle issued notices convening the board of aldermen in extraordinary session at an early hour on the morning of the 22d, "to receive a communication from the mayor." A quorum of the board met as called. Whereupon McCorkle, affecting to act as mayor pro tempore, communicated to that body the appointment of appellant Watkins previously made by Mayor Duncan, and submitted this appointment to the board as a nomination for their approval and confirmation. The board of aldermen rejected the appointment, whereupon President McCorkle immediately transmitted to the board the nomination of appellee Mooney to fill the vacancy caused by the resignation of Smith, which nomination was confirmed and approved by the board.

It is charged that this action by McCorkle and his associate members of the board of aldermen was the result of a conspiracy upon their part, and of others acting with them, to defeat the mayor's right of appointment, and to install such members of the board of police and fire commissioners as would be unacceptable to him, and to deprive him of his legal power pertaining to his office.

The facts above stated are gathered from the petition of appellant Watkins.

filed against appellee Mooney in the Fayette Circuit Court to prevent the exercise by Mooney of the duties and privileges of the office which they were each claiming. The circuit court sustained a demurrer to this petition, and dismissed the action. Wherefore this appeal, which presents two questions of law:

1st. Was the mayor absent within the meaning and contemplation of the statute?

2d. Does the statute require appointments made by the mayor to fill vacancies in the board of police and fire commissioners of cities of the second class to be confirmed by the board of aldermen before they become effective?

The court does not regard the allegation of the alleged conspiracy as one at all material in this case. In our opinion the question is purely one of power. One department of government will not undertake to inquire and can not ordinarily investigate the motives prompting members of a distinctly different department in the exercise of power conferred upon them by law.

It is the contention of appellee that the word "absence" as employed in this statute has a well-defined and understood meaning; that it should be given its strict literal meaning, to be away from or to be withdrawn from a place, and that it has reference solely to a physical absence of the subject. Many words of common use in our language have two or more meanings. It is not infrequent that a word having one meaning in its ordinary employment has a materially different or modified meaning in its legal use. This word "absence" is a fair example. It has been held that one may be absent though actually present, as where a judge, though on the bench, does not sit in the case. He is there taken as absent in contemplation of law. (*Bingham v. Cabbot*, 3 Dall., 1936; *Byrne v. Arnold*, 24 N. Brunsw., 161.) It has also been held to mean "not present." (*Paine v. Drew*, 44 N. H., 306.) It has been held, too, as not meaning "out of the State only." (*James v. Townsend*, 104 Mass., 367.)

"Absence" and "disability" are words which from their use in statutes may have two different meanings. They are quite frequently found in some form in the statutes of this and other States, as well as in the Constitutions of many of the States. The legislature has not defined the sense in which either of the words is to be construed, leaving their construction and application to be gathered from the intent of the act or section in which they may be found, by the light of its subject-matter and evident purpose. President Arthur, in his first message to congress, clearly and ably set forth the ambiguity of the term "disability" as used in the Constitution of the United States, providing that "in case of the removal of the president from office, or of his death, resignation or disability to discharge the powers and duties of said office, the same shall devolve upon the vice-president," etc. Yet "disability" is a word of scarcely less ambiguity as generally used in common parlance than "absence." In some States their statutes provide that the chairman of the board of aldermen, or other officer holding the position of vice-mayor, shall act in case of the absence of the mayor from the city. Such, for example, are the cases of *O'Malley v. McGinn* (Wis.), 10 N. W., 515; *In re Cleveland v. Mayor* (N. J.), 18 Atl., 67.

In other cases cited it was shown that the mayor was absent from the State, and the court found that he could not perform the duty which the

vice-mayor was assuming to do. Such are *State v. Byrne* (Wis.), 78 N. W., 320, and *People v. Van Anden* (Mich.), 74 N. W., 1009. In the case first named the facts do not show in the opinion how far the mayor was from the city, nor how long he had been away, nor the particular urgency of the action of the vice-mayor. In the last-named case the mayor was shown to have been absent from the State for two weeks, and as having expressed a purpose, when he left, of being absent for three weeks.

It is a difficult task, if not an impossible one, to lay down a rule that could apply to all cases, defining the meaning of the word "absence," as used in the statute quoted above, and similar ones. We do not lay any particular stress upon the fact that the mayor was not absent from the State, though in one of the cases cited the court seems to have done so. For example, the mayor of Lexington, if at Hickman, Ky., would be further removed from his city, and, therefore, less capable of being in touch with its governmental affairs than if he were at Cincinnati. So the mayor of Newport or Covington, cities of the second class, also would be absent from the State, and of course from their respective cities, if across the river in Cincinnati, a matter of ten minutes' journey.

It may be that the courts, until the legislature has spoken more definitely as to its meaning upon this subject, might have to determine each case largely upon the particular facts presented. We think that the soundest reasoning under the authorities cited and examined gives the word "absence" the meaning of that absence which would make it impossible for the official to perform the act in question. Where the mayor is to preside personally at a meeting of a board which he is ex-officio a member, absence in that case would probably mean an absence from the place of meeting. But for the matter of making an appointment, signing a contract which he was permitted by law to sign for the city, or to issue a proclamation, or to issue a notice citing an official to appear for a violation of the statute, which he was authorized to try, the mayor might perform any of these acts though beyond the corporate limits of the city. Would the chairman of the board of aldermen be authorized, if the mayor should happen to go out to the waterworks near Lexington, and in which his city is interested, as it supplies its citizens with water necessary for their comfort, health and protection, to take advantage of such an absence to disarrange and confuse his policy of government? There can be but little doubt that he should not presume to act in a case of such absence except the emergency was such as to demand that the official act be then done.

In discussing a somewhat similar provision of law found in the Constitution of Louisiana the Supreme Court of that State, in the case of *State of Louisiana, &c. v. James Graham*, 26 La. Ann., 568 (21 Am. Rep., 561), had under consideration the meaning of the term "absence from the State" as used by the Constitution. In that case the governor had gone beyond the State lines to Pass Christian, a few hours' run from the capital of Louisiana. Said the court: "How is the absence of the governor to be ascertained? It is manifest that there ought to be some certain proof accessible to the public, from which they may, with certainty, derive the knowledge as to who is authorized to act as governor of the State. As the law makes no provision for the mode in which the governor shall manifest to the public his

absence from the State, it necessarily is left to his discretion, subject to his responsibility to the people. If the interests of the State should suffer in consequence of his prolonged absence, he would be amenable to public sentiment and to the control of the impeaching power of the State. \* We do not think that it was ever contemplated that the movements of the governor should be watched with the view that the lieutenant-governor or speaker of the house of representatives should slip into his seat the moment he stepped across the borders of the State."

To the same effect see *People v. Parker*, 3 Neb., 409, 19 A. Rep., 634.

To adopt a thought so forcibly presented in the last-named case, when we reflect upon the possible consequences of such construction of the statute, and upon the disgraceful tricks, strifes and exhibitions which might be entailed upon the people of the community, we hesitate and cast about for a more salutary rule than to adopt the suggestion of appellee, that the mere physical absence is the one contemplated, for one which, while it will insure the efficient administration of the affairs of the city government during the brief temporary absence of the executive, will at the same time protect that department of the government against unnecessary and ill-advised intrusion.

We have, therefore, concluded that the absence contemplated by the legislature in the employment of that word in the section under discussion is not merely a physical absence of the mayor from the city, but is such an absence as renders him incapable for the time being of performing the act that may be in question, which act must present such a necessity for immediate attention as to require it to be then executed.

In the case at bar there was no such urgency, and no emergency apparent for the president of the board of aldermen to assume the duties of mayor. (*Mayor of Detroit v. Moran*, Mich., 9 N. W., 252; *Lynd v. Winnebago*, 16 Wall., 6; *Bernard v. Taggart*, N. H., 25 L. R. A., 613.)

2d. It is insisted for the plaintiff that the appointment of members of the board to fill vacancies must be confirmed by the board of aldermen as original appointments must be. It is argued, and this we conceive to be the main argument for the appellee in this behalf, that there is no apparent reason, and in fact none, why the legislature should require the mayor's appointees, original and for full terms, always to be confirmed by the board of aldermen, and yet allow him to fill vacancies in the same board without such confirmation. The argument seems to us to be almost irresistible when presented to that body who make the laws. But the consequences are not so much to be regarded in the construction of the statutes as the language employed, where the language is unambiguous. In fact as long as the language of the statute is not ambiguous the courts have no discretion as to the meaning they will give to it.

Says Sutherland on Statutory Construction, section 287: "It is beyond question the duty of courts in construing statutes to give effect to the intent of the law-making power, and seek for that intent in every legitimate way. But, \* \* \* first of all, in the words and language employed, and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation."

Any other course would be extremely mischievous and dangerous. It is not for the judiciary to make laws. If they should, under the guise of interpretation, give to plain, unambiguous language used by the legislature in expressing its intention a meaning nowise warranted by the language employed, it would practically be to constitute the courts not only the construers of the law, but its makers. The meaning of the language of the section quoted is absolutely clear, is entirely free from ambiguity, is as plain and as simple as any similar number of words in common use in the English language. We can find no warrant to hunt beyond their common every-day use for a latent meaning supposedly in the minds of the legislature. Furthermore, the statute, section 3108, expressly confers upon the mayor the power to fill all vacancies in office unless it was otherwise provided in that act. We find no provision otherwise, nor can we see why the legislature should confer the power upon the mayor to fill vacancies in more important positions than these are without the confirmation of the board of aldermen, and yet require the confirmation in this particular instance. In any event, as to the wisdom or folly of such a provision, it is a matter beyond the control of the judiciary.

A distinction is obviously intended to be made between original appointments of members of the board and appointments to fill vacancies, otherwise there is no sense or meaning in the provision directing and authorizing the mayor to fill all vacancies. If the legislature had intended that appointments to fill vacancies should be submitted for confirmation to the board of aldermen, it would doubtless have put in after the word mayor, as it expressly did when providing for the original appointment, "subject to the approval of the board of aldermen." Whether the injunction prayed for was or was not a proper incident of appellant's claim and suit, yet the facts stated in the petition were such as presented a cause of action against appellee, and the demurrer thereto should have been overruled.

The judgment dismissing the petition is reversed and cause remanded, with directions to overrule the demurrer and for further proceedings not inconsistent herewith.

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RODEMER v. RETTIG, EX'OR, &c.

(Filed January 29, 1903.)

1. Wills—Gifts—R. died testate leaving two grown children, the appellee, Mrs. Rettig, and appellant. After making a devise of \$800 she devised the residue of her estate, consisting of money, stock and notes, to her son and daughter. She left a note for \$2,000, executed by appellee, payable to the testatrix, but the following words are found in the note: "This note, however, to become null and void on the death of said Barbara Rodemer." It is insisted that this note was a gift to her daughter, Mrs. Rettig. Held—That said note was not valid as a gift inter vivos, as there was no delivery of it or attempt to deliver it to the donee.

2. Overruled cases—McGlasson v. McGlasson's Ex'or, 21 Ky. Law Rep., 1843.

Harvey Myers and Bromwell & Bruce for appellant.

H. J. Gausepohl for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Paynter.

Barbara Rodemer died testate in Kenton county on April 18, 1899, leaving two grown children, a son and a married daughter, appellant and appellee, Mrs. Rettig. After a special bequest of \$300, she disposed of the rest of her estate in the following language, to wit: "All the rest of my estate, consisting of money I hold in building associations, notes, and what moneys I may have at the time of my death, I give, devise and bequeath to my son, August Rodemer, and my daughter, Mary Rettig."

She left personal property, consisting of notes and stock in building associations, other than the note here in controversy, amounting to \$2,432.79. The question involved is whether or not a note which the appellee, George Rettig, executed to her is part of her estate. It is as follows:

"\$2,000.

Covington, Ky., March 8, 1896.

"One day after date I promise to pay to the order of Barbara Rodemer \$2,000, with interest at 5 per cent. per annum.

"This note, however, to become null and void on the death of said Barbara Rodemer.

"No.... Due.....

(Signed) GEO. RETTIG."

She collected the 5 per cent. on the note from the time it was executed until the time of her death, except the interest for the last year. George Rettig executed his note to her for \$2,500 for borrowed money, and afterwards paid \$500 on it; for the balance of the note he executed the \$2,000 note; the \$2,000 note remained unpaid at her death, and the payor claims it was a gift to his wife. As an evidence of it he relies upon the terms of the note and other testimony tending to show that she intended her daughter to have it as a gift.

The appellant insists there never was any delivery of the note, and, therefore, it was not a gift *inter vivos*, while the appellee insists that it was by the terms of the note and that the testimony to which we have alluded shows that it was a gift. It is essential to the validity of a gift *inter vivos* or *causa mortis* that there shall be a delivery to the donee and the property or thing given must immediately pass and be irrevocable by the donor. (*Duncan v. Duncan*, 5 Litt., 12; *Walden v. Dixon*, 5 Mon., 170; *Knott v. Hogan*, 4 Met., 102.)

It was held in *Payne v. Powell*, 5 Bush, 252, that a writing signed by a man purporting to make a gift of his personal estate to his sons is ineffectual, because there was no actual or constructive delivery of either the writing or the property by the donor and no acceptance by the donee. In that case the court held that a transfer by writing alone will not satisfy the requirement of delivery. Mrs. Rodemer retained possession of the note from the time of its execution until the time of her death and controlled it, as evidenced by the fact that she collected the interest thereon annually from the payor. There was no delivery of the note at any time actually, symbolically or otherwise. The note was made payable one day after date, and there was no restriction in its terms that prevented her from compelling payment of it at any time.



Suppose the following language had been endorsed on the back of the note and signed by her, to wit: "This note, however, to become null and void upon my death." It would not have had the effect of preventing her from collecting the note during her lifetime, nor would it have been a delivery of it to the payor; it would have been just as ineffectual from a legal standpoint as if it had been written in the face of the note as was done in this case. The note was given for a valuable consideration.

In the case of *Knott v. Hogan*, 4 Met., 100, the writing was executed at the time the note for money loaned was executed. It was stipulated that if the payee should not collect the note in her lifetime, her representatives were directed to surrender it to the payor, "as I intend it as a gift from me to him." The court held that it was not a valid gift. It is manifest from this conclusion of the court that the stipulation in the note did not amount to a gift *inter vivos*, as there was no delivery of the note. It is nothing more than an intention to make a gift.

Counsel for appellee relies upon the cases of *Meriwether v. Morrison*, 78 Ky., 573; *Stephenson's Adm'r v. King, &c.*, 81 Ky., 425, and also upon the case of *McGlasson v. McGlasson's Ex'or*, 21 Ky. Law Rep., 1843. The *Meriwether* case and the *Stephenson* case do not support counsel's position. In the *Meriwether* case the donor wrote upon the notes "I transfer the within note as a gift to Miss Agnes Morrison," and handed the notes to his nephew, directing him to put them away and give them to her after his death, and informed Miss Morrison that he had given her the notes. The court held that the jury was authorized to find that there had been an actual delivery of the notes to the nephew as trustee for Miss Morrison. In the *Stephenson* case the court held that when the donor delivered to the donee a letter containing a full description of her notes and bonds it was a sufficient delivery to make the gift *causa mortis*. In that case the court regarded that delivery as essential, and held that delivery of the letter was equivalent to a delivery of the notes. The case of *McGlasson v. McGlasson's Ex'or* does support the contention of counsel for the appellee. The consideration of the note in that case was stipulated to be for certain personal property. It contained this language: "If not paid during the holder's life, Leonard McGlasson, this note is void or not attempted to be collected."

The court seems to hold that as the note was not collected during the lifetime of the payee, it was void, according to the stipulation of the note. No case is cited in support of its conclusion. It is not in accord with the rulings of this court on the question of what acts constitute valid gifts, and it is directly in conflict with *Knott v. Hogan*.

We are of the opinion that the transaction as to the note did not amount to a gift of it to the daughter of the testatrix, but that it is a part of the estate devised to her son and daughter, and should be treated as an asset of the estate. In so far as the case of *McGlasson v. McGlasson's Ex'or* is in conflict with this opinion it is overruled.

Judgment is reversed for proceedings consistent with this opinion.

Whole court sitting.

## NELSON BROS. v. CITY OF LEXINGTON.

(Filed January 30, 1908—Not to be reported.)

**Municipal taxation—Findings of fact by chancellor—**This appeal involves the question as to whether the grain elevator of appellants is without or within the limits of the city for purposes of city taxation, and the determination of this question depends on the true location of a mile stone. Held—That as the proof is conflicting and the chancellor who was on the ground and had a better acquaintance with the witnesses, decided that the elevator was within the city, his finding will not be disturbed.

Breckinridge & Shelby and Nelson & Pendleton for appellants.

W. S. Bronston for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Nunn.

The boundary of the city of Lexington is a circle two miles in diameter, the center being the center of the courthouse.

The contention of appellant is that their "grain elevator" is outside of the city limits, and is not subject to city taxation. They claim that the mile stone, placed by authority of the appellee, was for eighty or one hundred years at a point nearer the courthouse than their elevator, leaving their elevator on the outside of the city limits; and they introduced a great deal of convincing proof to substantiate their claim. On the other hand, the city claims that the stone contended for by appellants is not the true boundary-line stone, and that the true line is 206 feet further from the center of the courthouse than the stone claimed by the appellants.

The proof shows that the point claimed by the city is just one mile from the center of the courthouse. Appellants virtually admit this, but claim that one hundred years or more ago civil engineers and surveyors were not provided with accurate and improved instruments, and that, therefore, they committed an error in ascertaining the boundary, and that by reason thereof the actual boundary was fixed at a point claimed by appellants, and that said error was acquiesced in for eighty or one hundred years, and that the city is estopped from now claiming out to where the true boundary ought to have been established. On the other hand, the city claims that no mistake was made, and that the mile stone was first placed at the point now claimed by the city, and that the earth was washed away and the stone fell down and was removed to the place claimed by appellants. The parties have introduced much proof to sustain their contentions, both oral and written, some of the plats made by civil engineers not being in the record, but we have carefully considered the evidence before us and are left in doubt as to which party is in the right. We feel constrained to support the finding of the chancellor, he having seen and heard the witnesses, and being upon the ground, could better understand the facts as applicable to the real issue.

Wherefore, the judgment of the lower court is affirmed.

1478 BD. OF EDUC. OF LEXINGTON, &C. V. MOORE.

BOARD OF EDUCATION OF THE CITY OF LEXINGTON, &c. v.  
MOORE.

(Filed January 30, 1903.)

Office and officer—Change of salary during term of office—Municipal government—M. was elected treasurer of Lexington, a city of the second class, for a term of four years, as provided by section 3131, Kentucky Statutes, and entered upon the discharge of his duties on January 1, 1900. Section 3225, Kentucky Statutes, provides that the city treasurer shall be treasurer of the board of education, and keep its funds and accounts separate from the funds and accounts of the city. The board of education had no authority to elect or employ a treasurer. Section 3064, Kentucky Statutes, provides that the general council shall fix the salaries of all officers and employees of the city before their election or employment, and their salaries shall not be changed during their term of office. Several months after the induction of the treasurer into office the board of education allowed him a salary or compensation as treasurer of the board of \$200 per annum. This action was instituted to test the validity of this action of the board. Held—That M. was, by virtue of his office as treasurer of the city, also ex-officio treasurer of the board of education, therefore, said board had no authority to fix any compensation for his services. M. did not hold two offices. He only held one office, the salary of which had been fixed at \$1,800 before his election, and under the statute and section 161 of the Constitution said salary could not be increased or reduced during his term of office.

Morton & Darnall for appellants.

J. Soule Smith, A. M. Baker and L. J. Moore for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Settle.

By chapter 89, article 3, Kentucky Statutes, Lexington is designated as a city of the second class. Section 3212 of the statute provides for the maintenance of a system of public schools in that city under the control of a board, to be styled the "board of education," consisting of two trustees from each ward of the city, and the appellant board of education was created in this way. The board of education by section 3314 is given control of all the funds that are dedicated to the use of the public schools of the city, and the title to all property, real and personal, in the city used as public school property.

Section 3225 directs that "the treasurer of the city shall be treasurer of the said board of education, and as such shall keep separate and distinct from all other funds all moneys, bonds and securities belonging to, or which may hereafter be dedicated or set apart for, public schools, and shall pay out or deliver any of said funds, bonds or securities upon the warrant of said clerk and approved by the president of the board of education, and shall perform such other duties as may be prescribed by said board."

Section 3131 provides for the election of the treasurer by the qualified voters of the city, and prescribes the qualifications of such treasurer, and section 3132 provides that "the treasurer shall give such bond and receive such salary as the general council shall, by ordinance, provide." Section 3064 declares that "the general council, unless otherwise provided by law, shall fix the salary and compensation and prescribe the duties of all officers, deputies

and employes of the city, except as to the officers in office when this act takes effect. Such salary shall be fixed before their election or employment, and the salary of no city officer, deputy or employe when so fixed shall be changed after his election, employment or appointment during his term of office or employment."

The appellant, M. Kaufman, was in November, 1899, duly elected treasurer of the city of Lexington by the voters thereof, for a term of four years, beginning January 1, 1900, and on the last-named date he executed bond, took the oath required by law, and entered upon the discharge of the duties of the office of treasurer, his salary as such treasurer having theretofore been fixed at \$1,800 per annum by ordinance adopted by the general council of the city. From and after his induction into office Kaufman received, as treasurer, the funds under the control of the board of education that were dedicated to school purposes.

On June 4, 1900, and several months after the election and qualification of Kaufman as treasurer, the board of education, by a vote of a majority of its members, allowed him a salary or compensation for his services rendered, and to be rendered, as such treasurer of \$200 per annum, and soon thereafter \$100 of the salary thus allowed was paid him by the board of education. After the allowance of salary and the payment of \$100 to Kaufman by the board of education, appellee, L. J. Moore, a citizen, resident and taxpayer of the city of Lexington, brought suit in the Fayette Circuit Court against appellants, Kaufman and "board of education," seeking a cancellation of the resolution allowing the salary of \$200 per annum to the former, and praying that the latter be enjoined from paying him any further sum of the salary allowed. Demurrers were filed by appellants to the petition and overruled. Kaufman then filed answer, in which he in substance averred that by section 3235 of the statute supra he was required, as treasurer, to keep, and did keep, separate and distinct from all other funds, all moneys, bonds and securities dedicated to the use of the public schools of the city, which came into his hands, and that the city council of Lexington in fixing his salary at \$1,800 per annum did so without having in contemplation the services he would be required to render to the board of education as treasurer; and further, that the board of education had the right, in the exercise of the power and discretion conferred upon it by law, to make the appropriation in question by way of salary, or compensation to him for the alleged extra services rendered by him as its treasurer.

Appellee filed a demurrer to the answer, which was sustained by the court. Kaufman failing to plead further, and no answer having been filed by the board of education, the lower court thereupon rendered judgment granting the prayer of the petition. To this judgment appellants excepted, hence this appeal.

We are of the opinion that the judgment was proper. Section 161 of the Constitution provides that "the compensation of any city, town or municipal officer shall not be changed after his election, or appointment, or during his term of office." Besides, we find that section 3064 of the statute supra expressly declares that the general council of the city shall fix the salaries of all the city officers before their election or appointment, and the "salaries of no city officer, deputy or employe when so fixed shall be changed

after his election, appointment or employment, during his term of office or employment."

The statute (section 3235) requires Kaufman, as treasurer of the city, to act as treasurer for the board of education. Whatever services he performed for it in this capacity were not rendered by reason of any employment from it, for the board had no authority under the statute creating it to employ a treasurer. Kaufman does not hold two offices, for performing the duties of which he may receive two salaries, but only one office, the salary of which (\$1,800) is paid by the city of Lexington. In other words, by virtue of his election as treasurer of the city of Lexington he became and is ex-officio treasurer of the board of education.

The law applicable to this case was, we think, correctly announced by this court in *Jefferson County v. Waters*, 24 Ky. Law Rep., 816. Waters was treasurer of Jefferson county. Before his election the salary of that office was fixed at \$1,000, the county furnishing his office, fuel, lights and janitor service. Waters presented a petition to the fiscal court, asking for and obtained an additional allowance of \$1,000 as expenses to be paid annually. From this allowance the county appealed to the circuit court. In that court an amended petition was filed, which set out substantially these facts, viz.: "That when appellee was elected county treasurer, and when the salary was fixed by the fiscal court at \$1,000, it was thought that under the law the county levy did not extend over property in the city of Louisville, but only reached property outside of Louisville, and that since appellee's election, and since the salary was fixed at \$1,000, it had been legally determined that the county levy extended over all the property in the county, including that in the city, and that this decision added to the amount of money coming into his hands by about \$140,000, and that the duty of accounting for this additional sum was not intended to be covered by the salary of \$1,000 fixed."

Upon appeal to this court the judgment of the circuit court, approving the allowance made by the fiscal court to Waters, was reversed, this court holding that under section 161 of the Constitution, and section 934 of the Kentucky Statutes, the compensation of the county treasurer can not be increased during his term of office, and that the allowance made was an evasion of the constitutional inhibition. The same doctrine was announced by this court in *Commonwealth v. Carter*, 21 Ky. Law Rep., 1509, and also in *Morgantown Bank v. Johnson*, 22 Ky. Law Rep., 210.

Other decisions of this court might be cited in support of this view, but we deem it unnecessary to do so. Clearly the allowance of \$200 per annum to Kaufman by the board of education was violative of section 161 of the Constitution, and of the provisions of section 8064 of the statute supra, as it was a change and increase of his salary as treasurer made after his election and during his term of office as such.

Judgment affirmed.

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PAUL V. WETLAUF, &c.

(Filed January 30, 1903—Not to be reported.)

Appeals—Final order—On this appeal appellant complains of an order entered in the lower court confirming the report of the master commissioner,

which disallowed his claims. Held—That as there had only been an order confirming the report of the commissioner, it was not a final order and no appeal lies from it.

Chas. Richie and John B. Phipps for appellant.

Kohn, Baird & Spindle for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Burnam.

In May, 1898, the executor of Fred Weitlauf instituted a suit in the Jefferson Circuit Court for a settlement of his estate, and referred the case to the master commissioner to ascertain and report claim against the estate of testator. John M. Paul filed with the master commissioner two accounts against the estate, aggregating \$469.80, which were numbered by the commissioner "13" and "14." In February, 1899, the commissioner filed a report disallowing these claims by their numbers on the proof attached thereto. No exceptions were filed to the action of the master commissioner by Paul, and the commissioner's report was confirmed on the 28d day of May, 1899. On the 10th day of May, 1900, Paul appeared in court and filed his affidavit, in which he says that he forwarded his claims to his attorney in Louisville, to be filed against the estate of decedent, and supposed that he was attending to the matter; and that he had only recently learned that the commissioner had disallowed them on his own motion, without exceptions having been filed thereto, and asked that the order confirming the report, in so far as his claims were concerned, might be set aside, and an order was entered to that effect. But on the 22d day of May, 1900, the chancellor set aside the order made at the instance of Paul, and from this last order this appeal is prosecuted.

Appellant only brings a small portion of the record up to this court, from which it is impossible for us to determine what the merits of his claim are, or what relief he is entitled to. An order confirming a commissioner's report is merely interlocutory, subject to revision and correction upon final judgment, and from which no appeal lies. (*Adkisson v. Dent, &c.*, 88 Ky., 628.) The record does not disclose any judgment of distribution by the lower court.

In the condition of the record there is nothing for us to do but to dismiss the appeal without prejudice, and it is so ordered.

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BLUE, &c. v. WATERS.

(Filed January 30, 1903.)

Infants—Partition of lands—Joint tenants—This appeal involves the sufficiency of title to two lots of land proposed to be conveyed by appellant, which was allotted to her in a partition proceeding dividing the estate of her mother. The mother made a will, devising her estate to her children, appellant being one. After the making of the will, but before the death of the testatrix, a daughter died, leaving her husband and two infant children surviving her, both of whom were under fourteen years of age. The testatrix left land and money to be divided. A suit was instituted for a valua-

tion and division between the joint tenants of the lands and a division of the money to equalize the beneficiaries. The two infants and their father, who was their statutory guardian, were named as defendants in the partition proceeding, but the infants being nonresidents, were not brought before the court by constructive service. The guardian filed an answer for them, agreeing to the allotment. It is urged that the title of appellant to the lots in question is invalid on account of the infants not having been properly brought before the court. The infants were brought before the court by constructive service in this action for specific performance, and their guardian filed an answer for them approving the allotment. Held—That under section 499, Civil Code of Practice, providing for partition of lands, the infants were necessary parties, either as plaintiffs or defendants, and the answer of their guardian approving the division was insufficient to cure the defect. There should be proof showing that said division was advantageous to said infants, and that proof can be made in this action.

Oliver H. Stratton and A. E. Willson for appellants.

J. B. McCormick for appellants E. W. and W. R. Blue.

C. H. Shield for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Burnam.

We are asked on this appeal to pass upon the sufficiency of the title of appellant, Elizabeth Weller Blue, to two lots, situated on Indiana avenue, in the city of Louisville, which were allotted to her in the division of the estate of her mother, Sarah Weller, and which she has contracted to sell to the appellee, Rebecca Maney Waters. Sarah B. Weller by will, which was duly probated in the Jefferson County Court on the 18th day of July, 1900, after making provision for the payment of her debts, devised all the rest of her estate of every kind and description to her seven children, George P. Weller, Laura A. Sullivan, Elizabeth W. Blue, Mary B. Coldewey, John C. Weller, W. L. Weller and R. L. Weller, equally. After the execution of the will, and before the death of Sarah B. Weller, her daughter, Mary B. Coldewey, died, leaving surviving her her husband, William Coldewey, and two sons, Bernhard and Anton Weller Coldewey, who were infants under fourteen years of age. Her sons, John C. and George P. Weller, were appointed executors of the will. On the 3d day of December, 1900, the executors instituted a suit in equity in the Jefferson Circuit Court, making the other children and W. G. Coldewey, the father and statutory guardian of his infant children, defendants, in which they alleged that testatrix was at her death the owner of a number of separate parcels of real estate in the city of Louisville, which were specifically described, and the title to which at her death vested in her children and grandchildren as joint tenants; that after the payment of the debts there remained \$38,809.60 in their hands, the proceeds of the personal estate, and a mortgage note for \$2,750, and asked that the entire real property owned by the testatrix should be divided between the four adult defendants and the two infants; and that they should be permitted to retain in money their entire interest in the estate, and to this end asked the court to appoint three commissioners to value and divide the real estate among the defendants, and to report the sum required in cash to

make the plaintiffs and defendants equal in the aggregate value of the estate received by them. The estate of the testatrix was divided in this proceeding in accordance with the prayer of the executors, the real estate and mortgage note being valued by the commissioner at \$29,750. The real estate allotted to Mrs. Sullivan was valued at \$6,800, and each of the other defendants, in addition to the real estate allotted to them, received in cash a sufficient amount to make their interest equal to the valuation placed on the realty allotted to Mrs. Sullivan. The infants, Anton W. and Bernard Coldevey, who were not made parties to the proceeding, received, in addition to certain specific real estate, \$450, the plaintiffs, John C. and S. P. Weller, were adjudged \$4,800 from the cash in their hands, and the balance of it was divided equally amongst the heirs. The lots in this controversy on Indiana avenue were allotted to E. W. Blue, who sold them to the appellee, Rebecca Mary Waters, on the 3d day of March, 1903, and who refused to accept the pay for them. Appellants thereupon instituted this suit for the specific enforcement of the contract of sale.

Appellee defended on the ground that the infants not being parties to the partition suit, were not divested by the judgment in that proceeding of their title to the lots, and made her answer a cross petition against the infants and their statutory guardian, whom she alleged were nonresidents of the State, and asked that a warning order be issued notifying them of the proceeding. W. G. Coldevey filed an answer as statutory guardian, in which he says that the interest of his wards was promoted by the allotment of the real estate to them instead of money, and asked that the partition made in the former proceeding be approved and confirmed. Upon final submission the chancellor held that the title was not good, and dismissed her petition, and to reverse that judgment this appeal is prosecuted. The effect of the judgment in the partition suit was to invest a considerable proportion of the personal estate of the infants in realty. Section 499 of the Civil Code reads as follows: "A person desiring a division of land held jointly with others, or an allotment of dower, may file in the circuit court of the county in which the land, or a greater part thereof, lies a petition containing a description of the land and statement of those having an interest in it, and the amount of such interest, with prayer for the division and allotment, and thereupon all persons interested in the property who have not united in the petition shall be summoned to answer on the first day of the next term of the court.

"2d. The statutory guardian of an infant, committee of a person of unsound mind, and husband of a married woman, may unite in the petition in the names of and in conjunction with such infant, person of unsound mind, or married woman, and if the petition be against an infant, person of unsound mind, or married woman, the guardian, committee, or husband, may appear and defend for them. If they fail to do so, the court shall appoint a discreet person for that purpose."

These sections of the Code clearly contemplate that in a suit for the partition of real estate held jointly by infants and adults that the infants shall be parties to the proceeding, either as plaintiffs or defendants, in order to divest them of title. As they were not parties to the original suit filed by the executors against the other heirs and their father and statutory guardian,



the judgment of partition in that proceeding was ineffectual to pass their title to the real estate. But in this proceeding they were made defendants to the cross petition of the defendant, Waters, and are before the court by constructive service of process, and their father, as statutory guardian, has filed an answer, in which he says that the partition of the real estate in the old suit was fair and advantageous to his wards, and that the investment of a part of their money in real estate was advantageous and beneficial to them. If this answer had been supplemented by other proof showing that the partition was fair and the investment of the money of the infants was judicious and advantageous to them, the chancellor would have been justified in approving the partition in the old suit. In the case of the Kentucky Union Land Co. v. Elliott, 12 Ky. Law Rep., 812, it was held that whilst infants were necessary parties to an action for partition of land held by them as joint tenants, and that a judgment of partition in a suit to which they were not parties was erroneous, that their statutory guardian, after they had been brought before the court, might in open court adopt the report if the partition was equal and just. We think that the necessary proof showing these facts can be made in this case without resorting to a new suit for that purpose.

For reasons indicated the judgment is reversed and cause remanded for additional proceedings consistent with this opinion.

#### MCKAY v. CITY OF HENDERSON.

(Filed January 29, 1908—Not to be reported.)

**Damages—Location of smallpox pesthouse—Pleading—Appellant brought this action for damages sustained by reason of the location by the city of its pesthouse near his farm, and within one-half mile of the city limits, in violation of section 8909, Kentucky Statutes. In his petition he alleged that he had occupied, for several years, a farm containing about sixteen acres, which he cultivated in fruit and vegetables, and that the city sent smallpox patients to the pesthouse, located near him, which prevented the plaintiff from getting hands, from cultivating and gathering or marketing his said vegetables and fruit, and secluded himself and family from communicating with other persons, and by reason thereof was damaged in the sum of \$500. The city filed its answer, which was merely a traverse of the petition. To this the plaintiff filed a reply which was not in avoidance of anything in the answer. The defendant filed a demurrer to the petition and reply, which the court sustained, and dismissed the action. Held—That as the reply contained new matter which should have been in the petition the demurrer to it was properly sustained. The damages sustained were not the proximate result from the acts of the city, and it is not shown that the city caused the inconvenience complained of.**

Montgomery Merritt for appellant.

John F. Lockett for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Hobson.

Appellant brought this suit against appellee to recover damages by reason.

of the location of its pesthouse. The city filed its answer, which was merely a traverse of the petition. To this the plaintiff filed a reply, setting out new matter, which was not in avoidance of anything in the answer. The defendant filed a demurrer to the petition and reply, which the court sustained, and dismissed the action. As the matter in the reply was not in avoidance of anything in the answer, but was simply new matter, which should have been put in an amended petition, the court properly sustained a demurrer to the reply. The sufficiency of the petition is a matter of more difficulty. It is there alleged that the plaintiff resided for several years before it was filed within one-half mile of the lower boundary line of the city on the farm of one Annie B. Norris, containing about sixteen acres, which he cultivated in fruit and vegetables; that the city maintained its pesthouse near his said residence and within one-half mile of the city limits, in violation of section 3909, Kentucky Statutes. The petition then read as follows: "That they, in the month of April and May, 1895, sent to and kept at said pesthouse persons affected with smallpox, which prevented the plaintiff from getting hands; from cultivating and gathering or marketing his said vegetables and fruit, and secluded himself and family from communicating with other persons, and by reason thereof he was damaged in the sum of \$500."

In *Clayton v. City of Henderson*, 22 Ky. Law Rep., 383, it was held that the pesthouse having been located where it was in violation of the statute, one who lived nearby, and so took the smallpox, might recover damages therefor. (Also *City of Henderson v. O'Halloran*, 24 Ky. Law Rep., 995.) But the plaintiff does not bring himself within the rule thus laid down, as it will be observed that it is not charged that he or any of his family took the smallpox. The charge is in substance that by reason of the location of the pesthouse, and the keeping of persons there affected with smallpox, the plaintiff was prevented from getting hands or cultivating or gathering or marketing his vegetables or fruit, and that he and his family were secluded from communicating with other persons. Only the proximate damages for a wrong can be recovered. It is not shown in the petition that the persons who refused to work for the plaintiff had any well-grounded apprehension of taking the smallpox, if they did work for him. So far as appears their course may have been entirely groundless. The same is true of the seclusion of the plaintiff and his family from communicating with other persons. The petition shows no pecuniary loss directly to the plaintiff from the pesthouse. The things relied on seem to have come entirely from the acts of others, and there is nothing in the petition to make the city responsible for the conduct of people not controlled by it, or, so far as appears, having any reason to act as they did from what the city had done. In 1 *Sedgewick on Damages*, section 129, it is said: "The true test would seem to be whether the action of the intervening agency was such as was to be expected to happen upon the defendant's act; and if it were so to be expected the result is not remote. In the case of a human agency, the intervention will generally be of a sort not to be expected. But where the intervention was directly and naturally induced by the defendant's act, the consequence is not remote, though the intervening agency was human."

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Under this rule it seems to us that the allegations of the petition were insufficient, and that the demurrer was properly sustained.

Judgment affirmed.

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EDGAR ALEXANDER AND EDGAR ALEXANDER, ADM'R OF ARTIE ALEXANDER v. FIRST NATIONAL BANK OF HARRODSBURG AND MERCER NATIONAL BANK OF HARRODSBURG, KY.

ALEXANDER v. FIRST NATIONAL BANK OF HARRODSBURG, KY.  
SAME v. MERCER NATIONAL BANK OF HARRODSBURG, Ky.

(Filed February 8, 1903.)

Usury—Interest—Sureties—Bills and notes—Novation—The principal in notes having died, it was found that his estate would pay only about 70 per cent. of his indebtedness. It was agreed that his brother, a surety, should take the land belonging to decedent at a fixed price, and that the banks, which were principal creditors, should loan to his sureties enough money to pay the 70 per cent. of the indebtedness besides a sufficient sum to pay the balance owing by the sureties, and that the sureties in order to secure these loans should mortgage to the banks the lands received from decedent together with other lands. The original notes to the banks, as also the new notes, bore interest at the rate of 8 per cent. These notes were renewed from time to time, and suit was brought on them. Personal judgments were sought and an enforcement of the mortgage liens on the land. The defendants were not ready to file their answers at the first term of court, and in consideration of further time being given them until the February term they paid the banks interest on the notes sued on to February 10. The answer to the petition of the First National Bank denies the amount of its claim, and in the second paragraph alleges that the note carries with it a large amount of usurious interest, and asks that the entire interest from the date of the first notes executed by the original debtor to the bank be forfeited. A similar answer was filed to the cross petition of the Mercer National Bank. While this suit was pending E., the brother of the original debtor, filed a separate suit against each of the banks, in which he sought to recover double the amount of interest paid within two years. His suit against the First National Bank was dismissed. He recovered judgment against the Mercer National Bank for double the amount of interest paid within two years. In the suit of the banks against him they were given judgment for the amount of their debts without interest prior to the institution of their suits, and a decree directing a sale of lands to satisfy the mortgage debts. Appeals have been prosecuted from said judgments. The sister of the original debtor, who was one of his sureties, died pending the litigation, and E. qualified as her administrator. Held—That the amount of money paid to the banks after suit for indulgence until the next term of court to enable defendants to present their answers were not payments of usury. Such agreements, made in good faith, are upheld by the courts. The claim of E. against the First National Bank for double the amount of payments of interest should have been allowed as the proof sustains same. The testimony of the bank president as to statements of the deceased sister was incompetent to affect the claim of E. E. is not entitled to have the usurious interest paid on notes during the lifetime of the original debtor credited on the debts, as the arrangement entered into by which E. bought the

debtor's land, and he and his sister borrowed the money to pay off the debts, was a satisfaction of the original debtor's liability, and, therefore, the interest can not be forfeited as the subsequent notes were not renewals of the original debts.

Gaither & Vanarsdall for appellants.

W. Lawson Sumrall for appellee Mercer National Bank.

T. H. Hardin for appellee First National Bank.

Appeals from Mercer Circuit Court.

Opinion of the court by Chief Justice Burnam.

This appeal is from a judgment of the Mercer Circuit Court rendered in three cases, which were consolidated and heard together. A summary statement of the facts out of which the litigation grew is necessary for the proper understanding of the questions of law which we are asked to decide. On the 9th day of July, 1893, T. F. Alexander executed a note to the First National Bank of Harrodsburg for \$2,000, due on the 18th of January, 1894, which the appellants, Ed. Alexander and his sister, Artie Alexander, signed as his securities. On the 18th of September, 1893, he executed his note to the same bank with the same securities, due on the 16th of December, 1893, for \$6,738.09. This latter note was taken up by the execution of a thirty-day note by the same parties for \$6,777.42, and which matured on the 19th day of January, 1894. At this latter date T. F. Alexander executed his note to the bank for \$8,768.34, due seven months after date, with his brother, Ed. Alexander, and his sister, Artie Alexander, and James L. Bond as securities. The proceeds of this note were applied to pay off the balance due upon the \$2,000 note, dated on the 9th of July, 1893, and the \$6,777.42 note dated the 16th of December, 1893. All these various notes bore interest at the rate of 8 per cent., and the accumulated interest was added to the principal at the date of each renewal. On the 6th day of April, 1894, Thomas F. Alexander executed his note to the Mercer National Bank for \$4,868.25, due six months after date, with Artie Alexander, Ed. Alexander and James L. Bond as his securities. The net proceeds of this note, \$4,200, was put to the credit of T. F. Alexander, a discount of \$168.25 being reserved as interest at the rate of 8 per cent.

Thomas F. Alexander died intestate on the 15th of April, 1894, before the maturity of either of the debts to the banks, and his sister and security, Artie Alexander, qualified as his administrator. It was developed after his death that his estate was insolvent, and his heirs at law, with a view of facilitating the settlement of his estate and saving his sister, Artie Alexander, from loss so far as possible because of the various liabilities incurred by her as surety for her brother, sold and conveyed to her in fee all their interest in his estate, real and personal. His realty consisted of a tract of land in Mercer county, containing 220 acres. It was ascertained prior to the 22d of April, 1895, that after reducing to cash all the available personal estate of decedent and selling the 220 acres of land belonging to T. F. Alexander for \$40 per acre that his estate would pay 70 per cent. of his debts, and on that day a consultation was had between the administrator, Artie Alexander and the appellant, Edgar Alexander, and their attorney on one side, and the officers

of the First National Bank and the Mercer National Bank, their principal creditors, at which it was agreed that the appellant, Edgar Alexander, should purchase the 220 acres of land at \$40 an acre, amounting to \$8,800; and that the two banks would loan him enough money to pay 70 per cent. of the indebtedness of T. F. Alexander and also a sufficient sum to pay the overplus of his indebtedness, which would fall upon Edgar Alexander and his sister Artie. To carry out this agreement the First National Bank loaned to Ed. Alexander on that day \$8,507.36, on which interest was charged at the rate of 8 per cent., and a note was taken therefor, due six months after date, for \$8,847.95, and the Mercer National Bank on the same day advanced to him \$4,195.45, taking a note therefor, due six months after date, for \$4,866.22, on which interest was charged at the rate of 8 per cent. Seventy per cent. of this money was paid over to Artie Alexander, administrator, by Edgar Alexander, and was by her applied to the indebtedness of T. F. Alexander, the balance of the money was used by Ed. Alexander to pay the overplus due the respective banks by his sister and himself as securities thereon. To secure the payment of this note, so executed to the banks, Edgar Alexander and his sister, Artie Alexander, executed a mortgage on several tracts of land, including that which had formerly belonged to the estate of Thomas F. Alexander.

The note to the First National Bank was renewed on the 26th day of October, 1895, by Ed. and Artie Alexander by the execution of a new note for \$9,801.82, due on the 29th of April, 1896, interest being added at the rate of 8 per cent., and was again renewed by the execution of a note for \$9,569.89, due six months after date. On the 1st of November, 1896, this note was renewed by the execution of a note for \$9,752.88, due six months after date. On the 4th day of May, 1897, this note was renewed by the execution of a new note for \$9,752.88, due six months after date. At this time Ed. Alexander paid to the bank \$390.12, as interest at the rate of 8 per cent., by his check on the Boyle National Bank, and on the 7th of November, 1897, this note was renewed by the execution of a new note to the bank for the same amount due six months after date, interest on this note at the rate of 8 per cent. being paid to the bank by the check of Ed. Alexander on the Boyle National Bank for \$890.12.

On the 8d of September, 1898, the appellee, the First National Bank of Harrodsburg, instituted this suit, asking a personal judgment on the last renewal of their debt and for an enforcement of the mortgage lien executed to them on the 28d of April, 1895, jointly with the Mercer National Bank. The Mercer National Bank was made a defendant, and on the same day filed its answer, which was made a cross petition against its co-defendants, Artie and Edgar Alexander, in which they set up their note dated November 9, 1897, for \$4,721, which they allege was a renewal of the note executed on the 28d of April, 1895, and ask a personal judgment against Edgar and Artie Alexander, and joined in the prayer for an enforcement of the mortgage. The defendants were not prepared to file their answers to the petition and cross petition at the following October term of court, and in consideration of the continuance of the cause to the next term of the court, which began in February, 1899, and an extension of time to file their answer until the fourth day of that term, they paid to the banks interest on the notes sued on to February 10, 1899, at the rate of 6 per cent. The amount paid to

the First National Bank under this agreement was \$488.87, and to the Mercer National Bank \$211.14. In January, 1899, before the expiration of the time given to the defendants to answer, Artie Alexander died, and shortly after her death the co-defendant, Ed. Alexander, qualified as her administrator, and the action was, by consent, revived against him as administrator.

The answer of appellants to the petition of the First National Bank denies the amount of his claim, and in the second paragraph alleges that the obligation sued on carried with it a large amount of usurious interest, and they ask the forfeiture of the entire interest from the date of the first note executed by T. F. Alexander to the bank, under sections 5197 and 5198 of the United States Revised Statutes. A similar answer was filed to the cross petition of the Mercer National Bank, and while this suit was pending, the appellant, Edgar Alexander, on the 20th of January, 1899, filed a separate suit against each of the banks, in which he sought to recover double the amount of interest paid on his indebtedness to them within two years prior to the institution of the suits. His petition against the First National Bank covers the following alleged payments of interest on the debt sued on:

To amount paid as interest at 8 per cent., May 25, 1897.....	\$390 11
To amount paid as interest at 8 per cent., December 27, 1897.....	890 12
To amount paid October 26, 1898.....	488 87
Total.....	<u>\$1,219 10</u>

The claim against the Mercer National Bank on this score is as follows:

To amount paid as interest May 27, 1897, at 8 per cent .....	\$109 89
To amount paid December 24, 1897.....	190 28
To amount paid October 26, 1898.....	211 14
Total.....	<u>\$517 28</u>

The issues were made up in the three cases and they were consolidated, and the proof taken in the consolidated actions and final judgment rendered in all the cases in February, 1901. The suit of Edgar Alexander v. First National Bank was dismissed. In his suit against the Mercer National Bank he was given a judgment for \$376.46, being double the amount paid as interest on the 24th of December, 1897. In the suit of the banks against Edgar Alexander they were given judgment for the amount loaned by them on the 28d day of April, 1895, without interest prior to the institution of their respective suits, and a decree of foreclosure directing the sale of the mortgaged lands entered. From that judgment Edgar Alexander and Edgar Alexander, administrator of Artie Alexander, deceased, have appealed.

They insist that under the proof they are entitled to a judgment against the First National Bank for \$2,880.20, double the amount of interest paid within two years from the institution of their suit; also that he was not given a judgment against the Mercer National Bank for the full amount sued for. And in the case of the banks against him he complains that the judgments did not give him a credit for all the interest which accrued upon the original loans of T. F. Alexander to the banks prior to the execution of the notes by him and his sister on the 28d of April, 1895.

Nearly all the questions of law involved upon this appeal have been passed upon by this court in the recent cases of the Second National Bank of Richmond v. Fitzpatrick and the Citizens National Bank of Danville v. Farmer's Ass'ee, 28 Ky. Law Rep., 613. It will, therefore, only be necessary for us to apply the law as determined in these cases to the facts as developed by the proof in these consolidated actions. We will first consider the questions involved in the suit by Alexander against the two banks to recover double the amount of interest paid. The money paid to the banks by the appellant on October 26, 1898, can in no sense be regarded as a payment of usury. Appellees were entitled at that term of the court to a judgment by default for their respective demands or that the issues should be made up by answer. To prevent this, and secure time for the preparation of their defense, appellants paid a stipulated sum, which was in fact 6 per cent. interest upon the principal of the respective debts sued on. Courts will not permit agreements of this character made in good faith to become the basis of a claim for double the amount so paid as a penalty under the statute, and, in our opinion, the trial court properly refused to so treat these payments. The \$109.89 paid to the Mercer National Bank on the 27th of May, 1897, was less than interest at the rate of 6 per cent. for the time covered upon the debt, and consequently did not contain usury for which a suit can be maintained under the statute.

We will not consider the claim of appellant for double the amount of interest paid to the First National Bank. He testifies unequivocally that on the 25th of May and 27th of December, 1897, at the dates of the renewal of his debt to the bank, that he actually paid the interest thereon at the rate of 8 per cent. by checks drawn on the Boyle National Bank, and these checks are filed as exhibits with his deposition. The president of the bank admits the receipt of these two sums of money, and that they were paid as interest, but seeks to escape liability under the statute on the ground that Artie Alexander in her lifetime informed him that she was jointly bound for the obligation sued on with the appellant, Edgar Alexander; that she furnished to Edgar Alexander one-half the money which went to make up the respective checks. It was not competent for the appellee's president to testify to oral statement made to him by Artie Alexander after her death as to what proportion of these payments were furnished by her, and even if competent, it is not enough to outweigh the testimony on this point in favor of the appellant. We are, therefore, of the opinion that the appellant, Alexander, was entitled to a judgment in his suit against the First National Bank for twice the amount of these payments, which amounts to \$1,560.44, and that their note against him should have been credited with this sum as of the date of the institution of the suit.

We now come to appellant's claim to have the obligations due the banks purged of all the interest which accumulated during the lifetime of T. F. Alexander on his debts to them. This contention is made upon the theory that the obligations executed on the 23d of April, 1895, by Edgar and Artie Alexander were mere renewals of the existing indebtedness of T. F. Alexander, deceased, to the banks as of that date. Appellees, on the other hand, insisted that the transaction of that date resulted in the total extinguishment of the indebtedness of T. F. Alexander, and the loan to appellant was

a new transaction. The evidence of every witness who has testified as to what took place between the parties on that day, except the appellant, Edgar Alexander, is to the effect that it was the intention of all parties that the indebtedness of T. F. Alexander should be paid and his estate finally settled. He had been dead more than a year, and his creditors were unfortunate for the payment of their respective debts. It was made manifest that his estate was insolvent, and that his unsecured creditors would only realize 70 per cent. of their indebtedness if the estate was settled out of court in the most economical way. It was, therefore, agreed that appellant should take the land of T. F. Alexander at \$40 per acre, the personal estate had already been reduced to cash, and it was easy to determine what the estate would pay. To save the cost of a settlement in court the sale to Edgar Alexander was agreed to, and to enable him to pay for the land, and to consummate the agreement with the creditors, the appellee banks consented to loan him a sufficient sum of money to make the deal successful. They surrendered as of that date their old obligation on which James L. Bond was bound as security; they gave up all claim against the estate of T. L. Alexander, and loaned the money solely upon the credit of appellant and his sister, with the mortgage upon their lands, including that purchased from the estate of T. F. Alexander. We think that there can be no doubt that on the 23d of April, 1895, the administrator of T. F. Alexander could have, under the Federal statute, required the banks to accept the principal of the indebtedness of T. F. Alexander in payment of their debt; and that after payment they might have maintained a suit for double penalty. But having elected to pursue a different course, they can not at this late day in this transaction be permitted to treat the obligation sued on as mere renewals by the security of the debts due the banks by T. F. Alexander. We, therefore, conclude that the chancellor properly denied appellant this relief.

For reasons indicated the judgment in the case of Edgar Alexander v. The First National Bank, and the First National Bank v. Edgar Alexander, &c., are reversed. The case of Edgar Alexander v. The Mercer National Bank, and the Mercer National Bank v. Edgar Alexander on cross petition are affirmed, and the several causes remanded to the trial court for proceedings not inconsistent with this opinion.

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CITY OF LOUISVILLE v. GLEASON, &c.

(Filed February 3, 1903—Not to be reported.)

Street improvements—Payment—Statute of limitation—Appellæ G. was a contractor for the construction of a section of Highland avenue, and brought an action on apportionment warrants against abutting property owners to recover the price of the construction. This court decided that the property owners were not liable on said warrants as the improvement was not original construction, but reconstruction, for which the city alone is liable. Several of the property holders pending the litigation paid to the contractor the amounts due on their warrants under an agreement that should it be determined that they were not liable on same, said amounts should be returned. On the trial below, in which the contractor sought to recover the amounts due from the city for the benefit of the property holders who had paid him,



the city claims that it had paid said indebtedness, and no recovery could be had for the further reason that the proof did not authorize a recovery. Held—That under section 2833, Kentucky Statutes, it is provided that in all actions to enforce liens a copy of the ordinance authorizing the improvement, a copy of the contract therefor, and a copy of the apportionment, each attested by the comptroller, should be prima facie evidence of the validity of the claim. This proof having been made, it devolved on appellant to defeat the claim. Appellant can not claim that the payment to the contractor under a special agreement for refunding same ensured to its benefit, as none of these payments were made on behalf of the city.

2. Statute of limitation—The contract being in writing, an action to enforce payment of the contract price will not be barred until after fifteen years. It is not a liability created by statute which would be barred after five years.

H. L. Stone for appellant.

Lane & Harrison for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge O'Rear.

This is the third appeal of this case. (106 Ky., 125; 22 Ky. Law. Rep., 1660.)

Appellant Gleason, contractor, entered into a contract with the city of Louisville for the construction of the section of Highland avenue between Broadway and Everett streets, under the ordinance passed by the city council and approved by the mayor on the 6th of April, 1894. This suit was brought by the contractor upon apportionment warrants issued to him under the ordinance and contract mentioned, against the abutting property holders and the city of Louisville, in which the contractor sought to enforce his liens upon the abutting property, provided the court should adjudge it liable therefor, and seeking to recover against the city for the contract price for the work in the event the abutting properties were not liable.

In the appeal last decided (22 Ky. Law Rep., 1660) it was held that this work was not an original construction, such as under the statute governing cities of the first class could be made and charged against abutting properties, but that it was a reconstruction for which the city alone was liable. Among the property holders whose property was affected, and who were proceeded against in this suit, were Kate L. VanCleave, against whom an apportionment warrant had been issued for her portion of the improvement for \$127.65; J. W. VanCleave, \$150.77, and \$56.39; Sarah L. Caron, \$179.48; C. T. Dearing, \$84.89; Elizabeth Paul, \$29.84; Ernest Mennebrooker, \$2.02. The total contract price for the work done under this contract was \$3,442.61. After the institution of the suit against all the property holders and the city, including those named above, the parties just named, to clear their properties of the cloud and apparent lien against their title created by the litigation, agreed to and did pay to the contractor, Gleason, the respective amounts claimed against them, under an agreement with Gleason that if in that action it should finally be determined that the property holders were liable under the ordinance and contract for the assessment, these payments should operate as their discharge; but that if it should be held by the courts that the property holders were not liable, then the contractor would repay to

these parties the said sums respectively, with interest. These facts were set up in this action by an amended petition, filed May 11, 1900, and the suit progressed for the recovery of the remainder of the contract price of \$3,442.61. Upon final hearing the circuit court adjudged, and that was affirmed upon appeal, that under the statute property holders were not liable, nor was their property, for any part of this sum, but that the city alone was liable therefor.

At the close of that judgment was this reservation: "It is further considered by the court that this action is retained upon the petition of the plaintiff to recover of the city of Louisville all sums and warrants paid to him by persons against whom warrants were issued therefor by the city of Louisville in favor of said plaintiff on the issues as made by and between the plaintiff and the city of Louisville thereon."

Not until after the affirmance of the judgment against the city on the last appeal did it attempt to controvert the allegations of the amended petition just referred to. After the affirmance it filed an answer, in which it denied the averments of the amended petition, that Gleason, the contractor, had agreed with the respective property holders named to refund to them the sums so paid by them, and denied that the said sums were paid under the agreement alleged. In the second paragraph it pleaded that since the affirmance of the judgment against it it had fully paid the same to the plaintiff. In the third paragraph it pleaded that a summons had not been issued upon either the original or the amended petition against any of the parties whose names are set out above, and that summons had not been issued against the city in said action until more than five years after the plaintiff's cause of action accrued as against said parties respectively and as against the city, and the five years' statute of limitation was pleaded and relied upon. A demurrer was interposed to this last paragraph. The cause was submitted and decided without proof. The judgment of the court was in favor of the plaintiff, Gleason, against the city for the aggregate of the sums represented by the apportionment warrants issued against VanCleave and others above named, aggregating \$600.70 (so recited in the judgment). From that judgment the city has appealed. Copies of the ordinance, contract and apportionment, as provided for in section 2838 of Kentucky Statutes, were on file in the action.

The issues thus presented by the record are as follows: Plaintiff asserted that he had performed the labor mentioned under a written contract with the city, the contract price of which was \$3,442.61. The contract was admitted, as was the performance of the labor, and the price. It was also admitted that the city had paid the plaintiff the amount of the judgment last appealed from, which was all of the contract price except that reserved by the judgment and represented by the apportionment warrants of VanCleave and others set out above. As to this sum the plaintiff pleaded as special matter that he had released the property owners under an agreement with them that he would reimburse the sums paid by him for the release if it should finally be determined that the improvement was not one for which the property was liable. The city did not deny the consideration for this agreement, but denied the special arrangement to reimburse the lot owners. Under section 2838, Kentucky Statutes, it is provided that in all actions to

enforce liens a copy of the ordinance authorizing the improvements or work, a copy of the contract therefor, and a copy of the apportionment, each attested by the comptroller, should be prima facie evidence of the due passage, approval and publication of the ordinance, and of the due execution and approval of the contract, and shall also be prima facie evidence of every other fact necessary to be established by the plaintiff in such action as to entitle him to the relief authorized to be given in that act. And it has been held by this court in *Keller v. Gleason*, 19 Ky. Law Rep., 154; *City of Louisville v. Cassidy*, 105 Ky., 424, and other cases, that where there is no evidence in the record save the copies mentioned in the section referred to above, a prima facie case is made out, although an issue may be joined upon all the matters averred in the petition. In this case, however, the city did not put in issue the facts necessary to entitle the plaintiff to recover under his contract. It relied alone upon the proposition that the property holders and not the city were liable; that it was an original construction, and not a reconstruction of the street.

The question then is, upon whom was the burden to prove that the city had been discharged by reason of the payments made by VanCleave and others to the plaintiff? The city insists that inasmuch as this matter was averred in the amended petition by the plaintiff and denied by the city in its answer, that it was error to adjudge against the city without any proof on this subject. Upon all the pleadings, including the original petition, and the city's original answer thereto, the plaintiff was shown to be entitled to recover the full contract price of \$8,442.61 against the city. The only defense presented by the answer of the city was the plea that it had paid since the affirmance of the last judgment the amounts therein adjudged against it. The city did not plead, nor was it claimed in the record, that the payments made by VanCleave and others to appellee were made for or on behalf of the city, or that they were accepted by appellee as a discharge of the city's liability, or as a satisfaction, to that extent, of the contract sued on, and entered into between the city and appellee. If it be that the city was entitled to the benefits of appellee's pleadings suggesting these payments, then the city must accept the statements made by the plaintiff as to the payments, coupled with the conditions therein named. VanCleave and others were not parties to the contract. They were not bound thereon. However, the pendency of this suit by the contractor asserting the claims against their property created a cloud against their title. This, by arrangement with the contractor, they procured to be discharged. This arrangement did not and could not possibly have affected the rights of the city.

A payment made by a stranger to a contract, who was under no obligation thereon, will not operate as a discharge or payment of the obligation unless it is made with that intention on the part of the person making the payment, and is so accepted by the creditor. (*Dodge v. Freedman's Sav. and Trust Co.*, 98 U. S., 385; *Stark's Adm'r v. Thompson's Ex'ors*, 3 Mon., 303; *Daniels on Negotiable Instruments*, section 1254.)

As to the plea of limitation contained in the third paragraph of the answer to the amended petition the plea was not good, and the demurrer should have been sustained.

In *Kirwin v. Nevin*, 23 Ky. Law Rep., 947, it was held that the liability of

the lot owner to the contractor for street improvements was one arising under a statute, and that the five year period of limitation applied to it. This case and this doctrine, however, are not in point here, because the city's liability is not properly one created by statute, but is created by a contract in writing and signed by it, therefore, the fifteen year period of limitation alone applies.

There is no error in the record, and the judgment must be affirmed.

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HAY v. CITY OF LEXINGTON.

(Filed February 8, 1903.)

Street improvements—Damages—Statute of limitation—Appellee improved the street in front of appellant's property by the construction of a brick street. The grade of the street was raised about seven and one-half inches above appellant's lot, causing water from the street to run on appellant's lot, for which he instituted this action for damages. There was no allegation of any imperfection in the plan or construction of said improvement. The city interposed the statute of limitation of five years as a defense. Held—That under section 243 of the Constitution an action for injury to private property can be maintained where it was not allowed before, but where there is no defect in either the plan or execution of the work the property holder may recover his entire damages in one suit. The appellant having failed to institute his action for damages until after five years from the construction of the improvement, is barred.

Forman & Forman for appellant.

W. S. Bronston for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

The city of Lexington, in November, 1891, improved the roadway of North Broadway in front of the property of appellant by the construction of a brick street. This improvement involved the alteration of the graded street, raising it slightly so as to leave the street and the sidewalk about seven and one-half inches above appellant's lot. This suit was brought in October, 1900, against the city for damages resulting from the inconvenience caused appellant's tenants and the diminution of the rental value of his property by reason of the water being thrown onto his premises from the street, whereas before the change of the street it had been allowed to run down the street and not onto appellant's lot.

The evidence failed to show that the improvement complained of was in anywise negligent, or deficient in plan or execution. It further showed pretty conclusively that the improvement was a permanent one as that term is used in this connection. The court, at the conclusion of appellant's evidence, directed peremptorily a verdict for the city. This appeal involves alone the plea of limitation, appellee having interposed the plea of the five year statute. At common law the judgment of the municipal governing body concerning the grading of its streets, and the manner of its being done, so far as either was not negligent, was a matter within their discretion.

Damages resulting from its proper exercise, that is, its exercise in the absence of negligence, were not recoverable against the municipality. (*Keasy v. City of Louisville*, 4 Dana, 154; *Wolfe v. Covington & Lexington R. R., Co.*, 15 Ben Mon., 409; *Chapman v. The Albany & Schenectady R. R. Co.*, 10 Barb., 280.)

For its negligent execution of its plan of public improvements the city was of course liable to suit by the property owner injured thereby.

Section 242 of the present Constitution provides that municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured or destroyed by them. This section of the Constitution, as applicable to damage or injury done to abutting property by a regrading of a public street, was first under consideration by this court in *City of Henderson v. McClain*, 103 Ky., 402. There the question was fully considered and the court held that the municipality was liable under this section for damage done abutting property in regrading a street, although under the previous decisions of the court, including those cited above, it would not have been. This has been followed in *City of Mt. Sterling v. Jephson*, 21 Ky. Law Rep., 1028, and *Thoman v. City of Covington*, 28 Ky. Law Rep., 117. But none of these cases dealt with the question of limitation. They merely determined the fact that the city was liable, whereas before the enactment of that section of the Constitution they could not have been. The nature of this liability is not changed from a tort by the section of the Constitution. It merely extends to the municipality a liability for an act, which is essentially a tort, for which it had not before been subject.

For appellant it is contended that the act of the city in this instance constituted a continuing nuisance which rendered the city liable for each recurrence of damage to the premises in question. Many authorities from other jurisdictions are cited in support of this argument, wherein the question is interestingly discussed. In this State, however, it is settled that where the injury done by a public improvement, permanent in its nature, is such as that the damages occasioned thereby are permanent, the recovery must be had for the entire damage in one action, and such damages accrue from the time the nuisance is first created, and from that time the statute of limitation begins to run. (*E., L. & B. S. R. R. Co. v. Combs*, 10 Bush, 382; *L. & N. R. R. Co. v. Orr*, 91 Ky., 109.)

Thus it appears that the city's wrong, its tort, is of that character, for which it is liable, but the liability is an entirety, accrues upon the completion of the public work, and the damages therefor must be recovered in one action. The case of *City of Louisville v. Coleburne*, 22 Ky. Law Rep., 64, is cited and relied on by appellant as settling a contrary rule. This case and others of the kind, such as *Cornelius v. L. & N. R. R. Co.*, 23 Ky. Law Rep., 1069, and *Finley v. City of Williamsburg*, 24 Ky. Law Rep., ante, 1336, are not authority in point. In all of these cases it appeared that the improvements causing the damage had been negligently made, and were, therefore, susceptible of remedy, by repairing the defects. It must be evident that if a public improvement of this nature is negligently done, so that its imperfect condition causes an unusual accumulation or flow of water upon the adjacent premises, the remedy will lay more

effectually in repairing the defective part, and allowing damages for the injury up to that time, than by attempting to fix upon the probable damages for all time, or in assessing them from time to time. On the other hand, if the work is of a permanent character, and perfectly done, nothing in the way of its betterment that could remedy the evil complained of is possible or practicable. All that could be done in that way has already been done. If, then, the injury is caused and must, from the nature of the situation continue, it is obvious that the only remedy is to measure the damages that will compensate for the injury, and give them to the party aggrieved. It is also equally clear that it must be then apparent, when such work is completed, just what this damage is likely to be. It is, in such case, the diminished value of the property, in money, caused by the act in question. (*R. R. Co. v. Price*, 11 Ky. Law Rep., 1367; *Henderson v. Winstead*, 22 Ky. Law Rep., 628.) This entire damage is then a cause of action against the wrongdoer.

The doctrine underlying the cases of *Cornelius v. L. & N. R. R. Co.*, *supra*; *City of Louisville v. Coleburne*, and *Finley v. Williamsburg*, *supra*, is that a continuing nuisance caused by a negligent construction, being susceptible of remedy by repairing the defective premises, gives to the demandant a new cause of action for each successive injury, for it was the duty of the wrongdoer, as it was in his power to remove the cause of the recurring injuries; his failure to do so was a new cause of the damage, and, therefore, a basis for a new right of action therefor at each occurrence. This distinction between the two classes of cases is clearly recognized in *L. & N. R. R. Co. v. Orr*, *supra*.

While it is argued for the appellant that the injury in this case was such as might be remedied by a special system of drainage, or sewage, at that point, nothing appears in the record to show this fact; no witness testified to it; nor does it appear what the present system is. The record shows that the impairment of appellant's property is due to the fact that since the reconstruction of this street in 1891 the pavement has shed its surface water during rainy weather so that some part of it goes upon appellant's premises, damaging the walls and foundation of his houses, and making them undesirable as places of residence. This is an injury differing in degree only from any other inconvenience, annoyance or impairment caused by such an improvement, which lessens the value of the property. It was not shown that it was practicable to provide at that point any different method of disposing of his natural and damaging incident from the one actually adopted. We are of opinion that the facts shown by appellant's evidence were such as to conclusively establish that the statute of limitation in favor of the city began to run in November, 1891, and the peremptory instruction was justified.

The judgment is affirmed.

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ANDREWS, & CO. V. WILSON'S ASS'EE.

(Filed February 3, 1903.)

Assignment for benefit of creditors—Trusts—Discharge of trustee—Decedents' estates—W. made a deed of assignment for the benefit of his creditors

to A. and B., who instituted an action to settle the trust in which the creditors were paid 10 per cent. of their indebtedness. About five years thereafter an order was entered in that action, reciting that as the assignees had fully settled the trust that they are hereby discharged from liability and their sureties released. Afterwards a creditor of W. filed this action in the circuit court, alleging that W. had died and appellant, as administrator of his estate, had taken possession of his books and accounts, which were valuable, and was proceeding to have them sold for his benefit. Appellant, in his answer, alleged that as the trust had been fully settled and the assignees discharged, that he, as administrator, was entitled to the books and accounts. In another paragraph of his answer he alleges that in the event the court should decide that he is not entitled to the books as administrator, that he as a creditor of W. be permitted to maintain this action for the benefit of all the creditors, and that a receiver be appointed to take charge of the books and accounts, collect all accounts and apply the proceeds to the payment of the unpaid debts of W. On appeal, Held—That appellant, as administrator, was not entitled to the books and accounts of W. The deed of assignment vested all the interest of W. in his assignees for the benefit of his creditors, and his death did not have the effect of revoking the trust created, so long as there remained any debts due by him at the date of his assignment, nor to deprive his creditors of any right which they acquired by the deed of assignment. Nor did the order of court discharging the assignees from all further connection with the trust estate and releasing their sureties have this effect. Equity will not allow a trust to fail for want of a trustee. The effect of the judgment discharging the assignees was to create a vacancy in the position of assignee, which the court could fill, and appellant should be granted the relief prayed for the benefit of himself and the other creditors, except the bank books should not be sold.

R. J. Babbitt and Jos. H. Powers for appellants.

W. G. Dearing, G. A. Cassidy, B. S. Granzis and John P. McCartney for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Chief Justice Burnam.

In February, 1896, David Wilson, doing business as a private banker under the name of the Exchange Bank of David Wilson & Co., at Flemingsburg, Ky., made a general deed of assignment of all of his property to the appellees, R. K. Hart and J. H. Soursley, for the benefit of all of his creditors equally. The assigned estate was settled in a proceeding instituted by the assignees in the Fleming Circuit Court in March, 1896, to which all the creditors were made parties and received 10 per cent. of their respective demands, which was paid to them under an order of the court. At the April term, 1901, of the Fleming Circuit Court the following judgment was entered in the proceeding: "All the matters in controversy herein having been fully settled the assignees are now discharged, and they and their sureties are now relieved from any further liability herein on their bond as such assignees or otherwise, and the cause is filed away."

In September, 1901, Barney Cassidy instituted a suit in the Fleming Circuit Court against the assignees, Hart and Soursley, and Watson Andrews as administrator of David Wilson, who died pending the litigation, and Watson Andrews as an individual, in which he set out all the foregoing facts,

and alleged that he was a creditor of Wilson; that Andrews, as administrator of David Wilson, had taken possession of the books of Wilson belonging to the bank, which he alleged were of the value of \$175, and sought to have them sold for his exclusive benefit. Andrews, as administrator of Wilson, and in his individual capacity, filed an answer, which he made a cross petition against Hart and Sousley, in which he alleged in substance that he was a creditor of David Wilson, deceased; that he had qualified as his administrator; that the assignees had been discharged by a judgment of the Fleming Circuit Court as assignees and released from further liability as such; admitted that the books sought to be attached showed claims due the estate of Wilson in excess of the valuation placed thereon by plaintiff which had not been collected by the assignees previous to their discharge, and claimed that as administrator of David Wilson he was entitled to hold the books and collect the unadministered assets shown thereon for the benefit of his creditors. And in the third paragraph of his answer he alleged that in the event the court should be of opinion that he was not entitled to the possession of these books in his capacity as administrator of Wilson, that he was interested in the collection of the indebtedness due as shown by the books as a creditor; that the assignees, Hart and Sousley, had grossly neglected their duties; had made fraudulent and improvident compromises; wasted the assigned estate, and had been discharged from any further connection therewith by a judgment of the Fleming Circuit Court in the proceeding *supra*; denied their right to further administer the trust or hold possession of the books, and asked that a receiver be appointed to wind up the trust; and that he be allowed to prosecute and defend for all the creditors of David Wilson, who were too numerous to be brought before the court; and that the books, consisting of ledgers, memorandum books, cash books, and all other property belonging to the assigned estate not administered by the assignees, should be turned over to the receiver, who should hold the books and any moneys realized therefrom for the benefit of all the creditors of Wilson.

General demurrers were filed by the assignees to the petition of Barney Cassidy, and they also filed general demurrers to each paragraph of the cross petition of Andrews, all of which were sustained by the trial court and the existing attachment discharged, and a judgment entered that Hart and Sousley, as assignees of David Wilson, were entitled to the possession of all the books and memorandum belonging to the bank and the assigned estate, and that they should be delivered to them, and Andrews has appealed.

The deed of assignment of Wilson vested all of his interest in the assigned property in the assignees for the benefit of his creditors, and his death did not have the effect of revoking the trust thus created so long as there remained any debts due by him at the date of his assignment, nor to deprive his creditors of any right which they acquired by the deed of assignment. (*Gardner v. Letcher*, 16 Ky. Law Rep., 776; *West v. Griffing*, 23 Ky. Law Rep., 311.) Nor did the order of the Fleming Circuit Court discharging the assignees from all further connection with the trust estate and releasing their securities from all further liability in connection therewith have effect. Equity will not allow a trust to fail for want of a trustee, nor there be any doubt that a trustee may be discharged from further o



tion with the trust by a court of competent jurisdiction, and a new trustee or receiver appointed to administer the trust, either upon his own application or that of a creditor or party having pecuniary interest in the trust estate. (Burrell on Assignments, 3d edition, section 469.) It seems to us that the necessary effect of the judgment of April, 1901, was to create a vacancy in the position of assignee. Appellant does not seek in this proceeding to surcharge or falsify any former settlement made by the assignees. All he asks is that the court by proper orders will appoint a receiver to look after assets which he alleges have not been collected and apply them equally for the benefit of all the creditors. Upon the averments of the cross petition he was entitled to the relief sought. But it would not be proper to decree a sale of the bank books themselves. They are the evidence of the assets of the trust estate, which belong alike to all the creditors, and which should be preserved for their inspection upon proper application and at proper times.

For reasons indicated we think the chancellor erred in sustaining a demurrer to the third paragraph of the appellant Watson Andrew's cross petition, and adjudging the former assignees entitled to the absolute custody and control of the bank books and papers of the assigned estate. The judgment is, therefore, reversed and cause remanded for proceedings consistent with this opinion.

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MURPHY v. BALTIMORE & OHIO SOUTHWESTERN R. R. CO.

(Filed February 3, 1903.)

Railroads—Negligence—Defective coupler—Appellant was a brakeman on a freight train of appellee, and while attempting to make a coupling between two cars his arm was caught between the bumpers and mashed, necessitating its amputation, for which this action was instituted to recover damages. Contributory negligence of appellant was relied on for defense. At the conclusion of appellant's testimony the court gave a peremptory instruction to find for appellee, from which this appeal is prosecuted. The proof showed that one of the cars that appellant attempted to couple was provided with a Buckeye automatic coupler which, when in good condition, is operated by a rod running along the end of the car, at the end of which is a crank which the brakeman, standing outside the track, may operate, and a chain attached to this rod will raise the pin, and the only other duty required is to open the knuckles, which requires but a moment. The chain on the rod which moved the pin was broken, but this fact was not known to appellant until he was in the act of making the coupling, and knowing that if he failed to make the coupling the car would be run down grade against a car in which some men were loading stock, thus endangering their lives and property. Held—That the court erred in giving the peremptory instruction as the defective condition of the coupler was known to appellee or its agents, whose duty it was to inspect same, or could have been known to them by the exercise of ordinary care. It was unknown to appellant until a few moments before the accident, and while he might have avoided the injury to himself by stepping from between the cars, it was not negligence on his part if he attempted to make the coupling in the only way he could, by raising the pin with his hand, in order to prevent injury to the men and stock on the track ahead of him. The defective coupler was the prime cause of the injuries, and it was a question which should have been submitted to the jury to determine from all the circumstances whether appellant was or not guilty of

negligence in attempting the coupling, and if so, whether such negligence contributed to his injuries to such an extent that but for same they would not have been received.

Geo. Weissinger Smith and O'Neal & O'Neal for appellant.

Barnett Gibson and Gibson, Marshall & Gibson for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Settle.

The appellant, John F. Murphy, while in the service of the appellee, Baltimore & Ohio Southwestern Railroad, as a brakeman upon one of its freight trains, in attempting to make a coupling had his arm caught between two cars, wounding and mangling it to such an extent as to require amputation between the elbow and shoulder.

The petition alleges in substance that his injuries were caused by the negligence of the appellee in providing a defective engine for pulling its train of cars, and in failing to provide a good and sufficient coupler for one of the two cars which he was attempting to couple, that is, that the coupler on one of the cars was defective and the chain belonging thereto broken, which defect made it dangerous for use. It is further averred in the petition that the defective condition of the coupler was known to appellee, but unknown to appellant at the time of the injury.

The answer denies the negligence complained of in the petition and pleads contributory negligence on the part of appellant, which is denied by the reply. Upon the conclusion of appellant's evidence the jury, under a peremptory instruction from the special judge, found for appellee, and appellant's motion and grounds for a new trial having been overruled, he prosecutes this appeal. No effort was made in the trial court to show that the engine was defective, but appellant sought a recovery upon the sole ground that the coupler was defective and dangerous. The coupler complained of was what is known as a Buckeye automatic coupler, which, when in good condition, is operated by a rod running across the end of the car at right angles to the track. On the end of the rod a lever or crank is attached. A brakeman standing outside of the track may pull the lever and thereby move the rod, which in turn draws a chain attached to an iron pin which is raised by the use of the lever, and when so raised the only remaining duty is to open the knuckles on a plane with the earth's surface. If the coupler is in order, all this may be done in a moment, and the stationary car is thus made ready to automatically grasp the approaching car. It is manifest, therefore, that when the Buckeye coupler is in good order there can be little or no danger to the brakeman in making the coupling.

Although the answer denies that the coupler was in a defective condition, in the brief of counsel for appellee it seems to be admitted that it was in fact defective, in that the chain attached to the pin was broken, and, besides, it is overwhelmingly shown by the evidence introduced in the court below that such was its condition. The proof also conduces to show that when in this defective condition the only practical way to make the coupler do its work is to insert the arm between the bumpers, take hold of the pin with the thumb and fingers and lift it up, and at the same time pull the knuckles out with the hand, and it is further shown that while attempting to operate

the coupler in this way appellant's arm was caught between the irons of the two cars when they came in contact.

It is, we think, also conclusively shown by the evidence that the defective condition of the coupler was known, or by the use of ordinary care could have been known, to appellee's agents and servants, whose duty it was to give attention to such things, sometime before appellant's injuries were received. Upon the other hand, the evidence also shows that its condition was not known to the appellant until in the act of making the coupling. The coupling was done at Flora, Ill., under the following circumstances: At that point the conductor desired to take in his train some loaded cars standing on the side track. These cars were stationed behind a flat car loaded with lumber. By order of the conductor appellant opened the switch and signalled the engineman to back the engine, to which was attached one freight car. The engine and car slowly backed down the grade, while appellant ran ahead, and he reached the lumber car when the backing train was about twenty-five feet away. He kept outside of the rails, and when he reached the lumber car, pulled the lever out. As the chain was broken the effort failed, of course, to draw the pin. This was the first warning that he received of the broken condition of the coupler. By this time the backing train had gotten in about twelve or fourteen feet of him. It appears that about twenty feet behind the lumber car were two cars wholly or partly loaded with live stock, with one or more persons on them, or at them loading the stock. This fact was known to appellant, who doubtless also knew that if he failed to make the coupling the lumber car would probably be driven down grade against the cars upon which were the men and stock, by the collision with the backing train. Upon discovering the condition of the coupler appellant placed one foot inside the rail, reached over the dead irons, and with his hand opened the knuckles, and raised the iron pin, and in this position his arm was caught by the colliding cars and crushed as stated.

The lower court in granting the peremptory instruction seems to have proceeded upon the idea, not that appellant was guilty of negligence in the manner of operating the defective coupler, but that his injury resulted from his negligence in failing to get out of the way of the approaching train after he discovered that the coupler would not work by the action of the lever, and this conclusion seems to have been reached because of an answer made by appellant to a question upon cross-examination, to the effect that he might have stepped back after the discovery of the defect in the coupler before the cars met.

We do not agree with this conclusion of the trial court, for, in our opinion, the question of whether the appellant was or not negligent should not be made to depend altogether upon whether it would have been possible for him to have escaped by stepping back from between the cars, after he discovered the defect in the coupler, but whether in the emergency presented, confronted as he was with the necessity for immediate action, and knowing of the danger to himself from attempting to make the coupling, and of the danger of injury to the men and stock in the cars a few feet beyond him from his failing to do so, he acted with ordinary care in the performance of his duty.

On this point appellant testified as follows: "The whole thing didn't con-

sume but a few seconds, the engine and cars were moving down on me, and I was trying to get the coupling open because I was on the down hillside, and I knew the gentlemen below were loading the stock on the two stock cars to go with us, and a man braking as long as I had been, nine or ten years, didn't want to miss a coupling."

"Q. What would have been the consequence of doing nothing?"

"A. I was trying to do that because if I missed the coupling the cars would roll on down onto the stock cars and cripple some one. A person has to look out for that."

"Q. Was that part of your duty?"

"A. Yes, sir."

It must be borne in mind in this connection that the entire transaction consumed, as appellant stated, "but a few seconds."

At the time he went in to adjust the coupler the backing car had gotten within ten or twelve feet of him; the cars were moving very slowly, not faster than two miles an hour. It can not be said that in reaching over the irons with his hand to open the knuckles, or to release the iron pin, appellant was guilty of negligence, for according to the evidence this was the only way to open the coupler in its defective condition, and, besides, he doubtless believed that the coupler could be thus prepared for performing its office in time for him to avoid the backing train, if it continued the same slow movement until it got to the car to which it was to be coupled. But according to the evidence, when the backing train was only four or six feet off, it gave a sudden lurch, as if something had let loose, thus attaining an increase of motion, which in all probability could not reasonably have been anticipated by appellant at the time he took hold of the coupler, and but for this increased movement of the train, it may without violence to the evidence be assumed, that he could have adjusted the defective coupler, and stepped back from between the cars before they came in contact, and thereby have escaped injury.

So we think that in view of such an emergency as that in which the evidence shows appellant was required to act, with little time for thought or reflection, and having in view, as he doubtless did, the danger that threatened the men and stock in the cars beyond him, and the danger to himself as well, the lower court erred in assuming that the appellant was negligent in failing to step back from between the cars. The jury under proper instructions from the court should have been allowed to determine from the evidence whether he was or not guilty of negligence in attempting the coupling, and, if so, whether such negligence contributed to his injuries to such an extent that but for same they would not have been received.

We find in *Goodrich v. New York Central & H. R. R. Co.*, 24 N. E. R., 397, a case not altogether unlike the one at bar, *Goodrich*, who was a brakeman, in attempting to couple some cars, got his hand crushed. The train was slowly backing at the time, and when the cars to be coupled were in a few feet of each other, he stepped between them for the purpose of inserting the link in the bumper or drawhead of the stationary car. When the cars were three or four feet apart he discovered that the bumper of the moving car was lower than the bumper of the stationary car. He testified that he thought by raising the link it would enter the bumper of the stationary

car, but found that it would not do so, and his hand was caught in the effort to raise the link. In discussing the cause of the accident the Court of Appeals of New York said: "The defective bumper was thus shown to have been the proximate cause of the accident. It was literally the *causa causans*. Its immediate effect was to permit the deadwoods of the two cars to come together, and the plaintiff was from that cause exposed to a danger not within the ordinary risks of his employment. This result was traceable directly to the defendant's failure to provide the moving car with bumpers in good order, and unless the proof showed (which it did not) that plaintiff himself was in some way responsible for the condition of the car, the negligence of the defendant was established. The question as to the plaintiff's contributory negligence was, I think, one of fact for the jury. \* \* \* He appears to have thought that the coupling could be made with the straight link that was in the draw head. He had the right to assume that fact, and that the coupling appliances were in good order. It was only at the moment that the cars were about to collide that he discovered his error. The court can not affirm that for such an error of judgment, induced as it was, to some extent, by defendant's neglect, he is to be held to have been careless. Under such circumstances, when the whole transaction is the occurrence of a moment, a man is not to be held responsible if he errs as to the estimate of danger that confronts him. If he acts the part of a prudent man, willing to and intending to perform the duty to which he has been assigned, he has done all that the law demands of him, and whether he acted such a part under the circumstances of this case was for the jury to determine."

The Supreme Court of Iowa, in *Fox v. Chicago & St. P. R. R. Co.*, 17 L. Rep., annotated, 289, in discussing the question of whether a brakeman was guilty of contributory negligence in attempting to climb a car to set a brake when the train was in motion, in doing which he fell and his foot was crushed, said: "It is contended that the plaintiff can not recover on account of the dangerous speed of the train because he testified that he knew of its speed before he caught hold of the ladder, but he was required to mount the car. It is true he might have refused to have done so because it was running too fast, or because his lantern was out, or because when he approached the car he discovered that the ground sloped away from the track, so that he could not readily seize the ladder and place his foot on the stirrup. But he was acting under orders, and in an emergency which gave no time for reflection, and the jury might well find, as they did, that he was not chargeable with contributory negligence."

We find nothing in the foregoing authorities that conflicts with any rule of law announced by this court in respect to cases of this character, and an examination of the authorities cited by counsel for appellee will, we think, show that none of them discusses the law in regard to the sudden discovery of dangerous defects, or the duty of a brakeman, in an emergency such as confronted appellant, to protect property or the lives of others thereby imperiled.

With reference to the danger that might, and doubtless would, have resulted to the stock and stockmen near appellant, in the event he failed to effect the coupling of the cars, we find the rule thus stated in *American & English Encyclopedia of Law*, 2d edition, volume 7, sections 2 and 3, page 896: "He

whose duty it is to care for the safety of others may do so even though his duty leads him into great and visible danger, and not be chargeable with contributory negligence. But the injured person must not have created the danger, or been guilty of negligence from the consequences of which he tried to save others, or his recovery will be barred; and it must appear that he was in the discharge of duty, and could by the exercise of ordinary care have performed his whole duty, and yet escaped the danger."

The rule stated is manifestly sound in principle and consonant with reason, and by it the conduct of appellant on the occasion of receiving his injuries should be measured. We find no error in the rulings of the lower court in excluding certain questions and answers in the depositions excepted to.

For the reasons herein indicated the judgment of the lower court is reversed and the case remanded, with directions to set aside the verdict and judgment and grant appellant a new trial.

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HENRY, CHAIRMAN, &c. v. SECREST.

(Filed February 8, 1908.)

Election—Injunction to compel count of ballots in primary election—Appellee was a candidate for the nomination of assessor at a Democratic primary election held for county officers in Nicholas county, and was defeated by six votes. Appellee was present at the meeting of the committee when it met to canvass the returns, and demanded that the boxes be opened and the ballots counted. The committee declined to do this, but awarded the certificate of nomination to appellee's opponent. Whereupon appellee instituted this action for a mandatory injunction to compel the committee to open the boxes and count the ballots, alleging that upon a count of the ballots it would be shown that he was nominated for the office; also that he had given notice to the committee of his intention to contest the nomination and requesting that they provide the manner of conducting the contest, and that the committee had refused to do so. A demurrer to the petition was interposed and overruled. Appellants then filed an answer, to which a demurrer was sustained, and the injunction granted from which this appeal is prosecuted. Held—That the petition was insufficient, and the demurrer to it should have been sustained as it contained no allegation of fraud or mistake on the part of the committee or on the part of the election officers, and did not set forth any specific grounds of contest. A mere statement, though in the form of a written notice, from a candidate made to the committee that he proposed making a contest would not be sufficient to justify the latter in prescribing the form or manner of proceeding in such contest when such contest might not be made. The committee could not be required, in the absence of a contest, to open the ballot boxes and count the ballots.

Dickson & Kennedy for appellants.

John I. Williamson and Chas. W. Wood for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Settle.

On May 4, 1901, a primary election for the nomination of Democratic candidates for county offices was held in Nicholas county by order of the Demo-

cratic committee. Appellee, E. J. Secrest, and six others were candidates in the primary for the nomination of county assessor. The race was quite close between the candidates for assessor, for appellee was defeated by only six votes by the candidate declared the nominee.

The primary seems to have been fairly and legally conducted, returns were duly made from the several voting precincts of the county, and on May 6 the committee met at the courthouse in Carlisle, the county seat, and in due form canvassed all the returns, and declared the candidates receiving the highest number of votes duly nominated. Appellee was present at the meeting of the committee mentioned, and demanded of them that they open the ballot boxes returned from the several precincts, and count the ballots in order that it might be determined whether he or his leading opponent was entitled to the nomination for the office of county assessor. The committee refused to comply with his request, and thereupon appellee instituted suit in the Nicholas Circuit Court against appellant Henry and others, chairman, and members of the Democratic committee, respectively, for the purpose of obtaining a mandatory injunction from the judge thereof to compel the county committee to open the ballot boxes, and make a count of the votes from the ballots cast and returned.

The petition avers in substance that the appellee had, after notice to the committee, demanded of them a count of the ballots and the opening by them of the ballot boxes for that purpose; that he believed that a count of the ballots would show that he had received a plurality of the votes cast in said primary for the nomination as assessor. It was alleged that the committee refused his request to count the ballots; and further, that though requested, and in writing notified by him to do so, they refused to make or arrange the form or manner of deciding the contest which he proposed to make for the nomination of assessor. Appellants filed special demurrer to the petition and to the jurisdiction of the court, which was overruled. They then entered motion to require appellee to paraphrase his petition, make it more specific, and to strike out certain parts thereof, all of which motions were overruled. Thereupon a general demurrer to the petition was filed and overruled, after which answer was filed.

The answer traverses the petition; denies the jurisdiction of the court, and avers in substance that no contest had been instituted by appellee, and that none was then pending; that the vote had been fairly canvassed and counted by the committee from the returns made by the election officers of the various precincts of the county; that the count thus made showed the nomination of a person other than appellee for assessor, and that they had no right to open the ballot boxes and count the vote from the ballots. A demurrer was filed to the answer by appellee, which was sustained, and appellants refusing to plead further, the lower court granted the mandatory injunction to compel the committee to open the ballot boxes and count the ballots. To that judgment appellants excepted, and to reverse it they prosecute this appeal. The petition contains no averment of fraud, wrongdoing or mistake on the part of the committee, or any of the officers of the election. It does not set forth any ground for a contest. It gives no reason to support appellee's claim to the nomination, but merely expresses his opinion that the

counting of the ballots contained in the boxes would show him entitled to the nomination.

Section 1568, Kentucky Statutes, provides that "in all cases of a tie or contest the committee or governing authority of the political party holding such primary election shall have the power to hear and determine such contest, and decide who shall be entitled to the nomination. The proceedings in such cases shall be in such form and manner as the committee shall determine upon."

We are not inclined to believe that a mere statement, though in the form of a written notice, from a candidate made to the committee that he proposed making a contest, would be sufficient to justify the latter in prescribing the form or manner of proceeding in such contest, when after all it might, or might not be made, and certainly the committee could not be required, in the absence of a contest, to open the ballot boxes and count the ballots.

If appellee intended to inaugurate a contest, he should have done so in the usual and only proper manner, by giving notice to the committee as well as to the candidate whose right to the nomination was to be contested, and by filing with the committee specifications showing fully the grounds upon which the contest was to be based. If for irregularities, fraud, or mistake in the manner of holding the election, receiving votes, counting votes, or certifying the returns, it should be stated. In the absence of such specifications the committee were justified in refusing the appellee's demands. We are also of the opinion that the special judge erred in not sustaining the general demurrer to the petition. It presents no cause of action, and the court had no authority to grant the injunction in the absence of a contest, and upon the mere suggestion of appellee, that he believed a count of the ballots would show his nomination, especially when the facts alleged in the petition show that a count had been properly made by the committee by a canvass of the returns.

Judgment reversed, with directions to the lower court to dissolve the injunction and dismiss the petition.

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CAVENAUGH v. WILLSON.

WILLSON v. CAVENAUGH.

(Filed February 3, 1908—Not to be reported.)

Judicial sales—Rights of parties after reversal of judgment—Interest—Rents—Repairs—Attorneys' fees—Executions amounting to \$2,213.08 were issued against the property of appellant C. in favor of several laborers who had obtained judgments against her as a silent partner in a firm which had taken contracts to build a portion of a railroad. The property was sold under these executions, and appellee Willson became the purchaser for the amount of same. Appellee paid off the purchase money and took possession of the property, which he held for several years, until after the judgments on which the executions issued were reversed. No supersedeas was issued in the case. This action was instituted to ascertain the rights of the parties in the property. The case was referred to the commissioner, and he reported that appellee had, and could have, collected during the time he had possession



of same rents to the amount of \$3,735.78; that he had paid for necessary repairs, taxes, insurance, etc., \$1,588.81, and that appellee had paid the purchase money with interest. The court gave judgment against appellee for the amount of the rents, but credited him with the amount paid for repairs, taxes and insurance. It gave judgment in favor of appellee for the amount paid on the executions, with interest. Held—That the judgment of the chancellor was fair and equitable. Appellee held the property as a quasi trustee, and was liable only for the rents that were collected by the exercise of reasonable diligence in renting same, and was entitled to be compensated for rents, insurance and taxes. He was entitled to collect the amount paid by him under the execution sale. It is no objection to his claim that this amount included his fee as attorney, amounting to 25 per cent. of it as it was reasonable for the services rendered, and the court properly treated it as paid by him; besides, he settled with his clients and partner on this basis.

Lane & Harrison for Catherine Cavanaugh.

Burton Vance for A. E. Willson.

Appeals from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge O'Rear.

A firm styled Cavanaugh, Crow & Co. had obtained a contract for the building of a part of the Louisville Southern Railroad. They failed. A number of their laborers instituted suits against them, and included Mrs. Cavanaugh, appellant, as a party defendant under an allegation that she was a silent partner in the firm. She was then authorized to contract, etc., as a feme sole. The lower court held her to be liable, and rendered personal judgment against her in favor of the laborers, upon which twenty-three several executions issued. The aggregate sum to be raised by these executions, including costs, was \$2,213.02. Willson & Thum were the attorneys for the plaintiffs in these suits. Appellee, Augustus E. Willson, was a member of that firm. They charged their clients, and were settled with on that basis, 25 per cent. of the claims for their legal services. The proof shows this particular charge to have been reasonable and satisfactory. Mrs. Cavanaugh prosecuted an appeal to this court without supersedeas. It was not decided for several years. In the meantime the executions were levied upon a house and lot belonging to Mrs. Cavanaugh, and at the sale appellee Willson became the purchaser at the price of \$2,213.02. No one else bid. He then offered, and frequently thereafter offered, to Mrs. Cavanaugh to allow her to redeem the property by paying off the debts represented by his bid. She declined, though amply able financially to have complied. After Willson had obtained a deed and the possession of the lot the judgment in favor of the laborers against Mrs. Cavanaugh was reversed by this court. This suit is to settle the rights of Mrs. Cavanaugh, owner, and Willson, purchaser. It was decided on a former appeal of this case (22 Ky. Law Rep., 474) that Mrs. Cavanaugh was entitled to the property; that an attorney for a plaintiff who had procured the property sold under an erroneous judgment under which he had bought it, was liable to restore it or its value to the defendant, including an accounting by the attorney for "rents and profits" during the time he held the possession. But it was then decided that in the accounting the purchaser should be reimbursed by the owner for the purchase money paid out by him in buying the property. The former opinion on

this point is as follows: "It follows from what we have said that \* \* \* the value of the property or the property itself must be adjudged to Mrs. Cavanaugh. The purchase money paid out by appellee, which appears to have been \$2,218.00, with interest from the 1st day of April, 1889, is to be charged on the property, less the rents and profits appellee has received from the property since his possession of it in May, 1896."

On the return of the case further pleading was allowed to show the state of the account thus directed to be struck between these litigants. An order of reference to the master commissioner was entered. He took proof, and reported that appellee Willson had, and could have, received rents to the amount of \$2,725.78; that he had during his possession paid for necessary repairs, taxes and insurance, etc., \$1,538.81. The foregoing figures represent the sums as altered slightly (by allowance of interest) in the final judgment of the court. The commissioner also found, and the court confirmed it, that Willson paid for this property \$2,218.02, as of April 1, 1889, and allowed that sum and interest accordingly.

The complaints of Mrs. Cavanaugh on this appeal are that Willson did not pay \$2,218.02, or other sum than about \$400, for the property; that he should have been charged with the reasonable rental value of the property, without regard to what he actually received; and that he was entitled to nothing for repairs or insurance (taxes seem to be conceded).

It is argued by appellee that this court found on the former appeal as a settled fact that Willson had paid \$2,218 for the property as of April 1, 1889.

Whether it so decides or not, we are convinced that he did so. The facts are, at the marshal's sale Willson became the purchaser, as stated, and executed to the respective plaintiffs bonds as required by law for the purchase money, bearing interest from April 1, 1889. These bonds he subsequently paid off, as he was bound to do. It is not material when they were paid, as they bore interest from date. The commissioner consequently correctly charged interest from their date. But it is said that Willson's fee of 25 per cent. was not "paid" by him, and that it should have been excluded by the court. No sound reason was advanced why this should be. Willson & Thum charged, and were paid, this fee in settling with their clients. Whether the bonds were paid by Willson to the clients, and they then repaid the fees in cash, or whether the fees were credited, is mere matter of form, and can not change the legal effect of the transaction. That was a payment in law of the bonds, and likewise a payment by the client of the fees. (2 Benjamin on Sales, section 1062.) It was shown, too, that in the settlements between Willson & Thum of their partnership business these fees were divided between them. So Willson paid the money evidenced by these fees, paid one-half direct to his partner in satisfaction of the latter's right thereto. Besides, Willson's services were shown to be worth the sums charged as fees. Why should not the value of one's labor be reimbursed to him in such an accounting as this as rightfully as his money? Labor was doubtless one of the earliest, as it is now one of the essential, criterions of value. The purchaser was required to account for "rents and profits" during his holding of the property. This accounting was directed to be, and was had, in equity.

The effect of the former ruling was to hold that the purchaser held the

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property in trust for the owner. He was bound to take care of it. If he had failed, he would have been liable for the resultant damage. The court is trying to restore the parties to their former situations in so far as it can. The property was adjudged, and has been restored, to the owner. But that does not satisfy her legal rights, for had the possession not been taken from her she would have received the rents in the meantime. What rents? The highest and continuously? Not so; but such as could have been obtained under existing state of repairs and condition of the property, and demand for it by renters. It is indisputably shown that appellee exercised the best care and the utmost diligence in keeping it occupied, and got for it the most rent that could be had for such property. This is the very best test of rental value, far more satisfying to the court than expert witnesses, testifying upon hypothetical states of case. It was, therefore, proper to have charged appellee with the rents actually received, and which by ordinary care and reasonable diligence, he would have received. But had appellant been in possession she could not have had her rents as clear profits, for the property had to be repaired. If not, it would not only have fallen down and become worthless so far as the building was concerned, but of course it would not have been tenanted at all. Nothing was claimed or allowed for permanent improvements or betterments; only necessary repairs were allowed. And this was right. Had the property burned during the appellee's possession he would have been compelled to either account for its value or to restore it as it was. The insurance, though in appellee's name, would in equity have been adjudged for the benefit of appellant upon proper showing, as he held it as a quasi trustee for her.

We are of opinion the judgment of the lower court conforms to the directions and principles announced in the former opinion, and that it has reached a just and equitable conclusion.

Both judgments affirmed.

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WORTHINGTON v. BOARD OF EDUCATION OF CITY OF LEXINGTON.

(Filed February 4, 1908—Not to be reported.)

Municipal taxation—Submission of vote on taxation to the people—The board of education of Lexington adopted a resolution providing that a proposition be submitted to the voters of the city, authorizing the issual of \$75,000 of bonds for the purpose of building three additional school houses. The proposition was submitted to a vote at the November election, 1902, and resulted in 1,681 yeas and 487 nays. At the same general election there was cast for a member of congress by the city of Lexington 8,769 votes. This action was filed by appellant to enjoin the issual of the bonds on the ground that two-thirds of the vote cast at said election was not cast in favor of said proposition. Held—That only two-thirds of those voting on the question was necessary to give authority for the issual of the bonds, and as the proposition received this vote in its favor appellant's petition was properly dismissed.

Wm. Worthington for appellant.

Geo. S. Shanklin for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Wm. Worthington, instituted this suit against the appellee, the board of education of the city of Lexington, to enjoin and restrain them from the issue of seventy-five bonds of \$1,000 each in the name of the city of Lexington. He alleges that at a regular meeting of the board of education they unanimously passed the following resolution:

"Whereas, Additional school buildings are necessary to accommodate the white and colored children of the city of Lexington, and the regular annual revenue of the board of education is not sufficient to purchase sites, erect and equip said buildings; now, therefore, be it resolved by the board of education of the city of Lexington, Ky.:

"Section 1. That this board incur a debt not exceeding \$75,000 for the purpose of purchasing sites for and erecting and equipping three new school buildings in Lexington, two for white and one for colored children, and issue bonds to the amount of the indebtedness so incurred, to run for thirty years, which shall be of the par value of \$1,000, and shall bear interest at the rate of 4 per cent. per annum, payable semi-annually, and which shall be secured by a pledge of the property so purchased, erected and equipped, and all other property and revenue of the board of education.

"Sec. 2. That the proceeds of the said bonds shall be used exclusively for the purpose set forth in this resolution.

"Sec. 3. That this board request the general council to provide for the collecting of a sinking fund tax sufficient to pay the interest on said indebtedness, and create a sinking fund for the payment of the principal thereof, within the term for which the bonds are issued.

"Sec. 4. That the county court of Fayette county be, and it is hereby, requested to order a special election to be held, of which fifteen days' advertisement and notice shall be made in the official newspaper of the city of Lexington, Ky., at the same time and place as the regular election in the city of Lexington, Ky., on November 4, 1902, for the purpose of submitting to the qualified voters of said city the question whether or not said board of education shall incur said indebtedness, and issue bonds therefor, and to direct those charged with the duty of having printed the ballots to be used at said election, to have printed thereon said question in such form as the law provides."

That on the 1st day of October, 1902, the Fayette County Court entered an order calling for a special election on November 4, 1902, submitting to the qualified voters of the city of Lexington the question as to whether the board of education of the city of Lexington should incur the indebtedness for the purpose indicated in the resolution; that on the 4th of November the special election was held in conformity with the order of the county court, and that the vote upon the question of the issue of the bond resulted in 1,621 yeas and 487 nays; that the general council of the city of Lexington in conformity with section 3 of the resolution of the board of education did levy a tax to create a sinking fund for the payment of the bonds and the interest thereon; that the assessed value of the taxable property of the city of Lexington amounts to more than \$17,500,000, and that the indebtedness

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of the city does not exceed \$750,000, and that the tax rate for the year 1908 was only \$1.16% on each \$100 of taxable property; that at the same election on which the bond proposition was voted there was cast for a member of congress by the city of Lexington 8,769 votes.

The ground on which appellant asks the injunction is that the board of education has no power to issue and sell the bonds in question; second, that the proposition to issue the bonds did not receive two-thirds of all the votes cast for members of congress at the election at which a vote was taken upon the proposition. The act of the general assembly approved March 30, 1900, amending the act for the government of cities of the second class, to which Lexington belongs, reads as follows: "That the board of education shall have power to issue school bonds, to run for not exceeding forty years, for an amount not exceeding \$100,000, sufficient to purchase sites and erect and equip school-houses: Provided, That said bonds do not bear exceeding 6 per cent. per annum interest, payable semi-annually, and shall not be sold for less than par and accrued interest, and the proceeds of said bonds shall be used exclusively for the purpose named in this act, and shall not be in violation of the Constitution of this Commonwealth, and provided that said bonds shall not be issued without the assent of two-thirds of the voters voting at the election to be held for that purpose."

We are of the opinion that the board of education had authority to submit the proposition to issue bonds in question to a vote of the people, and it is apparent from the averments of the petition that the statutory method of taking the necessary steps have been strictly complied with; that none of the limitations imposed by section 157 of the Constitution upon the incurring by municipalities of indebtedness are infringed by the proposed issue of the bonds sought to be enjoined. It was held in *Belknap v. City of Louisville*, 99 Ky., 474, that under section 157 of the Constitution a city was not authorized to become indebted beyond the current revenue for the year without the consent of two-thirds of the voters actually voting at the general election when the question was submitted, and not merely two-thirds of those voting upon the question. But in *Montgomery County Fiscal Court v. Trimble*, 20 Ky. Law Rep., 828, it was held that only two-thirds of those voting on the question was necessary to give authority to issue the bonds, and so much of *Belknap v. The City of Louisville* as was in conflict with the opinion was overruled. Under the authority of this case we conclude that the proposition received the necessary two-thirds of the votes, and we are, therefore, of the opinion that the chancellor properly dismissed appellant's petition, and held that appellees had full authority to issue and sell the bonds sought to be enjoined.

Judgment affirmed.

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

## KENTUCKY COURT OF APPEALS.

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RYAN, &c. v. QUINN.

(Filed February 4, 1903—Not to be reported.)

1. Damages—Assault and battery—Evidence—Instructions—Pleading—Appellee was a sheriff of a Democratic primary election and instituted this action against appellants, R. and N. and four others, charging that while engaged in performing his duties, he was without provocation assaulted by defendants, R. and N., who were accompanied by four others, and was beaten and kicked, and severe and painful injuries inflicted upon him, for which he sued to recover damages. He also alleged that three of the defendants conspired and combined with R. and N. in the commission of the injuries complained of. The answer traversed the allegations of the petition, and in the second paragraph alleged that plaintiff was endeavoring to block the polls and prevent the election from being held, and without any cause, committed an assault on others, including defendant Ryan, and that his conduct resulted in an altercation, which was the result of his own assault. The court sustained a demurrer to the second paragraph of the answer, and a trial was had on the issues presented in the first paragraph of the answer, which resulted in a verdict in favor of plaintiff against R. for \$1,000, and for \$500 each against the other defendants, from which this appeal is prosecuted. It is insisted that the court erred in admitting in evidence the rules of the committee regulating the conduct of the election; also that the court erred in permitting a witness to testify that about eleven o'clock the committee declared the primary election off on account of various disturbances at the polls. Held—That evidence of the rules of the committee regulating the holding of the primary election was incompetent as officers of primary elections have the same powers and are subject to the same limitations as officers of regular State elections. It was also error to permit evidence to be introduced showing that the primary election had been declared off. Errors in instructions given are also urged for reversal. Held—That in the first instruction the court erred to the prejudice of appellants in resting the authority of appellee upon the rules of the committee and not upon the statute. The instruction was also erroneous and prejudicial in not defining the limitation upon the authority of the officer. By section 1470, Kentucky

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Statutes, no person other than the election officers shall remain within fifty feet of the polls except when voting. Under section 1484, Kentucky Statutes, it is made the duty of the sheriff to preserve order at the polls, and enforce the provisions of the election laws under the direction of the judges. Neither of defendants were residents or voters of the precinct. If the evidence for defendants be true R. did not propose to remain within fifty feet of the polls, but only wished to talk with the judges to get them to admit S. as a challenger or inspector. When R. communicated this to appellant it was his duty to report the fact to the judges and act under their discretion. In the meantime he might require R. to stand back fifty feet from the polls, and if R. disobeyed his order he might place him under arrest, distinctly notifying him of the cause of his arrest. But he had no right without this to strike R. unless in his necessary self-defense. If R. resisted arrest he might use such force as was necessary to make the arrest (short of taking his life). Under the pleadings and facts proven, showing that R. pulled appellee off the steps, the court should have instructed the jury that they should find for plaintiff against R. a reasonable compensation therefor, and if they believed from the evidence that in addition to this R. struck appellee, or beat or kicked him, or that others did so with whom R. was acting in concert, or whom he incited, aided or abetted or procured to do so, they should in addition find in favor of plaintiff against R. such an amount as would fairly compensate plaintiff for any physical or mental suffering or medical or dental bills caused to him by such striking or beating, and that in addition to compensatory damages they might, in their discretion, award punitive damages in such sum as they deemed proper under all the evidence, not exceeding in all the amount claimed in the petition; and on the question of punitive damages they might take into consideration any mitigating circumstances shown by the evidence. The evidence does not warrant the giving of the third instruction, to the effect that as there was no plea of son assault de mesne the verdict must be for plaintiff, and that the only question for the jury to determine is what amount in damages should be assessed. The court properly sustained a demurrer to the second paragraph of the answer as it was insufficient. Although it alleged that appellee began the difficulty by striking him, he did not allege that he then took hold of him in his necessary self-defense to prevent him from striking him again, using no more force than was necessary for his protection, and that this was the wrong sued for. Although self-defense was not pleaded, the matter pleaded was competent in mitigation of damages. If those who did hurt appellee were not acting in concert with R., but of their own wishes, R. was not responsible for their acts. The third and fourth instructions were in effect peremptory instructions to the jury to find against R. compensation for plaintiff's injuries, and should not have been given. The fourth instruction was also erroneous in using the word "approved." If R. incited, procured or encouraged the other men to beat plaintiff he is responsible, but he is not responsible because in his heart he may have "approved" of it. The word "procure" in this instruction should be substituted for the word "cause." The fifth instruction relative to punitive damages was erroneous. The sixth and seventh instructions are erroneous for the same reason as the fourth, in using the word approved. The court should have given a peremptory instruction to find in favor of the three policemen, as there is no evidence to show that they aided or acted in concert with any one in the infliction of the injuries complained of.

Zack Phelps, Fred Forcht, Jr., and Wilson Goldsmith for appellants.

Wallace & Miller, McDonald & McDonald, W. W. Thum and W. C. Owens for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hobson.

Appellee, James C. Quinn, filed this suit against appellants, charging in his petition that on June 12, 1899, while he was engaged in performing his duties as sheriff of the Democratic primary election, he was without provocation assaulted by the defendants, John Ryan and Frank Jeff Naves, who were also accompanied by four others, and was beaten, kicked, bruised and otherwise maltreated by them and their associates, so that he was painfully and seriously injured, having several of his teeth knocked out, his wrist sprained, and his face, head and body bruised in numerous places. He also charged that the defendants, Whitman, Raidy and Wentz, had previously combined and conspired with the other defendants, and aided and abetted them by remaining in the presence when the assault was committed and protecting the other defendants from interference while committing the assault. The defendants all filed answer, traversing the allegations of the petition. In the second paragraph they alleged affirmatively in substance that the plaintiff was endeavoring to block the polls and prevent a regular Democratic primary from being held, and without any cause committed an assault on others, including the defendant, Ryan; that his conduct resulted in an altercation which was the result of his own assault. The court sustained a demurrer to the second paragraph of the answer, and with the pleadings in this condition the parties went to trial. The jury returned a verdict in favor of the plaintiff against Ryan for \$1,000, and against each of the other defendants for \$500, on which the court rendered judgment.

The proof shows that John Ryan is a pump inspector of the city; that Frank Jeff Naves is employed in the fire department, and the other three defendants are policemen. The proof also shows that the plaintiff, Quinn was the sheriff of the primary election, regularly appointed, and that neither he nor Ryan lived in that precinct. The testimony on the plaintiff's behalf was substantially as follows: After the officers had got everything in order at the polls, and were getting ready to open them, a man named Tom Scally came in and presented credentials as inspector or challenger, and wanted to stay in, but the officers ruled him out. He went out, and not long afterwards John Ryan drove up with his son, Dennis Ryan, in a buggy, and Jeff Naves and Tom Scally and others had a conversation with him. Ryan then said: "Who is that fellow in the door?" Scally said: "His name is Quinn." Ryan pulled out a paper and said: "He has no right there; make him show his papers." Quinn then pulled out his papers; Scally read them and said "they are all right," and then went back to the buggy. He and Ryan had a conversation, and Ryan drove away. In a few moments Ryan returned in his buggy and had a conversation with the police; then he jumped out of the buggy and rushed up to the door and grabbed Quinn by the arm, saying with an oath, "I will put you out," and as he grabbed him by the arm he struck him. Quinn was standing on the step eight or nine inches above the level of the pavement, and from the strike and jerk fell on the pavement; just as he went to get up Ryan kicked him in the mouth, and kicked one



tooth entirely out and broke off another. As Quinn got up Jeff Naves struck him, and a half a dozen more struck him in the back. He hallooed for protection to the police, and they did not move. Some one called out "kill him," and, thinking he was going to be killed, he ran across the street, four or five men after him, and there he fell again, or was knocked down again. When he got up on the other side of the street the police were in the same place opposite the voting place, and Ryan and his buggy were going out the street. The police were thirty five or forty feet away, and did not move during the whole encounter. Such is the version of the transaction given by Quinn, and it is in the main sustained by the testimony offered by him, except that some of his witnesses say that when he ran across the street and fell the second time the police intervened. On the other hand, John Ryan testified that he went to the precinct in the interest of certain candidates for whom he was working to see if everything was right, and inquired for the inspector, Scally, and after learning that he was not admitted to the polls, drove away, but after going a short distance concluded to return, thinking that as the inspectors had been admitted at the other polls he would reason the matter with the officers and get them to admit Scally; so he came back and got out of the buggy and went up to Quinn, who was standing in the door, with a view of having an interview with the judges, and asked to be allowed to see them; that he had no conversation with the police and had no idea of trouble; that Quinn made a strike at him and knocked his hat off while he was parleying with him, and that he then, to protect himself and to keep Quinn from striking him again, grabbed Quinn; that he did not hit or kick him, and nothing was said about killing him or hurting him, and that as Quinn came off the steps toward the curbing his son, Dennis, jumped out of the buggy and squared off at Quinn and knocked him down and there was a running fight across the street, a number of men following them. The police crossed the street and the crowd dispersed. It was all done so fast that no mind could realize what was taking place until it was over. The defendant, Naves, testified substantially to the same facts, and so did the other defendants, who also testified that they intervened as soon as they saw Quinn down, and that the person who was assailing him then ran down the street. The proof for the defendants also showed that no body had voted at the time the difficulty came up, and that Quinn's conduct was boisterous and unseemly. There was no dispute as to the extent of Quinn's injuries. He had two teeth knocked out and was somewhat bruised, but not enough to require medication. His teeth were replaced by a dentist. He remained about the polls an hour or two after the difficulty, but finally was suffering so that he left.

The plaintiff introduced as a witness Isaac P. Miller, and over the objections of the defendants introduced certain rules of the Democratic committee for the purpose of showing that by these rules no person excepting those wanting to vote should be allowed within fifty feet of the voting place. The purpose of this evidence seems to have been to show Quinn's authority for keeping persons out. It has been held by this court that primary elections must be held under the statute; that the State having prescribed an official ballot and provided that a nominee by a primary election is entitled to have his name printed on the ballot, may properly prescribe how the

primary elections shall be held. By section 1551, Kentucky Statutes, all primary elections must be held under the same requirements as regular State elections, except as provided in the statute. By section 1560 the officers of all primary elections have the same powers and are subject to the same limitations as officers of regular State elections. Appellee Quinn, therefore, derived all his powers from the statute, and the rules of the committee could add nothing to them, and should not have been admitted.

The witness, Miller, was also allowed to state that the committee, about 11 o'clock, declared the primary off, owing to the fact that the election officers in various precincts had been interfered with by persons connected with the city administration. This evidence was incompetent. The defendants were in no way connected with, or responsible for, what occurred in other precincts, and the witness had no personal knowledge of the facts testified to. Proof of what others did was not competent against the defendants. (*Fin-nell v. Bohannon*, 19 Ky. Law Rep., 1587.)

The court instructed the jury as follows:

"1st. The court instructs the jury that the plaintiff in this action, James C. Quinn, who was the duly appointed and authorized sheriff of election at the polls or voting place for the fourth and fifth precincts of the eleventh ward at the Democratic primary held June 14, 1899, and as such it was his legal duty, and the duty of his associate officers, to obey and carry out the authorized and official instructions promulgated by the duly appointed and authorized Democratic authorities who directed the holding of said primary, and especially to obey and enforce instruction No. 2 to exclude all persons from the said voting place where he and they were the duly appointed officers, after it was opened, excepting those wanting to vote, and as such officer the plaintiff had a right to prevent, by force, if necessary, any person from entering said voting place except those wanting to vote.

"2d. The court instructs the jury that the defendant, John Ryan, was not an election officer or voter in said precinct, and did not go to the voting place at Nineteenth and Main, whereat the plaintiff was sheriff, for the purpose of voting, and had no legal right or authority after the voting place was opened to go within fifty feet thereof, or to enter without permission the said voting place for any purpose whatsoever after it was opened for the purpose of receiving votes.

"3d. The court instructs the jury that upon the pleadings in this case, as there is no plea or answer of son assault de mesne, their verdict must be for the plaintiff against the defendant, John Ryan, as it is shown from the defendant, John Ryan, himself, and he is corroborated by all of his own witnesses, that he seized hold of the plaintiff in anger, which, in law, the court instructs the jury is an assault and battery. So that as to the defendant, John Ryan, the only question for the jury to determine upon the evidence is what amount in damages they will assess in favor of the plaintiff.

"4th. Upon the question of damages to be awarded against the defendant, Ryan, the court instructs the jury that it is their duty to find, and they should find, in favor of the plaintiff such an amount as will fairly compensate the plaintiff for any physical or mental suffering and medical and dental bills, caused to him by the said assault and battery committed upon him by the defendant, Ryan, or by any of the others then and there committing

an assault upon the plaintiff, if the jury believe from the evidence that such further assault and battery by others was incited, caused, encouraged or approved by the said Ryan at the time of its commission.

"5th. The court further instructs the jury upon the question of damages against the defendant, Ryan, that if they believe from the evidence that the assault and battery committed upon the plaintiff by said Ryan or by others who were incited, encouraged, aided or abetted by Ryan to further assault the plaintiff, was accompanied by acts of cruelty and oppression, or were wantonly committed in reckless disregard of plaintiff's rights, then in addition to compensatory damages, as defined in instruction No. 4, the jury may further award punitive damages as a punishment to said Ryan, and as a warning to others not to commit similar assaults and batteries. But upon this question of punitive damages the court instructs the jury that they may consider mitigating circumstances, if any such they may believe from the evidence there were, and gauge their verdict as to the amount of punitive damages, if any such they decide should be given, by such mitigating circumstances. But the court instructs the jury that as to compensatory damages for the physical and mental pain, suffering and medical and dental bills caused by said assault and battery the jury should not consider mitigating circumstances at all, but should award the plaintiff such compensatory damages in full as defined in instruction No. 4, but not in all to exceed the amount claimed in the petition, \$5,000.

"6th. As to the other defendants in this case, Whitman, Raidy and Wentz, the three policemen, and Naves, a fireman, the court instructs the jury that if they believe from the evidence that they, or either of them, committed an assault and battery upon the plaintiff, or that they, or either of them, were present at the election precinct at Nineteenth, near Main, and when the said assault and battery was committed by the defendant, Ryan, or either of the said defendants, upon the plaintiff, but did not actually themselves join in the said assault and battery, but stood by and encouraged, incited, aided, approved and abetted the commission of any assault and battery upon the said plaintiff at said time and place, then such of the other defendants or defendant who did actually commit an assault and battery upon the plaintiff, for the law makes no distinction between accessories and principals in misdemeanor cases, of which the assault and battery as complained of in the petition is one, and all persons either actually committing an assault and battery, or inciting, encouraging, aiding, approving or abetting the committal of an assault and battery are liable equally and jointly as principals.

"7th. But unless the jury believe from the evidence that the defendants, Whitman, Raidy, Wentz and Naves, or either or any of them, committed an assault and battery upon the plaintiff, or that they, or either of them, was present at the said election precinct at Nineteenth, near Main street, when the said assault and battery was committed by the defendant, Ryan, or either of the defendants upon the plaintiff, and actually themselves joined in the assault and battery, or encouraged, incited, aided, approved or abetted the commission of said assault and battery upon the said plaintiff at said time and place, their verdict should be for such defendant or defendants.

"8th. As to such defendant other than Ryan, if the jury should find for-

the plaintiff, their verdict may be for compensatory or punitive damages, or both, as above instructed as to the defendant, Ryan. If, however, the jury as to all or any of the defendants, except Ryan, find for any or all of the defendants, except Ryan, their verdict should be: 'We, of the jury, find for the defendants (naming the defendants in whose favor they desire to find).'

"The court instructs the jury that they can not find any damages for plaintiff for or on account of loss of time caused to plaintiff by the assault and battery complained of in the petition.

The first instruction is erroneous in resting the authority of Quinn upon the rules of the committee and not upon the statute. It is also erroneous and prejudicial under the evidence in not defining the limitations upon the authority of the officer. By section 1470, Kentucky Statutes, no person other than the election officers shall remain within fifty feet of the polls, except when voting. By section 1484 it is made the duty of the sheriff to preserve order at the polls and enforce the provision of the election laws under the direction of the judges. By section 1576 any person who shall willfully disobey any lawful command of any officer of an election shall be fined not less than \$25 nor more than \$500. If the evidence for the defendants be true Ryan did not propose to remain within fifty feet of the polls, but only wished to talk with the judges to get them to admit Scally. When Ryan communicated this to Quinn it was his duty to report the fact to the judges and act under their discretion. In the meantime he might require Ryan to stand back fifty feet from the polls, and if Ryan disobeyed his order he might place him under arrest, distinctly notifying him of the cause of his arrest. But he had no right without this to strike Ryan unless in his necessary self-defense. If Ryan resisted arrest he might use such force as was necessary to make the arrest (short of taking his life).

As these facts were not shown by the proof, in lieu of instruction Nos. 1, 2, 3, 4 and 5 the court should simply have told the jury that it was conceded in the evidence that Ryan took hold of Quinn and pulled him off the steps, and that under the pleadings they should find in favor of the plaintiff against Ryan a reasonable compensation therefor; and that if they believed from the evidence that in addition to this Ryan struck Quinn, or beat or kicked him, or that others did so with whom Ryan was acting in concert, or whom he incited, aided or abetted, or procured to do so, they should in addition find in favor of the plaintiff against Ryan such an amount as would fairly compensate Quinn for any physical or mental suffering or medical or dental bills caused to him by such striking or beating; and that in addition to compensatory damages they might, in their discretion, award punitive damages in such sum as they deemed proper under all the evidence, not exceeding in all the amount claimed in the petition; and on the question of punitive damages they might take into consideration any mitigating circumstances shown by the evidence.

The evidence does not warrant the third instruction, although it is shown by the evidence that Ryan took hold of Quinn. All the proof introduced by the defendants is to the effect that he did this after Quinn struck him. The court properly sustained a demurrer to the second paragraph of Ryan's answer, because in it, although he alleged that Quinn began the difficulty by striking at him, he did not allege that he then took hold of him in his neces-

early self-defense to prevent him from striking him again, using no more force than was necessary for his protection, and that this was the wrong sued for. But although there was no plea of self-defense, the matter shown was competent in mitigation of damages, and if Ryan testified truly he did not hurt Quinn at all. If those who did hurt Quinn were not acting in concert with Ryan, but of their own wishes to get even with him for his own boisterous conduct, Ryan was not responsible for his injury. The court, therefore, should have only told the jury under the pleadings that they should find against the defendant, John Ryan, as above indicated. The third and fourth instructions taken together were in effect a peremptory instruction to the jury to find against Ryan compensation for the plaintiff's injury. The fourth instruction is also erroneous in using the word "approved." If Ryan incited, procured or encouraged the other men to beat Quinn he is responsible, but he is not responsible because in his heart he may have approved of it. A man is not responsible for a beating inflicted by another because he thinks the punishment deserved, or is secretly pleased to see it go on. He is only responsible when he incites or procures it or aids in its conclusion. (*Blue v. Crisp*, 4 Ill. Ap., 51; *Lester v. McKee*, 79 Ill. Ap., 210; *Hilmes v. Strobell*, 59 Wis., 74; *True v. Commonwealth*, 90 Ky., 651; *Omer v. Commonwealth*, 95 Ky., 853.) The word "cause" in this instruction may have been misleading under the evidence, for it may have been inferred from it that if Ryan's act, however innocent, was the cause or occasion of Quinn's being beaten by the other men, Ryan was responsible, and it will be better to substitute the word procure for the word "cause." The fifth instruction was erroneous in so far as it authorized the jury to find "punitive damages as a punishment to Ryan and as a warning to others not to commit similar assaults and batteries." (*Snyder v. McGill*, 28 Ky. Law Rep., 587.) The sixth and seventh instructions are erroneous for the same reason as the fourth in using the word "approved."

As to the three policemen, appellants Whitman, Raidy and Wentz, the evidence is insufficient to sustain the verdict. The allegations of the petition as to them is that they had "previously combined and conspired with the other said defendants for the said assault, and aided and abetted in said assault by remaining in the presence when such assault was committed, and protecting said other defendants from interference while committing said assault." There is no evidence of a previous combination or conspiracy between the policemen and John Ryan or Frank Jeff Naves. The only evidence on this subject is that Ryan had a talk with the policemen before he came up to Quinn, but what passed is not shown, and there is nothing from which it might be inferred that the police aided in the assault by remaining present and protecting the other defendants from interference while committing it. They were thirty-five feet away; the altercation was continuous from the time Ryan's hat was knocked off until Quinn fell the second time on the opposite side of the street, and took less time perhaps than it would one to describe it. The only thing that it would seem the police failed to do that they ought to have done was to make the proper arrests. But this was after it was all over. Dennis Ryan says he ran away to avoid arrest, but it is clear from the evidence that he did not run far, and could have been arrested by proper diligence. Still a peace officer is not to be presumed

to violate his duty under his oath of office, and there must be something more than a mere failure to make an arrest which might be due to other causes before he can be held as a party to the assault. As to the three policemen, we see no reason why the peremptory instruction to find for them should not have been given.

Judgment reversed and cause remanded for further proceedings consistent herewith.

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GOODIN v. WILSON.

(Filed February 4, 1908.)

Title—Judicial sales—Executions—Appellant obtained a judgment for money against appellee, and an execution for same was issued and levied upon a tract of land in the possession of appellee, and the execution was returned with the endorsement of the levy made thereon. Appellant then instituted this action to enforce her lien, alleging in her petition that appellee had purchased the land at a judicial sale for \$2,000, and had paid the purchase money except \$400, but no deed of conveyance had been made to him by the commissioner. Her petition was dismissed, from which she prosecutes this appeal. It is urged for appellee that he had no title that could be subjected to either a levy or sale under execution. Held—That by his purchase of land at judicial sale he only obtained the equitable title, which was not subject to levy or sale under execution, under sections 1681 or 1709, Kentucky Statutes, but appellant should have proceeded to subject same to her debt, under section 489, Civil Code of Practice. Only lands to which the debtor holds the legal title can be subjected to levy or sale under execution, and appellant acquired no lien under the levy of her execution, and her petition was properly dismissed.

John T. Hays and John H. Wilson for appellant.

Hazelrigg & Chenault for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Barker.

Appellant, Mary J. Goodin, obtained a money judgment against appellee, J. H. Wilson, in the Knox Circuit Court, upon which she caused to be issued an execution, which was placed in the hands of the sheriff of Knox county, for the purpose of enforcing satisfaction of her demand. The sheriff attempted to levy said execution upon a tract of land, described by metes and bounds in his return on the writ, as the property of appellee. This execution was returned by the sheriff without further action than the endorsement of the levy; whereupon the appellant, for the purpose of enforcing her supposed lien, instituted this action in the Knox Circuit Court, setting up her judgment, the execution thereon, and the levy of the officer upon said land, and reciting the fact that appellee's title to the land in question was obtained by a purchase at decretal sale in the case of Tinsley v. Tinsley, in the Knox Circuit Court; that appellee had purchased said land for the sum of \$2,000, for which he had executed bonds payable to the commissioner of said court, one W. F. Westerfield, who was made a party defendant to the action, and called upon to set up and enforce his lien for the unpaid part of the purchase money, which appellant alleges, she was advised, amounted to about \$400.

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of the city does not exceed \$750,000, and that the tax rate for the year 1902 was only \$1.16% on each \$100 of taxable property; that at the same election on which the bond proposition was voted there was cast for a member of congress by the city of Lexington 3,769 votes.

The ground on which appellant asks the injunction is that the board of education has no power to issue and sell the bonds in question; second, that the proposition to issue the bonds did not receive two-thirds of all the votes cast for members of congress at the election at which a vote was taken upon the proposition. The act of the general assembly approved March 20, 1900, amending the act for the government of cities of the second class, to which Lexington belongs, reads as follows: "That the board of education shall have power to issue school bonds, to run for not exceeding forty years, for an amount not exceeding \$100,000, sufficient to purchase sites and erect and equip school-houses: Provided, That said bonds do not bear exceeding 6 per cent. per annum interest, payable semi-annually, and shall not be sold for less than par and accrued interest, and the proceeds of said bonds shall be used exclusively for the purpose named in this act, and shall not be in violation of the Constitution of this Commonwealth, and provided that said bonds shall not be issued without the assent of two-thirds of the voters voting at the election to be held for that purpose."

We are of the opinion that the board of education had authority to submit the proposition to issue bonds in question to a vote of the people, and it is apparent from the averments of the petition that the statutory method of taking the necessary steps have been strictly complied with; that none of the limitations imposed by section 157 of the Constitution upon the incurring by municipalities of indebtedness are infringed by the proposed issue of the bonds sought to be enjoined. It was held in *Belknap v. City of Louisville*, 99 Ky., 474, that under section 157 of the Constitution a city was not authorized to become indebted beyond the current revenue for the year without the consent of two-thirds of the voters actually voting at the general election when the question was submitted, and not merely two-thirds of those voting upon the question. But in *Montgomery County Fiscal Court v. Trimble*, 20 Ky. Law Rep., 828, it was held that only two-thirds of those voting on the question was necessary to give authority to issue the bonds, and so much of *Belknap v. The City of Louisville* as was in conflict with the opinion was overruled. Under the authority of this case we conclude that the proposition received the necessary two-thirds of the votes, and we are, therefore, of the opinion that the chancellor properly dismissed appellant's petition, and held that appellees had full authority to issue and sell the bonds sought to be enjoined.

Judgment affirmed.

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

## KENTUCKY COURT OF APPEALS.

RYAN, &c. v. QUINN.

(Filed February 4, 1903—Not to be reported.)

1. Damages—Assault and battery—Evidence—Instructions—Pleading—Appellee was a sheriff of a Democratic primary election and instituted this action against appellants, R. and N. and four others, charging that while engaged in performing his duties, he was without provocation assaulted by defendants, R. and N., who were accompanied by four others, and was beaten and kicked, and severe and painful injuries inflicted upon him, for which he sued to recover damages. He also alleged that three of the defendants conspired and combined with R. and N. in the commission of the injuries complained of. The answer traversed the allegations of the petition, and in the second paragraph alleged that plaintiff was endeavoring to block the polls and prevent the election from being held, and without any cause, committed an assault on others, including defendant Ryan, and that his conduct resulted in an altercation, which was the result of his own assault. The court sustained a demurrer to the second paragraph of the answer, and a trial was had on the issues presented in the first paragraph of the answer, which resulted in a verdict in favor of plaintiff against R. for \$1,000, and for \$500 each against the other defendants, from which this appeal is prosecuted. It is insisted that the court erred in admitting in evidence the rules of the committee regulating the conduct of the election; also that the court erred in permitting a witness to testify that about eleven o'clock the committee declared the primary election off on account of various disturbances at the polls. Held—That evidence of the rules of the committee regulating the holding of the primary election was incompetent as officers of primary elections have the same powers and are subject to the same limitations as officers of regular State elections. It was also error to permit evidence to be introduced showing that the primary election had been declared off. Errors in instructions given are also urged for reversal. Held—That in the first instruction the court erred to the prejudice of appellants in resting the authority of appellee upon the rules of the committee and not upon the statute. The instruction was also erroneous and prejudicial in not defining the limitation upon the authority of the officer. By section 1470, Kentucky



\* \* \* As a general rule, however, the purchaser acquires no more than an equitable title prior to the execution of a proper deed."

The contention of appellant's counsel, that the right of possession and the right to receive rents, necessarily carries with it the legal title, can not be maintained. There are many instances where the legal title may be in a trustee, with the possession and the right to the usufruct of the property remaining in the cestui que trust. It seems to us, therefore, that the title of appellee Wilson in the land in question was merely an equitable one, and that, as such, it was not subject to levy or sale under execution, and that appellant's remedy for subjecting the same to the payment of her debt is under the provision of section 489 of the Code, and not under sections 1681 or 1709 of the Kentucky Statutes. Holding this view, we think the court below did not err in sustaining the demurrer to the petition as amended and upon appellant's refusal to plead further in dismissing her petition.

Wherefore, the judgment is affirmed.

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BARKER, &c. v. TENNESSEE PAVING BRICK CO., &c.

(Filed February 4, 1908—Not to be reported.)

Street improvements—Res judicata—Contracts—This action was brought against appellants on apportionment warrants issued by the city of Somerset to appellee, as contractor, for the construction of sidewalks abutting appellants' property. A judgment resulted in favor of appellee, from which this appeal is prosecuted. On appeal it is insisted that the proof does not show a right in appellee to recover under section 8567, Kentucky Statutes. It is also insisted that as this court has heretofore held that other actions under this same statute should be dismissed, that those cases are decisive of this, and the matter is, therefore, res judicata. Held—That in those cases the record showed that the actions were brought before the work was completed under the contract, and those actions were, therefore, prematurely brought, and this being true, it is not a bar to the present suit as a judgment in a premature suit is not a bar to another action. The regular passage of the ordinances directing the improvements to be made, the contract for same, the acceptance of the entire work and the apportionment of the cost, are shown by copies of the official proceedings, which are filed with the petition and not denied. There is no allegation of fraud or mistake on the part of the council. It is thus shown by the proceedings of the council, which are attacked in no way, that it has determined that the entire work has been done, and that the contract has been complied with. This was sufficient to authorize a recovery.

Denton & Robinson for appellants.

O. H. Waddle for appellees.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Hobson.

This is an action against the property owners to enforce apportionment warrants for the construction of the sidewalk on Main street in Somerset, Ky. The circuit court sustained a demurrer to the petition, but on appeal to this court the petition was held sufficient and the judgment dismissing

the petition was reversed. (Tennessee Paving Brick Co. v. Barker, &c., 22 Ky. Law Rep., 1069.) On the return of the case the defendants filed answer. The court sustained a demurrer thereto, and the defendants have appealed.

There was a former suit to enforce seven of these warrants. The circuit court rendered judgment in favor of the plaintiffs. The defendants appealed, and in this court obtained a judgment directing the petitions to be dismissed. This judgment was pleaded by these defendants in bar of the action as to them. The sufficiency of this plea depends on what was determined on that appeal. The opinion of this court is found in *Barker v. Southern Construction Co.*, 20 Ky. Law Rep., 796. The court, after discussing a number of irregularities in the proceedings of the council, concluded the opinion with these words: "If it be conceded that the plaintiff presented a prima facie right to recover, we are still of the opinion that, taking the entire proceeding had in relation to the contract, the performance of the work and the so-called apportionment warrants, that the same failed in so many substantial respects to comply with the law that the plaintiff has failed to acquire any lien upon the property in question, and that the judgment adjudging to it a lien is erroneous."

It will be observed that the court did not rest its judgment on the irregular proceeding had in relation to the contract alone, nor alone on the performance of the work, nor alone on the character of the apportionment warrants; but on all these things combined. In so resting its decision the court had in mind section 3567, Kentucky Statutes (under which the action was brought), which provides that "no error in the proceedings of the board of council shall exempt from payment or defeat the lien after the work has been done as required by ordinance; but the board of council or the court in which the suit may be pending shall make all corrections, rules and orders, to do justice to the parties concerned."

The court, among other things, had shown that the work had not been completed. It held the contract was entire, and that a proper apportionment could not be made until the contract was completed; and it was to this it referred when it used the words, "the performance of the work," in the quotation made above. The court did not decide that the irregularities of the council or the character of the apportionment warrants alone would defeat the action, and could not do so in view of the statute referred to. The opinion is not, therefore, res adjudicata, that either of these objections alone would be sufficient. It is res adjudicata that that action could not be maintained, but it is not conclusive as to what would be the rights of the parties after the work was all done and the objection on account of the nonperformance of the entire contract was removed.

We, therefore, conclude that the judgment in that case dismissing that action must be considered as holding merely that the action was prematurely brought, and this being true, it is not a bar to the present suit as a judgment in a premature suit is not a bar to another action. (Freeman on Judgments, section 268.)

In the second paragraph of their answer the defendants stated that the contractor had failed to construct the sidewalk in accordance with the ordinance on the west and north side of Main street, from the south line of

Mrs. T. M. Shepherd's property to the foot crossing at the southeast corner of Mrs. J. M. Huskison's property, and did not build the sidewalk for more than half the distance provided in the ordinance that it should be built; that it failed to build it on the south side of Main street, as provided in the ordinance and contract, from the foot crossing at Mrs. J. M. Huskison's property to the street between H. B. Johnson and J. T. Howell as therein provided; that it failed to build, construct or reconstruct the sidewalk in many places along the line of the street and public square on both sides of the street and failed to grade, construct or reconstruct the sidewalk which they pretended to build in the manner provided by the ordinance and contract, in that they failed to use clean, sharp sand or to remove vegetable or murky material, or to roll or ram the bed of the sidewalk, so as to make it solid, or to spread it with sharp sand for the depth of two inches, or to use good vitrified brick as provided in the contract, or to set the outside curbing eight or six feet from the property line, as provided in the ordinance and contract, or to set the inside curbing of stone of sufficient thickness and durability to hold the pavement in its place as therein provided; but used in many places bats and broken brick, and no stone whatever for the inside curbing and no outside curbing next to the pavement, and in many places used no brick for some distance next to the outside curbing.

The ordinance passed by the city council ordained: "That sidewalks be constructed on the east side of Main street, from Griffin avenue to the foot crossing at Johnson's Hall, and on both sides of said street from the said foot crossing at Johnson's Hall, to Mrs. T. M. Shepherd's property, and on the west and north side of said street, from the south line of Mrs. T. M. Shepherd's property to the foot crossing at the southeast corner of Mrs. J. M. Huskison's property, and on the south side of said street, from the west line of Mrs. M. J. Wait's yard, to the street between H. B. Johnson and J. T. Howell, and both sides of the said street from the said corner of Mrs. M. J. Huskison's property and the said street, between Johnson and Howell, to Fifth street, including all sides of the public square; and wherever sidewalks have heretofore been constructed on said territory the same shall be reconstructed so as to have uniformity in the entire construction and reconstruction of the same, in accordance with the plans and specifications as heretofore provided."

The contract was let "for the construction and reconstruction of the sidewalks in the city of Somerset on Main street, from Griffin avenue to Fifth street, as provided by the ordinance." On August 12 the city engineer reported to the council that the contractor had completed the work of making the sidewalk on Main street, from Griffin avenue to the foot crossing at Johnson's Hall, in all respects as set forth in the ordinance. The work was accepted by the council and the cost apportioned among the property owners. On October 21 the engineer reported that the work of making a sidewalk around the public square was completed, and the council accepted it and apportioned the cost. Later, he reported that the contractor had completed the work of making the sidewalks from the foot crossing at Johnson's Hall to the north line of Mrs. T. H. Shepherd's property. The council accepted the work, and apportioned the cost as before. On November 27 he reported that the contractor had completed the work on the east side of Main street from

the public square to Third street. The council then examined the sidewalk, and finding that certain defects had been removed, apportioned the cost among the property owners. In his next report he reported that the work was completed on the east side of Main street from Columbia street to Fifth street. The council examined the work and finding it satisfactory, accepted it. On September 14, 1896, he filed his final report, stating that the contractor had completed the work of constructing and reconstructing the sidewalk on the east side of Main street from Griffin avenue to the foot crossing at Johnson's Hall, and both sides of the street from that foot crossing to Mrs. T. H. Shepherd's property, and on the west and north side of the street, from the south line of Mrs. T. H. Shepherd's property to the foot crossing at the southeast corner of Mrs. Huskison's property, and on the south side of the street from the west line of Mrs. C. Wait's yard to the street between H. B. Johnson and J. T. Howell, and on both sides of the street from the said corner of Mrs. Huskison's property and the said street between Johnson and Howell to Fifth street, including all sides of the public square. The work was accepted by the council, and the cost was apportioned among the property owners.

These facts are all shown by copies of the official proceedings of the council, which are filed with the petition and not denied. There is no allegation of fraud or mistake on the part of the council. It is thus shown by the proceedings of the council, which are attacked in no way, that it has determined that the entire work contracted for has been done, and that the contract has been complied with. In *City of Henderson v. Lambert*, 77 Ky., 80, it was said: "This court has several times decided that when work has been accepted by the proper authority of a city, and there is no allegation of fraud or collusion, such acceptance is conclusive evidence that the work was performed according to the requirements of the contract." (*Joyes v. Shadburn*, 11 Ky. Law Rep., 892; *Whitfield v. Hipple*, 11 Ky. Law Rep., 386; *Bogard v. O'Brian*, 14 Ky. Law Rep., 648.)

¶ We, therefore, conclude that the court properly sustained the demurrer to the answer.

Judgment affirmed.

#### LOUISVILLE RAILWAY CO. v. CASEY.

(Filed February 4, 1903—Not to be reported.)

Street railways—Negligence—Instructions—Verdict—Appellee brought this action for personal injuries sustained while getting off one of appellee's electric cars, which started before she could get off, throwing her to the ground and severely spraining her ankle, and she recovered a judgment for \$1,000, damages from which this appeal is prosecuted. It is insisted that the court erred in giving an instruction authorizing damages for a permanent injury, and that the verdict is excessive. Held—That the court properly permitted the jury to consider the case on the theory that the injury was permanent as the proof was sufficient to authorize the submission of that question.

Fairleigh, Straus & Eagles and Hazelrigg & Chenault for appellant.

Forcht & Field for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Barker.

Appellee, Catherine Casey, in her petition states that she was a passenger upon one of the appellant's street cars running over its line on Preston street, in Louisville, Ky. Just before the car in question reached Roselane street appellee, desiring to leave the car, rang the bell, and when the car stopped at Preston and Roselane streets she attempted to alight from the rear platform. As she was about to step from the lower step of the platform to the ground the car was negligently and carelessly started by appellant's employes in charge thereof, and she was violently thrown to the ground, wrenching and spraining her ankle, from which she suffered great pain and which has never become entirely well, it remaining so weak that she has not been able to walk upon it since with ease or comfort to herself, and that, by reason of said injury, her power to earn money has been substantially diminished.

Appellant's answer put in issue the material allegations of the petition, and also pleads contributory negligence. The evidence in this case, as is usual in cases of this kind, is conflicting and contradictory. That for the appellee shows a case of gross neglect on the part of appellant's servants and employes in charge of the car in question; whereas, the evidence for appellant shows no neglect whatever upon the part of its agents or employes, but, on the contrary, the kindest and most considerate treatment of appellee; that she was helped down from the car by the conductor, and stumbled and fell in the street after the street car had passed twenty-five or thirty yards beyond the point where she had alighted.

The jury which tried the case evidently believed the witnesses for appellee, as, upon trial of the case, they returned a verdict of \$1,000 in her favor. Upon this appeal appellant rests its right of reversal upon two grounds: First, that the court erred in submitting the question of permanent injury to the jury; and, second, that the verdict is excessive. We think there was sufficient evidence of permanent injury to authorize a submission of the question to the jury. Appellee testified that her ankle has never recovered its strength, and that she walks with difficulty; is unable to go up and down the steps as she had done before, and that she still suffers pain from the injury in question; and we, therefore, believe that the court did not err in submitting the question as to whether or not, under all the circumstances, appellee was permanently injured, to the jury.

The amount of the verdict we believe to be full large; but we can not say that, under all the circumstances of this case, it was excessive; certainly not so much so as to warrant us in invading the province of the jury in estimating it.

If the witnesses for the appellee are to be believed, the negligence of appellant's employes was great and reprehensible; and it was peculiarly within the province of the jury, who had all the parties before them, who heard the testimony and saw the demeanor of the witnesses, to judge of their credibility, and to estimate and fix the damage sustained by appellee.

Perceiving no error in the record the case is affirmed.

## ATCHISON v. CITY OF OWENSBORO, &amp;c.

(Filed February 4, 1908.)

Attorney's fees—Appellant was city attorney for appellee from January 1, 1894, to January 1, 1898; that during his term of office a controversy arose as to the liability of the banks to pay municipal taxes. Under his direction the city collector proceeded to collect the taxes, and suits were instituted, enjoining the collection of said taxes. Appellant represented the city in the circuit court, and on the trial the injunction was dissolved. An appeal was prosecuted to the Court of Appeals and an affirmance was had, with damages, which amounted to something over \$1,000. The banks prosecuted an appeal to the United States Supreme Court, which resulted in affirmance of the judgment, with damages. When the case came on to be heard in the Supreme Court appellant's term of office had expired, and he informed the council of the pendency of the appeal, and asked whether he should attend to it. No response was made to his letter, but he went to Washington and attended to the suit at an expense of \$90. The city collected \$18,859.56 from the banks, and refused to pay him anything for his services or on account of his expenses to Washington. He instituted this action to recover 10 per cent. of this amount, under section 3314, Kentucky Statutes, and the amount of his expenses. Held—That in defeating the actions brought by the banks against the city appellant did not recover anything except the damages, which were given on the affirmance of the case, to which he was entitled to 10 per cent. commission, but he was not entitled to his expenses to Washington, as he went at his own suggestion as a volunteer.

Chas. S. Walker and Lucius P. Little for appellant.

George W. Jolly for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hobson.

Appellant was the attorney of the city of Owensboro from January 1, 1894, to January 1, 1898. In the year 1894 there was a controversy between the banks and the city as to whether they were liable to municipal taxation. As city attorney appellant advised the tax collector to proceed to collect the taxes. As soon as proceedings were instituted for this purpose by the tax collector the banks filed their petitions in the Daviess Circuit Court, obtaining an injunction against the collection of the taxes. Appellant, as city attorney, was directed to defend the suits, which he did, and on March 2, 1895, obtained a judgment in the Daviess Circuit Court dismissing the petitions and dissolving, with damages, the injunctions. The damages awarded on the dissolution of the injunctions amounted to something over a \$1,000. The banks prosecuted an appeal from the judgment of the Daviess Circuit Court to this court. Appellant, as city attorney, represented the city on these appeals, and on March 24, 1897, obtained an affirmance of the judgment of the circuit court, with 10 per cent. damages on the supersedeas. From the decision of this court the banks on August 3, 1897, prosecuted an appeal to the Supreme Court of the United States, and before that appeal was heard appellant's term as city attorney ended. After the end of his term he wrote to the city council, calling attention to the cases and offering to go to Washington and attend to them if the council wished him to do so. The

council laid the communication on the table. Appellant, however, at his own expense, went to Washington, and in connection with his successor, the acting city attorney, attended to the cases in the Supreme Court, his expenses in this matter being something over \$90. On April 3, 1899, the Supreme Court affirmed the judgment of this court. After this the city council directed its tax collector to collect the taxes, which he did, and refused to pay appellant anything for his services, or on account of his expenses, and he thereupon filed this suit to recover therefor. The amount collected by the city tax collector from the banks was \$18,859.56, and appellant insists that a much larger amount was due by them, which the tax collector failed to collect. He claims that he is entitled to 10 per cent. on the amount paid by the banks, or which should have been paid by them.

Section 3314, Kentucky Statutes, is as follows: "The city attorney shall be paid an adequate annual salary, payable monthly out of the city treasury, the same to be fixed by ordinance before his election, and not changed during his term of office. In addition to his salary the city attorney shall be paid his expenses when it shall be necessary for him to go out of the city to attend to legal business for the city, and 10 per cent. upon all sums recovered and collected by him for the city."

As appellant was not city attorney when he went to Washington, and was not requested or employed by the council to go there, he has no claim against the city for his expenses in this behalf. The city attorney then in office did go in behalf of the city, and was in Washington attending to the matter, and appellant's position in the case was wholly that of a volunteer. He has no claim, therefore, against the city for the docket fees allowed in that court, or for his personal expenses. The services rendered in the Daviess Circuit Court, and in this court, stand upon a different plane. He was the city attorney when these services were rendered. In attending to the cases he was in discharge of his duties as city attorney. Whether such services, in the contemplation of the statute, were covered by the "adequate annual salary, payable monthly out of the city treasury," as therein provided, or whether he is, therefore, entitled to 10 per cent. of the sums in controversy in those actions, is a question which must be determined from the language of the statute itself.

The suits which the banks had brought against the city were proceedings instituted by them to prohibit the city from collecting the taxes. Appellant merely defended these suits. He did not recover anything in those actions, except the damages on the dissolution of the injunctions and the damages on the supersedeas. The term "recover" has a well-defined meaning in the law, and this meaning had been the matter of adjudication by this court prior to the adoption of the present statutes. Under the statute giving an attorney a lien for money or property, which may be recovered in an action prosecuted by him, it was held that the defendant's attorney, who merely defeated a judgment which was sought against his client, had no lien on the fund which was in controversy. (*Wilson v. House*, 73 Ky., 406.) We, therefore, conclude that for merely defending the suits brought by the banks it can not fairly be said that appellant recovered anything for the city, except the judgment for damages, and that he is not entitled under the statute to 10 per cent. of the amount of the taxes in controversy in that case, which

he did not in any legal sense recover. The purpose of the statute seems to have been to make the attorney diligent in recovering and collecting money due the city where the claim was placed in his hands for collection. If the statute were construed to give the attorney 10 per cent. of the amount in controversy in all actions which he might defend, the purpose of the statute in providing for him an adequate annual salary would be entirely defeated.

The court adjudged appellant entitled to 10 per cent. of the damages recovered by him for the city, and of this the city complains on the ground that he did not collect the money. But the statute should receive a reasonable construction. Appellant obtained a judgment for the money and an affirmance of the judgment of this court. The collection of the judgments was delayed by the appeal to the Supreme Court of the United States, without his fault and by matters over which he had no control. He did all he could do. The judgments were good, and in view of appellant's faithful services for the city, and his skill and efficiency in those actions securing to the city valuable rights, which it enjoys, we are not prepared to say that, under all the facts of the case, there was any error of the court in the judgment to this extent.

The judgment complained of is, therefore, affirmed on the original and cross appeal.

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INGRAM v. COMMONWEALTH

(Filed February 5, 1903.)

1. Criminal law—Seduction under promise of marriage—Evidence—Instruction—Appellant prosecutes this appeal from a conviction and sentence to confinement in the penitentiary for three years under an indictment charging him with seduction of a female under twenty-one years of age under promise of marriage. Appellant complains because the court refused to permit the woman to testify that in a conversation between her and appellant he told her that when he went to get her father's consent he told him that he had had sexual intercourse with his daughter. Held—That while the daughter should have been permitted to make such statement, the refusal to permit same to be made was not prejudicial as both appellant and the father deny that such a statement was made in a conversation between them.

2. Instruction—The court erred to the prejudice of appellant in failing to give to the jury an instruction to the effect that if they believed from the evidence, appellant, after the seduction of the girl and before his marriage to another woman, in good faith offered to marry her, but was prevented from doing so by her refusal to consent thereto, if she did so refuse, he was entitled to an acquittal. Appellant had the right, under the statute, to condone the offense by offering in good faith to marry the girl, and the jury should have been so instructed.

W. S. Pryor, M. O. Scott and Romine & Miller for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Robert Ingram, colored, was indicted in the Metcalfe Cir-



cuit Court for the seduction, under promise of marriage, of one Curtis Pendleton, also colored, a female under twenty-one years of age. The trial resulted in a conviction, his punishment being fixed by the verdict of the jury at three years' confinement in the penitentiary.

The motion of appellant for a new trial having been overruled, he prosecutes this appeal. There are but two questions necessary to be considered by this court: First, did the lower court err in refusing to permit appellant's counsel, upon cross-examination, to ask the prosecutrix in reference to a conversation she had with appellant, in which the latter claimed to have reported to her what had been said by her father in refusing his consent to their marriage; second, did the court err in refusing to give instruction No. 3, asked by appellant's counsel.

The following facts seem to be fully established by evidence, to wit: First, that appellant did, on at least two occasions, have sexual intercourse with the girl, Curtis Pendleton; second, that he did promise to marry her; and, third, that the father of the girl refused his consent to such marriage. There is, however, this difference between the statements of the prosecuting witness and those of appellant. She says the promise of marriage was made by appellant before, and when he first had carnal knowledge of her, and he says it occurred afterward. She also testified that no other man ever had similar intercourse with her, and that she would not have yielded her person to the gratification of appellant's lust but for his promise to marry her, and his assurance, as a minister of the gospel, that he would comply with his promise.

Appellant testified that after his illicit intercourse with the girl he offered in good faith to marry her, and asked her father to permit him to do so, but the latter refused his consent; that he then reported to the daughter what the father said, and she refused to marry him without her father's consent. Appellant further testified that he later went to see the girl and offered to take her to Tennessee and marry her without her father's consent, but she refused to go with him, and not a great while thereafter he married another woman. These conversations were denied by the girl in rebuttal, and she also testified that she did not refuse to go with him to Tennessee to be married, but, upon the contrary, asked him to take her to that State for that purpose, which he refused to do.

George Pendleton, the father of Curtis, when introduced as a witness, admitted that appellant had asked his permission to marry her, but that he had refused his consent on account of her youth, and so informed appellant. He also testified that he did not know at the time of the conversation with appellant that the latter had seduced his daughter. The question asked by appellant's counsel of the girl on cross-examination, which she was not permitted by the court to answer, was in substance as follows: "When the defendant returned to you from your father did he not state to you what had passed between him and your father about the marriage, and tell you what your father said about it?" It was avowed by counsel that the witness, if permitted to answer the question, would have said: "The defendant did tell me that he had stated to my father that he had had intercourse with me, but that my father would not let me marry him, and I told him that. I

"knew I was pregnant, but I would not marry him, or go to Tennessee with him.

Though the avowal shows that a part of the expected answer would not have been responsive to the question, still we think the question not improper as the girl testified that appellant, with her knowledge, went to her father to obtain his consent to their marriage; she saw them in consultation, and as he immediately reported to her what had been said by the father, she should, we think, have been permitted to state all that was said by appellant and herself when he reported to her the conversation with her father. We are of opinion, however, that the refusal of the lower court to permit the question to be answered did not operate to the prejudice of appellant, as he and George Pendleton both testified that he did not, in the conversation mentioned, inform the latter that he had had intercourse with the daughter.

While we do not think it would have been proper for the lower court to instruct the jury in form as set forth in instruction No. 3, asked by counsel for appellant, we are of the opinion they should have been instructed in substance that if they believed from the evidence appellant, after the seduction of Curtis Pendleton, and before his marriage to another woman, in good faith offered to marry her, but was prevented from doing so by her refusal to consent thereto, if she did so refuse, he was entitled to an acquittal. Such an instruction with those given by the court would, we think, have presented the whole law of the case to the jury.

The prosecutrix and her father corroborate the appellant as to the offer of marriage made by him at the time the father refused his consent, and though the daughter denied that any offer of marriage was made by appellant after her father's consent was refused, appellant testified that he did again, and in good faith, make such offer, notwithstanding the opposition of the parent. We are unable to say what credit, if any, was given by the jury to these statements of appellant, or what weight they might have given them under proper instructions from the court. In any event, we know the failure of the trial court to instruct the jury, as indicated, deprived appellant of any benefit that he might otherwise have received from his testimony with respect to the offer of marriage, as effectually as if the testimony had been excluded altogether from the consideration of the jury.

The statute under which this prosecution against appellant was instituted (section 1914, subdivision 12, chapter 86, Kentucky Statutes) provides that "no prosecution shall be instituted when the person charged shall have married the girl seduced, and any prosecution instituted shall be discontinued if the party accused marry the girl seduced before final judgment. All prosecutions under this section shall be instituted within two years after the commission of the offense."

This court, in the case of the Commonwealth v. Wright, 16 Ky. Law Rep., 351, affirmed the judgment of the circuit court which dismissed an indictment for seduction against Wright, who appeared in court upon the call of the case for trial, and offered then and there to marry the woman whom he had seduced, but she refused the offer and the marriage did not take place.

In recording its approval of the action of the lower court in dismissing the prosecution this court said: "The marriage of the parties is the pur-

pose, intent and spirit of the statute, within its keeping the past misery and shame may be forgotten, the future happiness of both secured, so that the statute being so construed, although the seducer be forced almost to the very doors of the penitentiary before offering to fulfill his promise of marriage, yet having done so in good faith and his offer having been declined, he can do no more. The woman and not the man defeats the object and purpose of the law."

If, therefore, the offense denounced by the statute may, as in the case *supra*, be condoned because of an offer of reparation made at the eleventh hour, may not an earlier offer of atonement by the offender merit a like favor at the hands of the law?

Appellant testified that such an offer was made by him in good faith, and if so, and it was rejected by the prosecutrix, the defense thus presented was authorized by the statute, and the jury should have been instructed thereon by the court.

For the reasons indicated the judgment of the lower court is reversed and the case remanded for a new trial and such other proceedings as may not be inconsistent with this opinion.

#### MASILLON ENGINE AND THRESHER CO. v. CARR, & CO.

(Filed February 5, 1902—Not to be reported.)

1. Husband and wife—Homestead—A mortgage on land was signed by husband and wife to secure an indebtedness to appellant. The name of the wife did not appear in the mortgage as one of the grantors. In an action to enforce collection of the debt it is urged that the wife had not relinquished her homestead in the land. Held—That said mortgage was insufficient to release the homestead interest and the proof showed it to be of less value than \$1,000.

2. Evidence—The evidence in the case is insufficient to show that the husband had improved the property out of his own means so as to increase its value beyond \$1,000.

Wm. M. Gravens for appellant.

H. K. Bourne and W. O. Jackson for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Chief Justice Burnam.

The defendants, James W. Carr and his wife, Amy A. Carr, signed and acknowledged the following mortgage to appellants upon a house and lot occupied by them as a homestead, worth about \$400:

"This indenture, given and entered into this 20th day of June, 1898, between James W. Carr, of the first part, and the Masillon Engine and Thresher Co. (Incorporated of Masillon, O.), of the second part: Witnesseth, that the party of the first part, for and in consideration of his indebtedness to the party of the second part, as follows: \* \* \* And to secure the payment of the same, we have granted, bargained and sold, and by these presents do grant, bargain and sell to the party of the second part all the following described real estate: \* \* \* This indenture is conditioned as follows: The said James W. Carr is indebted to the said Masillon Engine and Thresher

Co., as aforesaid; now if said parties of the first part, or any one for them, shall pay said indebtedness at the maturity, this indenture shall be void, else remain in full force. And the said parties of the first part hereby waive and relinquish to the said party of the second part all claims they have or may have to said property under the homestead laws of this State."

In this suit plaintiffs asked an enforcement of this mortgage lien and for a sale of the mortgaged property to satisfy their debt. Defendants, among other defenses, relied on their answer, say that at the date of the execution of the mortgage, and long prior thereto, they were bona fide housekeepers with a family, occupying and using and claiming the house and lot covered by the mortgage as a homestead; and that it was of less value than \$1,000; that the defendant's, Amy A. Carr's, name did not appear in the body of the mortgage; and that her mere signature thereto was not a release or waiver by her of her homestead exemption. The plaintiff for reply to this averment of the answer denies that the signature of Amy A. Carr was not sufficient evidence of a release and waiver of her homestead right in the mortgaged property, and affirmatively alleges that since the execution of the notes sued on and the mortgage the defendant, James W. Carr, had built valuable additions to the house, and had also erected a barn on the lot, which materially enhanced the value of the property; that these improvements were erected out of the means acquired or earned by him; that they were unable to state the value of such improvements, but that they would amount to a considerable sum, and asked that the property be subjected to the extent of the value of such improvements. A general demurrer was sustained to this reply, and upon final submission it was held that the homestead of defendants could not be subjected to the payment of plaintiff's debt.

Upon this appeal it is insisted for appellants that they were entitled to subject the homestead of appellees to the payment of their debt, and that the trial court erred in not so adjudging. It is further claimed that if the mortgage did not convey the entire homestead, that, in any event, the chancellor erred in sustaining the demurrer to their reply, in which they sought to recover for valuable improvements alleged to have been made upon the homestead after the creation of their debt. The law is well settled in this State that a homestead right is not waived by a mortgage, signed and acknowledged by the mortgagor and his wife, wherein she is mentioned as a party of the first part, but does not join in the grant, nor in any manner express in terms her intention either to relinquish her dower, or join her husband in waiving his right to the homestead exemption. This question was first considered in *Wing v. Hayden, &c.*, 73 Ky., 276, and was followed up by *McGrath v. Berry*, 76 Ky., 371. In that case the wife was mentioned as a party of the first part, and she signed and acknowledged the instrument, but she did not join in the grant, nor in any manner express in terms her intention to join her husband in waiving his right to the homestead exemption, and it was held that the homestead did not pass, and this rule has been since steadily adhered to. In this case the name of the wife does not appear even as a grantor in the mortgage. Her only connection with the instrument appears in her signature thereto. We are, therefore, of the opinion that defendants were not divested of the homestead exemption under and by virtue of the conveyance of the husband.

Nor did the chancellor err in sustaining the demurrer filed to the reply. If appellant desired to subject to the payment of their debt any other or different interest in the mortgaged property than was stated in their original petition, it should have been done by an amended petition, and not by reply. But even if we waive this irregularity in the pleading and treat the reply as in effect an amended petition, it does not state a good cause of action. It does not deny that the property is of less value than \$1,000, and that defendants occupied it as a homestead. There is no averment fixing distinctly the amount which the alleged improvements added to the pecuniary value of the homestead. And construing this pleading most strongly against the plaintiff, we must conclude that this alleged enhancement in value of the homestead was inconsiderable, or, at least, not sufficient to bring it within the rule announced in *Nichols v. Sennett*, 78 Ky., 680; *Fish v. Hunt*, 81 Ky., 584, and *Mosely v. Bevins*, 91 Ky., 260.

For reasons indicated the judgment is affirmed.

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LOUISVILLE & NASHVILLE R. R. CO. v. GILLIAM'S ADM'X.

(Filed February 5, 1903—Not to be reported.)

Railroads—Negligence—Instructions—Damages—Appellee's intestate was a fireman on a freight train on appellant's road. Some of the cars in the train were not provided with air brakes. At a water station the fireman had gotten out on the tender to adjust the water spout, as it was his duty to do, and while engaged in this act a portion of the train which had become detached ran against the section attached to the engine with such force as to knock the fireman from the tender, and caused such injuries as resulted in his death. This action for damages by his administrator resulted in a verdict for \$10,000 damages, from which this appeal is prosecuted. It is insisted that the court erred in refusing to give a peremptory instruction to the jury to find for defendant. It is also insisted that the court erred in giving an instruction authorizing punitive damages. Held—That there being evidence showing negligence on the part of the agents and employees of the company, the court properly refused to give a peremptory instruction. The instruction permitting a finding as to punitive damages was properly given as the evidence fails to show that any of the brakemen were in their proper places when the train parted to give any warning whatever. The verdict is not excessive in view of the gross negligence proven.

W. F. Browder, J. C. Browder, B. D. Warfield and Edward W. Hines for appellant

B. F. Proctor for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Nunn.

The appellant has appealed from a judgment of the Logan Circuit Court against it for the sum of \$10,000 in favor of appellee, for the death of her intestate, J. H. Gilliam, caused by the negligence of its agents and servants superior in authority to him.

The facts, in substance, are as follows: The decedent was a fireman on the train of appellant, composed of an engine and tender, thirteen box cars, a

passenger coach and a caboose. The box cars were loaded and the seven box cars next to the engine had air-brakes, and the others without air-brakes. The train crew was composed of a conductor, engineer, three brakemen and a fireman, the deceased. This train and crew started from Russellville to Owensboro, Ky., on the morning of the 18th of February, 1900. The last stop made before Gilliam lost his life, at Pettit Station, was at Crow Hickman, about four miles from Pettit. Between these two stations the train parted in some way, not known, and in stopping the train for the engine to take water at Pettit the detached portion ran against the front part and the collision knocked the intestate off of the tender, where he had gone in the discharge of his duty to adjust the spout of the water tank to take water; he was badly bruised and unconscious when found, and died in a few hours. The proof in the record shows that the conductor was in the passenger coach, making out a report of his trip, one brakeman was on the passenger coach with him, the front brakeman was in the cab with the engineer, and the other or middle brakeman was not located on the train (he did not testify). One witness stated that at the time or immediately after the collision he saw him sliding down a rod on the caboose. Some half a dozen witnesses who lived at Pettit, and along the railroad track back in the direction of Crow Hickman, state that they did not see any one on the train of cars except the brakeman, who was on the front end of the passenger coach, and appeared to be setting the brake. The first witness who saw that the train had parted was about a mile back from Pettit, and stated that the sections were about 250 yards apart then, and that the detached portion was gaining on the front portion, and the next witness, about a half mile from Pettit, stated that when the train passed him the sections were about three car lengths apart and the rear section was gaining on the front, and when the train arrived at Pettit the witnesses vary from one to two car lengths apart. The water tank is three or four hundred yards further on. The conductor, engineer and the two brakemen who testified stated that they did not know that the train had parted, nor what caused it; that the track was straight and there were some high and some lower cars in the train, and the high cars cut off their view, and, therefore, they did not see the break in the train. Not one of them states that he made any effort to see the condition of the train between said stations, nor was there a brakeman in his proper place or position on the train, and the engineer and conductor both knew of this fact, and made no effort to have them in their proper places. The rules of the company were introduced as evidence, and the same, with the other evidence, showed that the conductor's place was in the cupola of the caboose; the brakemen's on the top of the train, one at the rear end, one in the middle, and the other on the front end. All were violating the rules, and by reason thereof the intestate lost his life.

The lower court refused to give a peremptory instruction offered by appellant. The court did right in this. The court, at the instance of the appellee, gave to the jury five instructions, to the giving of all of which the appellant objected and excepted. Appellant then offered seven instructions, and the court gave them all, without objection from appellee. The twelve instructions submitted to the jury cover every conceivable hypothesis of the case. They had two approved definitions of "gross negligence." All

the instructions, taken together, were more favorable to appellant than it was entitled to. The appellant contends that the court should not have given the instruction on punitive damages. We think that the court did not err in giving same.

The case of Newport News & Mississippi Valley Co. v. Dentzel's Adm'r, 91 Ky., 45. In that case it appears that Dentzel was the head brakeman and was in his proper place on the train, near the front end. The train parted and left him on the front portion. The engineer increased the speed of the engine, to keep out of the way of the rear portion, and blew his whistle for the rear section to put on the brakes; supposing that they had done so, he checked the engine, and immediately there was a collision, and Dentzel lost his life by reason thereof. The conductor was in the caboose and the rear brakeman was with him. The court on these facts said: "While the appellant is not liable to an employe for injury arising from the neglect of a co-laborer, not superior to the one injured, yet in this instance the conductor, who was in charge of the train, was a party to the neglect. He not only permitted it upon the part of the rear brakeman, but also failed to give attention otherwise to the conduct of the train. The rule of respondeat superior, therefore, applies, and it is evident that the neglect was willful. It was an intentional failure upon the part of the one in charge of the train, and who represented the company, to perform a known and manifest duty, important to the safety of the deceased."

The court did not err in giving said instruction. The appellant insists that the lower court erred in overruling its plea to the jurisdiction of the Logan Circuit Court. It claims that appellee was a resident of Daviess county, Kentucky, and that her intestate's death occurred there, and appellant's residence, or home office, was in Jefferson county, Kentucky. Appellee admitted all this, except she denied that she was, at the time or then, a resident of Daviess county, Kentucky, and alleged that at the time of bringing the action, and at that time, she was a resident of Logan county, Ky. On the first plea the only evidence heard was that of appellee, and the court dismissed the plea of appellant. About one year after this order was made the appellant filed another plea to the jurisdiction, in which the same allegations were made, and also charged that appellee obtained the first order in her favor by fraud and false testimony. The court again heard all the testimony, and decided the question in favor of appellee.

Conceding that the first order was not final, which we do not decide, the court, on the second application, heard all the evidence, saw and knew most of the witnesses, and since the evidence was conflicting, we do not feel justified in deciding that appellee made a false statement when she said that her residence in Owensboro was only a temporary residence; that she claimed her residence all the time in Logan county, Kentucky, and that Logan county, Kentucky, at the time she instituted this action was her place of residence. The verdict appears large, but when considered in the light of all the facts introduced in evidence, and the age (twenty nine), strength and health of the deceased, we can not say that the jury exceeded the amount the appellee was entitled to recover.

Wherefore, the judgment of the lower court is affirmed.

## MARAMAN BROS. v. TROUTMAN.

(Filed February 5, 1908—Not to be reported.)

**Title—Possession**—This action is in effect an action of trespass to try title to land. Held—That appellee having proven that he and those from whom he purchased had enjoyed the adverse possession of the lot of ground, eighty-five feet in length and about twenty in width, for about twenty years, has the better title to same.

Ben Chapeze and Chapeze & Halstead for appellants.

Chas. Carroll for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted in the Bullitt Circuit Court, and though styled a suit in equity, it is in fact more in the nature of an action of trespass to try title. The lot in controversy is eighty-five feet in length and about twenty in width. Appellee owns one and a half acres of ground which he claims embraces the strip in controversy. About 1898 the one and a half acres were purchased by Troutman Bros. from the estate of George Withers, and they received a deed thereto from his heirs. Later, Troutman Bros. sold and conveyed the lot to appellee, C. F. Troutman. George Withers bought the lot of Wesley Phelps, and according to the proof was in actual possession of it as far back as 1883, and he and his heirs seem to have held the actual and adverse possession of same from that time continuously down to the time of the sale and conveyance of it to the Troutmans. It also appears that the Troutmans took possession of the lot when they purchased it, and have had the possession ever since. When they bought the lot it was enclosed by a fence which stood at the time of the institution of this suit in practically the same condition as when they bought the lot. They always claimed to the fence which enclosed the ground in controversy.

The answer of appellant contains a traverse of the petition, a claim of title and possession in themselves, and a plea of the statute of champerty.

In April, 1893, appellants entered upon the land in controversy, dug post holes thereon, set posts and erected a fence by which they attempted to enclose the strip in controversy. In doing this work they obstructed any entrance into appellee's lot except by going to the rear and tearing down the fence. Appellants' contention is that the strip in controversy is a part of a lot purchased by them of George Simmons, for which they received of him a deed that was acknowledged by the grantor April 2, 1900. In this deed it is recited as to the land in controversy, "It is further agreed that any part of the west side of said lot that may be enclosed or used by any person or persons is accepted by the grantees in statu quo, and in this manner the grantees hereby convey same." It would seem, therefore, that Simmons did not regard his title to the land in controversy good, and the expressions in the deed mentioned would seem to indicate that Simmons and appellants then knew that some person or persons other than Simmons held the possession of the land in dispute. Simmons' possession of the ground described in his deed to appellants, exclusive of this strip, was as old or older than the possession of appellee and the Withers.



There is some testimony from Simmons and one or two others to the effect that in a conversation with the widow of Withers some years after his death, he (Simmons) made some remark to her about her use of the ground in controversy, which he then claimed and she likewise claimed, and that he told her that she might have the use of the disputed strip as long as she lived, to which she replied, "all right." Even if this be true, it could not affect the title of her children, nor of appellee, their vendee, for the old woman only owned a homestead or dower in the lot. Her children were the true owners, subject to her dower or homestead.

We find from the evidence that appellee's possession of the ground in controversy, and that of those under whom he claims it, goes back to 1888, a period of nearly twenty years, and that possession seems to have been actual, continuous and adverse to appellants and all others. It may also be said that appellants' possession goes back through themselves and their vendors even a greater length of time than the possession shown by appellee, but they do not seem to have had actual possession of the ground in dispute until about the date of their deed from Simmons, at which time they forcibly, or, at any rate, without appellee's consent, took possession of it.

It is evident that the chancellor gave the parties to this action every liberty that could have been claimed in taking proof. The witnesses are numerous, and are doubtless known to the chancellor. With all the lights before him he came to the conclusion that appellee was entitled to the possession of the ground in controversy, and to \$40 in damages for the trespass committed by appellants. An examination of the record has given us no cause, or ground, for disturbing his judgment, and it is, therefore, affirmed.

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HARDIN v. COMMONWEALTH.

(Filed February 5, 1908.)

Criminal law—Malicious shooting and wounding—Instructions—Appellant was tried under an indictment charging him with unlawfully, willfully and maliciously shooting and wounding another, a felony under section 1242, Kentucky Statutes, and was convicted, from which he has appealed. Held—That the court should have confined its instruction to the definition of the offense as given in section 1242, Kentucky Statutes, and not have used in instruction No. 2 the words "and under circumstances reasonably calculated to excite his passion beyond his power of control." These words were prejudicial to appellant. The offenses described in sections 1166 and 1242, Kentucky Statutes, were misdemeanors at common law, and the definition of each as fixed by statute should be followed.

M. B. Bowden and Roy R. Clark for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Nunn.

The appellant was tried in the Logan Circuit Court on an indictment charging him with unlawfully, willfully and maliciously shooting and wounding one Will Grimes, with the intent to kill said Gaines, and on the

trial the evidence showed that the appellant was, at the time, the keeper of a pool room in the town of Russellville, and Gaines and others were in front of his building using boisterous language, and that appellant went out of his room on the pavement, where the parties were, and requested them to keep quiet or leave, and appellant and Gaines had an altercation of words, all that was said and done not being made clear, but the accused stepped back, or in his door, and fired and wounded Gaines in the leg. The court gave to the jury instructions, of which No. 2 was excepted to by the appellant, and is as follows: "The court instructs the jury that if they believe from the evidence, to the exclusion of a reasonable doubt, that the defendant, Jonah Hardin, did, in Logan county, Kentucky, within one year before the finding the indictment, unlawfully and willfully, and not in his necessary self-defense, or apparently necessary self-defense, and in sudden affray, or sudden heat and passion, without previous malice, and under circumstances reasonably calculated to excite his passions beyond his power of self-control, shoot at and wound one Will Gaines, upon his body or person with a pistol, a deadly weapon, loaded with leaden ball or balls, or ball or balls of other hard substance, with the intent to kill him, but without so doing, then, and in that event, the jury shall find the defendant not guilty as charged in the indictment, but guilty of shooting and wounding in sudden affray, or sudden heat and passion, and fix his punishment at a fine of not less than \$50 nor more than \$500, or imprisonment in the county jail for a period of time not less than six months nor more than twelve months, or both fine and imprisonment in their discretion."

Prior to the enactment of the statutes defining the offenses described in sections 1166 and 1242 of the Kentucky Statutes the offenses named therein were misdemeanors under the common law. The legislature of the State deemed it necessary to enact statutes with reference to such offenses, and in doing so it defined the offense of shooting and wounding another, as described in section 1166, and the offense of shooting in sudden affray, or in sudden heat and passion, as defined in section 1242, and fixing the penalties to be imposed under each section. The offense, as defined in section 1242, is: "If any person shall, in sudden affray, or in sudden heat and passion, without previous malice, and not in self-defense, shoot at, etc." This, we understand to be a complete definition of the offense to be punished by said section. If the legislature had intended that the language used in instruction No. 2, "and under circumstances reasonably calculated to excite his passion beyond his power of self-control," be added to said definition, it would have been in said section.

It is contended by the Commonwealth that the same principles governing a prosecution under sections 1166 and 1242 of the statutes are the same as the common law offenses of murder and voluntary manslaughter, and refer this court to the cases of *Rapp v. Commonwealth*, 14 B. M., 494, and *Young v. Commonwealth*, 2 Duvall, 875. In these cases the court was discussing common law offenses, and the language used by the court is subject to the construction claimed by the attorney general. But, in our opinion, the cases referred to have no application to prosecutions under the two sections of the statutes above referred to, for the reason that the common law definition of murder is a very different thing from the statutory offense of shooting and

wounding as described and defined under section 1166, and the definition of the common law offense of voluntary manslaughter is a very different thing from the statutory offense of shooting and wounding, as described and defined under section 1242 of the statutes, and the court, in said instruction No. 2, should have confined itself to the definition as given in section 1242 of the statutes, and the interpolation of the language referred to was prejudicial to the appellant.

Wherefore, the judgment of conviction of appellant is reversed and the case remanded to the lower court for proceedings consistent with this opinion.

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WOOLLEY v. MILLER, JUDGE, & CO.

(Filed February 6, 1903—Not to be reported.)

Writ of prohibition—The appellant, as chancellor, rendered a judgment enforcing a lien for taxes on real property and reserved the question as to whether a personal judgment should be rendered against W. An appeal was prosecuted from the judgment enforcing the lien, and W. fearing that the court would render a personal judgment against him, applied for a writ of prohibition. Held—That as the decision enforcing the lien has been affirmed, this court will not prejudge the right to a personal judgment by granting the writ of prohibition.

H. L. Lane, W. S. Pryor and R. W. Woolley for plaintiff.

H. L. Stone for City of Louisville.

Shackelford Miller for defendant.

Appeal from Jefferson Circuit Court, Chancery division.

Judge Paynter delivered the following response to petition for writ of prohibition:

By this proceeding the petitioner sought to have this court issue a writ of prohibition against the Hon. Shackelford Miller, judge of the chancery branch, first division, of the Jefferson Circuit Court, to prevent him from adjudging the question as to the right of the city of Louisville, the plaintiff in action No. 4,992, to a personal judgment against the petitioner.

The suit was to enforce an alleged lien for taxes on property belonging to the petitioner and others, and to obtain a personal judgment against him for the amount thereof. Judgment was rendered, giving the city a lien upon property for the taxes ascertained to be due the city. In that judgment a reservation was made in language as follows: "No personal judgment is now rendered in favor of plaintiff against either of the defendants for any part of the taxes, interest and costs aforesaid."

The petitioner prosecuted an appeal from the judgment and superseded it. Subsequently the city attorney desired to have the defendant, Judge Miller, pass upon the city's right to a personal judgment, and thereupon the petition was filed herein for the purpose of having this court issue a writ prohibiting the defendant from doing so. The court awarded the writ prohibiting the defendant from passing upon the question pending the appeal. The writ was granted upon the idea that no proceedings should be had in the court below until the appeal was finally disposed of, as the supersedeas suspended

further proceedings therein. The court has disposed of the appeal. The question which now confronts us is whether the writ shall be kept in force, thus preventing Judge Miller from finally determining the question of the right of the city to a personal judgment against the petitioner for the taxes sought to be recovered. The judgment did not dismiss the parties, nor did it purport to grant part of the relief sought and deny plaintiff's right to the other relief for which it prayed. The language used manifested a purpose to reserve the question as to the right of the city to a personal judgment. If we should take the opposing view, then we would hold that when the court said that "no personal judgment is now rendered" it was equivalent to saying that the plaintiff is not entitled to a personal judgment. The court might have used more apt language in reserving the question for future consideration. The mere fact that inartificial language was employed to express the purpose of the court can not have the effect of depriving the court of jurisdiction to adjudicate the question which it manifestly intended to reserve.

Section 376 of the Civil Code provides that "in an action to enforce a mortgage or other lien judgment may be rendered for a sale of the property and recovery of the debt against the defendant personally." This section expressly provides that in an action to enforce a lien a judgment in rem and in personam may be rendered. Suppose in such an action the court should render a personal judgment against the defendant, and would add thereto that no judgment in rem is now rendered. Certainly the court would be compelled to hold that the question of the plaintiff's right to a judgment in rem had been reserved for future adjudication. We are of the opinion that the court in its judgment reserved the right to pass upon the question of personal judgment. It would not be proper for us to intimate what, if any, judgment should be rendered, as that question must be determined by the court below.

Motion for the writ is overruled.

Whole court sitting.

Judge Hobson dissenting.

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MUTUAL LIFE INSURANCE CO. OF NEW YORK v. SINCLAIR.

(Filed February 6, 1903—Not to be reported.)

Insurance—Delivery of policies—Agents—Appellee brought this action to compel appellant to deliver to him two policies of life insurance for \$5,000 each. He made a written application for two policies, for \$5,000 each, to the Nashville agency, and agreed to accept one of them absolutely and was to have an option of sixty days to decide as to his accepting the second policy. Both policies were issued and sent to the agent at Russellville. Appellee accepted one of the policies and paid the premium on it. The other policy remained in the hands of the agent, and within the sixty days, he tendered the premium and demanded the policy, but the company refused to deliver it to him, on the ground that it was stipulated in the application that the policy should not be delivered until the insured had paid the premium during his good health, and that subsequent to the issue of the policy, and prior to the tender of the premium, appellee had received several pistol shot wounds, which the company deemed sufficient grounds for refusing the risk.

Held—That the company could not be compelled to deliver the policy while appellee had the option to accept the policy and pay the premium within sixty days, it was on condition that he should remain in good health. The second policy which the company is asked to be compelled to deliver was issued from the Louisville agency on an application containing the same condition as to good health of the insured. A., the agent at Pembroke, went to Russellville, the home of appellee, and the kind of policy agreed on, the application was signed, and it was agreed that the application and policy should be issued in the name of B., a brother of A., who was also an agent. It was understood that A. and B. would share the commission to be received from the premium. The policy was issued and mailed to B. at Pembroke, but before it arrived B., who left Pembroke, requested his brother, A., to receive the policy. After appellee had received the pistol wounds he tendered the premium and demanded that the policy be delivered to him, but the company ordered that it be not delivered to him. Appellee claims that the policy having been delivered to A., he was his agent, and not the agent of the company. Held—That the company had the right after appellee received the wounds to refuse to deliver the policy. A. was the agent of appellant and not of appellee, and a delivery of the policy to A. was not a delivery to appellee.

Edward Layman Short, Frederick L. Allen, Browder & Browder and Grubbs & Grubbs for appellant.

W. P. Sandidge and W. L. Reeves for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, Sinclair, instituted this action to compel the appellant to deliver to him two certain policies of insurance on his life for \$5,000 each. On December 11, 1899, the appellee made a written application to the appellant's Nashville, Tenn., agency for two policies on his life for \$5,000 each, but it was understood that it was optional with him to take one of them. Both policies were issued, but the one actually contracted to be taken was delivered and accepted, but the other remained in the hands of the appellant's agent with the agreement that the appellee, within a specified time, had the right to take it. On December 14, 1899, the appellee made application, in writing, to the appellant's agency at Pembroke, Ky., for a policy on his life for \$5,000. The application was forwarded to the home office of the appellant, it was approved, and the policy was issued and forwarded to the agency at Pembroke, Ky.

The policy for which application was made at Nashville is known in this record as the Tennessee policy, and the one for which application was made to the Pembroke agency is known as the Kentucky policy, and, for convenience, we will so designate them.

#### TENNESSEE POLICY.

The appellee claims that the agent of the company agreed, when he made the application for the Tennessee policies, that he would certainly take one of them, and that he should have sixty days in which to take the other one; in other words, that he, by that contract, acquired an option on the policy, and as he tendered the premium thereon within that period, he was entitled to it. The appellee thus claims that there was a consideration for the option

on the second policy. The appellant claims, first, that there was no consideration for the option, as they were independent contracts; second, that by the terms of the application the appellee expressly agreed that the policy was not to be in force "until the first premium shall have been paid during my continuance in good health." This quotation is taken from the application which the appellee made for the policies.

The facts are that after the first policy had been delivered to the appellee, and before the tender of the premium on the second one, the appellee received several pistol shot wounds, and from which he was suffering at the time the premium which was to be paid upon the policy was tendered and the policy demanded for it. After the general agent of the company learned of the appellee's condition he notified the Nashville agency not to deliver the policy. The question of the right to acquire an option upon a policy of insurance is ably and interestingly discussed by counsel for the appellee.

The evidence does not establish the fact that the appellant, through its agent or otherwise, agreed to waive the condition that the policy was not to go into effect until the first premium was paid while the applicant was in good health. There is evidence to show that there was an agreement that the policy in question was to be held and the appellee should have time in which to determine whether or not he would accept it, but he has failed to establish that there was an agreement to the effect that appellant's agents were to accept the premium when the applicant was not in good health. The mere fact that the appellant agreed to hold the policy for a certain period for the appellee to determine whether or not during that time that he would accept the policy did not, and could not, have the effect of waiving the necessity for the payment of the first premium while the applicant was in good health. The premium was not tendered while he was in good health. The evidence fails to show that the appellee's life will not be shortened by reason of the injuries which he received. The most that it does is to show that some persons have lived many years after having received injuries of the character of those inflicted upon the appellee. The appellant can not be compelled to assume a risk in the absence of a contract imposing it. We are, therefore, of the opinion that the court properly refused to compel the appellant to deliver the Tennessee policy.

#### KENTUCKY POLICY.

Eustis Hall and his brother, Elvis A. Hall, were the agents of the appellant at Pembroke, Ky., on the 14th day of December, 1899. Before that date the appellee, who was a friend of Eustis, notified him that he desired to take out a policy of insurance in the appellant company. Eustis promptly went to Russellville, where the appellee lived, to see him in regard to it, for he said "I had always regarded him as a good subject to insure, and kept my eye on him as a matter of course." After discussing the matter for some time, they agreed upon the character of policy for which the appellee was to make application. After doing this Eustis then told Sinclair that he wanted the application to go in in the name of his brother, Elvis, whereupon the appellee agreed to it, but enjoined him to look after it for him and see that it was attended to properly. The blank application was filled out by

Elvis Hall and signed by the appellee and forwarded to the company, approved by it and the policy issued and mailed to Elvis. Elvis was called away from home on some business, and, expecting the policy to reach Pembroke during his absence, he told his brother Eustis to take it out of the office, which he did. The two brothers were to participate in the commission, a per cent. of the first premium, which was to be paid them by the company for securing the policy, Elvis to receive the greater part of it. The policy was never forwarded to the appellee.

There is a provision in the application that the policy was not to be put in force until the first premium was paid while the applicant was in good health. After the appellee received the wounds heretofore mentioned the general agent at Louisville inquired of Elvis Hall if the policy had been delivered, and Hall told him that it had not. Thereupon he was instructed to return it, which was accordingly done. The premium was not tendered by the appellee until after he received the wounds mentioned, nor was the policy ever delivered, unless the facts which we will hereafter state amount in law to a delivery of it. It is claimed by the appellee that it was delivered to Eustis Hall for him, which was equivalent to a delivery to him, as Eustis was his agent; that although the premium had not been actually paid, the delivery of the policy to Eustis was a waiver of the provisions of the policy, which required it to be paid while the applicant was in good health. This claim is based upon the idea that Eustis was not the agent of the company in the transaction, but was the agent of the appellee, because the appellee had permitted the application to go in in the name of Elvis and had requested Eustis to see that the policy was properly issued.

Eustis testified that at the time appellee agreed to take the policy he told him that he could charge the premium to the "Pembroke account" (which was an account in the bank, of which Eustis was cashier, in his and Sinclair's name), or charge it to him on his (Eustis') own books, or to draw on appellee for it. It may be added here that neither of these things was ever done. Appellant insists that there was no delivery of the policy; that Eustis was its agent and not that of the appellee, and the fact that he took it from the postoffice in the absence of his brother was not intended as, nor did it amount to, a delivery of the policy to appellee. In addition, it claims that the premium was never paid at all, and, of course, not paid during the good health of the applicant; and, further, that there was a provision in the policy that the Halls were not authorized to waive the necessity of the payment of the premium before the delivery of the policy, and, therefore, if Eustis was the agent of the appellee, and Elvis delivered the policy to him as such, he could not waive this condition.

Eustis was as much the agent of the company as was his brother Elvis; he was the active agent in securing the application for this policy; he participated with his brother in the agent's commission, and the mere fact that for some business reason he preferred the application to be sent in by his brother, did not alter his relationship to the appellant. The appellee dealt with him as agent of the appellant, but as appellee had confidence in him, and was not so well acquainted with his brother, he enjoined upon Eustis to see that the business was properly transacted. That request and agreement to do so could not dissolve the relationship of agency and principal

which existed between Eustis and the appellant, and make him the agent of the appellee in the transaction. As the application was made in the name of Elvis, the policy was forwarded to him at Pembroke, and he requested his brother to get the envelope containing the policy and open it. The policy was in the hands of the agent of the appellant, whether with Eustis or Elvis.

As an evidence that Eustis did not regard the delivery to him as a delivery to appellee he never charged the premium to the account of Sinclair and Hall, nor to Sinclair on his own books, nor did he draw on Sinclair for the amount of it. Eustis was asked the following question: "But you had not determined when you received the policy in what manner you would attempt to collect that premium?" He answered: "No, sir; I had not, because I expected to go to Russellville and finally close up the other transaction." His testimony shows that he intended to deliver in person the policy to Sinclair and to go to Russellville for that purpose, and to try to get appellee to accept another policy.

Elvis Hall evidently did not regard the policy as delivered at the time he was instructed to return it, because he told the general agent that it had not been delivered, and that the premium had never been paid upon the policy. Eustis at the time did not believe it had been delivered, or that he held it for appellee, as he consented to the return of the policy to the company.

We are of the opinion from the facts shown, that Eustis was not the agent of the appellee in this transaction, but that of the company. We are further of the opinion that the receipt of the policy by Eustis was not intended as, and did not amount to, a delivery of the policy to the appellee. We differ from the circuit court in its finding on this question, as it held that the delivery of the policy to Eustis was a delivery to the appellee. Having reached the foregoing conclusion, it is unnecessary to discuss the question as to what would have been the effect of the transaction had the policy been delivered to Eustis, as the agent of the appellee, before the payment of the premium by the applicant.

The judgment is reversed on the original, with directions to the court below to dismiss the petition, and is affirmed on the cross appeal.

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NELSON MANUFACTURING CO. v. MANN BROS.

(Filed February 6, 1903—Not to be reported.)

**Lien**—Material men's lien—Appellees made a contract with J. & Son to put in their building hot water heating apparatus of certain specifications for the price of \$1,800, \$800 to be paid in cash and a note for the residue, payable in ninety days from the completion of the work. J. & Son made a contract with appellant to furnish them the material necessary for the work at the price of \$1,286.44. The work was completed. Appellees paid to J. & Son the sum of \$800, but refused to execute the note for the residue, claiming that the work was not done according to contract. Appellant filed its claim of lien under section 2463 of Kentucky Statutes against the property of appellees. Issues were joined between appellees and J. & Son as to the amount of damage sustained by the imperfect heating apparatus. The court adjudged that appellant was entitled to a judgment against J. & Son for



the amount of their claim, but that the payment to J. & Son of \$800 was to be credited on their claim, and that they have a lien on the property for \$295, and that same be sold to satisfy said lien. It was also adjudged that appellees had been damaged \$745 by putting in the defective heating apparatus. On appeal. Held—That it was error to credit appellant's claim with the \$800 paid to J. & Son, but appellants are entitled to a lien under the statute for the full amount of their claim against appellee's property, as the statute makes it the duty of the property owner to see that all claims for material put in his house are paid for and he can not evade this lien by paying to the contractor the full amount of the contract price. The damages allowed were more than appellees had sustained.

Yeaman & Yeaman for appellant.

S. B. & R. D. Vance for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Barker.

The appellees, Mann Bros., who are merchants in Henderson, Ky., entered into a written contract with T. M. Jenkins & Son, plumbers, to put into their three-story building, at the corner of Second and Main streets, in Henderson, a hot-water heating apparatus, at the agreed price of \$1,800, \$800 of which was to be paid in cash, and for the balance appellees were to execute their note, payable in ninety days after completion of the work. By the terms of the agreement it was stipulated that the heating plant in question was to be first-class in every respect, and of sufficient capacity to heat the first and second stories of the building at 70 degrees fahr., when the temperature on the outside is not colder than twenty degrees below zero; the radiators and all other work to be first class material, good style, and all necessary parts painted, and the work to be first-class in every respect. Said plant was to be so constructed as to burn hard or soft coal, and pea or slack coal if desired; flues to be made suitable for the plant.

In order to carry out said contract Jenkins & Son entered into negotiations with the appellants, the Nelson Manufacturing Co., of St. Louis, Mo., who were dealers in the material used in making such a heating plant as was contemplated by the contract between Jenkins & Son and appellees. These negotiations resulted in a sale by appellants to Jenkins & Son of the necessary material to carry out their said contract, at the agreed price of \$1,286 44. One of appellant's salesmen, L. B. Yeiser, visited Henderson, and assisted in the measurements and calculations and negotiations between Jenkins & Son and appellees, which took place prior to the consummation of the contract in question.

The plant was duly installed by Jenkins & Son, on the 30th day of November, 1899, before which time appellees paid over to Jenkins & Son, the contractors, the sum of \$800, but declined to execute their note for the remaining sum of \$1,000, and finally declined to pay anything further on the contract, claiming that the plant was worthless, and utterly failed to come up to the stipulations and agreements contained in the written contract between them and the contractors. Whereupon appellants, as the statute provides, filed their claim for a material man's lien, in the office of the Henderson County Court, within the time prescribed by law, and afterwards in-

stituted this action in the Henderson Circuit Court against Jenkins & Son, the contractors, and Mann Bros., the owners of the building in question, for the purpose of obtaining judgment for their claim and the enforcement of their material man's lien.

The issues between the parties were duly made up, and involved the question as to whether or not the heating plant came up to the terms of the contract between Jenkins & Son and appellees, and, if not, what damage appellees had sustained by reason of such failure. A great deal of testimony was given upon this mooted question, and when the case was finally submitted, the chancellor rendered a judgment in favor of appellants against Jenkins & Son for the full amount of their claim, \$1,286.44, with interest at 6 per cent. per annum from November 30, 1899, until paid, and adjudged that the appellants were entitled to a lien on the property of appellees, in which the heating plant had been installed, for the sum of \$225, with interest at 6 per cent. per annum from November 30, 1899, until paid, and entered an order of sale of the property for the purpose of enforcing this lien. From this judgment only the appellants, the Nelson Manufacturing Co., are complaining.

The chancellor evidently reached the conclusion that the payment of \$800 to Jenkins & Son, the contractors, by appellees, the owners of the building, was valid as against the claim of appellants for their material, and that the plant fell short of the contract stipulations, and that appellees were damaged in the sum of \$745 by reason of this failure on the part of Jenkins & Son to comply with their contract; he evidently believed, as the evidence indubitably shows, that all of the material furnished by appellants to Jenkins & Son was first-class, and suitable for the purpose for which it was sold, as he gave judgment in their favor against Jenkins & Son for the full amount of the contract price for the material in question.

We shall first examine the question of law which arises out of the payment by appellees to Jenkins & Son of the sum of \$800, and ascertain whether or not this payment relieved appellee of the duty imposed upon them by the statute, to see that the material man's claim was paid.

Section 2463 of the Kentucky Statutes contains the law affording to material men liens for the amount of their claim, where they have furnished material for the purpose of improving real estate. It is not necessary to set forth this section herein; we deem it sufficient to say that the statute amply covers the claim of appellants in this case. This statute has been construed by this court in several cases, and the question of law herein involved has been adjudicated. The constitutionality of the act was upheld in the case of *Hightower v. Bailey & Kerner*, 22 Ky. Law Rep., 88. In this case the court, by *Haselrigg*, Chief Justice, said: "This statute is radically different from our former laws on this subject, and has not heretofore been before this court for construction.

"The preceding statute, while giving liens to contractors, subcontractors, material men and laborers, practically, thereby, provides a process of garnishment in the hands of the owner of any money he might owe the contractor. Its purpose was merely to substitute the subcontractor, material man and laborer to the rights of the contractor, and was effectual only in the event the owner was indebted to the contractor. It was entirely safe for

the owner, without notice of the claims of others, to pay his contractor when he pleased, even in advance. The present statute was clearly meant to fasten, and it does fasten, on the property owner a lien for the claims of the subcontractor, material man and laborer, although the owner has no notice of such claims, and may owe the contractor nothing."

This case was cited and approved in the case of *Browinski v. Pickett, &c.*, 24 Ky. Law Rep., 305. In this case the owner of the building in question had paid over to his contractor all of the contract price of the building except the sum of \$874.41, whereas the claims due to various parties who had furnished material in the erection of the building amounted to \$2,992.24. The owner prorated the balance in his hands among these various parties, tendering to Browinski & Adcock, who had furnished paints, putty and glass for the building in question to the value of \$856.53, the sum of \$365.62, as their pro rata of the balance remaining in his hands. Browinski & Adcock refused to accept the sum thus tendered, and having complied with the statute, in order to effectuate their lien, brought suit to enforce the same for the full amount of their claim. Upon final submission the chancellor gave judgment against the contractor for the full amount of the material man's claim, and adjudged said material man a lien on the real estate of the owner for the sum of \$346.61. From this judgment the material man appealed, because he was not adjudged a lien for the full amount of his claim, \$856.53, and the owner of the building prosecuted a cross appeal, because the sum awarded the material man as lien was in excess of \$365.62. There was no dispute in this case that the owner of the building had paid over to the contractor, upon estimate of the architect, all but the balance above stated. In the opinion of this court, Burnam, Judge, it is said: "There is no doubt that appellants furnished the material sued for to Pickett to be used by him in the erection of appellee's house, and that they were so used. The statute, under this state of facts, gave to appellants a lien upon the land on which the building was erected which can not be evaded by the owner paying to the contractor on estimates made by the architect, and the fact that he did so furnishes no defense to the claim sued for. The only limitations upon the liens of persons who furnished labor and material in the erection of the building is that they shall in no case be for a greater amount than the contract price of the original structure. The report of the commissioner shows that the appellants are the only parties who have availed themselves of this provision, and secured a lien upon the property of appellees.

"It is insisted for appellees that before a material man can acquire a lien under the statute it must appear that the material was obtained by the contractor as the agent of the owner for use in the construction of the building; that if purchased in his own name, with the intention to be used in the construction of the building, that the material man would acquire no lien upon the property, even for the materials that were actually used in the building. There is nothing in the statute which is susceptible of such a construction. On the contrary, it says in plain terms that a person who performs labor, or furnishes materials in the erection, altering or repairing of a house by contract with the owner, contractor, subcontractor, architect or authorized agents, shall have a lien thereon, and upon the land upon which said improvements shall have been made. The testimony in this case

is up both to the letter and spirit of the statute, and we think the chancellor erred in not adjudging appellants entitled to a lien on the property for the full amount of their claim."

We do not see how the legal effect of the payment to Jenkins & Son can be distinguished from the payment so made by the owner of the building, Barker, to his contractor, Pickett, in the case cited. The owner of the building, in cases like the one involved here, pays money to his contractor at his peril. It is immaterial whether he knows of the claim or not; the statute casts upon him the duty, to the extent of the full contract price of the improvement to be made, of seeing to it that the material men, who have furnished material for the work provided for by the contract, are paid. No payments made by him to his contractor will relieve him of this duty, and, as said before, the question as to whether or not he knew of the claims of the material men at the time of the payment to the contractor is entirely immaterial. (*Hodges v. Arvidson*, 23 Ky. Law Rep., 2078.)

The chancellor, therefore, erred in allowing the payment of \$800 to Jenkins & Son, contractors, as a credit against the claim of appellants on their claim for the material furnished by them.

In regard to the question of the amount of damages allowed by the chancellor to Mann Bros. for the alleged failure of the heating apparatus to come up to the specifications in the contract, we are, after a careful reading of the record, convinced that it was entirely too large. We do not believe that a preponderance of the evidence warrants the conclusion that it would require \$745 to make the heating plant in question come up to the stipulations of the contract. We are not profoundly impressed with appellees' evidence as to the deficiencies of the heating plant. It is not necessary to state the effect of the evidence in this case with any great particularity, but we believe that a good deal less money than \$745 will supply all the deficiencies of the heating plant, if there be any; and we think, as said before, that the chancellor erred in allowing so large a sum as against the material men, the appellants.

Wherefore, the case is reversed, with directions to enter a judgment giving appellants a lien on the building of appellees for \$1,286.44, with interest from November 30, 1899, until paid, to be credited by any sum or sums of money which may have been paid by appellees to appellants since the judgment was rendered.

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ANGLIN v. CONLEY.

(Filed February 6, 1903.)

**Fraudulent conveyances—Mortgages—**Appellee instituted this action in equity to set aside a deed of conveyance made by A. to B., his brother, alleging that he had obtained a judgment against A. for \$850 damages for an assault and battery committed on him; that prior to obtaining this judgment A. had made a conveyance to B. of his one-fifth interest in land. Appellee alleged that this conveyance was made without any consideration, and with the fraudulent intent of cheating and defrauding his creditors. The court set aside the conveyance and ordered the land sold to satisfy appellee's judgment. On appeal it is insisted that appellee was not a creditor of A. Held—That appellee was a creditor of A., but the proof shows that B. had

furnished to A. about \$500, besides had paid for him about \$1,200 attorneys' fees, but he had no knowledge of any fraudulent intent on the part of A. to defraud his creditors, and the conveyance of the land was in effect a mortgage which gave B. a prior lien on the land for money advanced and paid for A. Appellee is entitled to a second lien on said land to satisfy his debt.

Theobald & Theobald and C. B. Wilhoit for appellant.

G. W. Armstrong, H. L. Woods and R. D. Davis for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Paynter.

The object of this suit was to set aside a deed which Talton B. Anglin executed and delivered to the appellant, James E. Anglin, by which he conveyed to him an undivided fifth interest in a certain tract of land, the appellee claiming that at the time of its conveyance he was a creditor of the grantor. The deed was dated July 10, was acknowledged on the 15th and lodged for record on the 22d of the same month. The consideration recited in the deed was \$500 cash in hand paid and love and affection, the grantor and the grantee being brothers.

From the averments of the petition it appears that on the 4th day of July, 1896, the grantor, Talton B. Anglin, shot and wounded the appellee, Conley; that on the 30th day of that month the appellee instituted an action against him for maliciously shooting and wounding him; that subsequently he recovered a judgment against him for \$850 and costs; that on the 14th day of August, 1898, this action was instituted in equity for the purpose heretofore stated. It is averred in the petition that the conveyance was made by the grantor to the grantee for the purpose of hindering and delaying the grantor's creditors in the collection of their debts, and that it was made without any good or valuable consideration. The appellant moved the court to compel the appellee to paragraph his petition, upon the idea that it stated two causes of action: First, because it was averred the grantor executed it with fraudulent intent to cheat his creditors; second, because it was averred that the deed was made without consideration, hence a voluntary conveyance. To paraphrase the averments of the petition they simply amount to the charge that it was a voluntary conveyance without consideration, with the fraudulent intent to cheat the grantor's creditors. In our opinion there is but one cause of action attempted to be stated.

The first question which we will consider is whether or not the appellee was a creditor of Talton B. Anglin at the time the conveyance was made or had such claim as would enable him to have the conveyance set aside upon a proper showing. It is urged in behalf of the appellant that the appellee was not a creditor of the grantor because the liability had not been fixed by a judgment of the court. It was held in *Lillard v. McGee*, 4 Bibb., 165, that a person who recovers judgment in slander is a creditor within the meaning of the statute. In *Slater v. Sherman*, 5 Bush, 206, it was held that one who had a claim against another growing out of assault and battery had the right to have a fraudulent conveyance set aside, although made before the judgment was rendered in his favor. The doctrine in those cases settles the question here that the appellee was a creditor of the grantor. The facts are about these: The appellant knew of the assault which his brother had

made upon the appellee; the brother intended to evade prosecution by leaving the State and obtained from the appellant \$500, with the understanding that he was subsequently to convey to him his interest in the land, which was afterwards done by the deed in question. Before that was consummated the grantor returned to Kentucky and either surrendered himself or was arrested. The deed seems to have been drawn on that day, but not acknowledged until five days thereafter, and recorded at the time heretofore stated. The appellant knew the purpose which his brother had in view in obtaining the \$500, which was to evade, for a time at least, a prosecution by the Commonwealth. After the grantor placed himself, or had been placed, in the custody of the law, the transaction was consummated by the execution of the deed. There is no evidence in the record that either the grantee or the grantor was aware of the fact that the appellee had a cause of action against the grantor for the injury which he had inflicted upon him, so that at the time the \$500 was furnished it is certain that the only purpose to be accomplished was the evasion of prosecution by the Commonwealth.

Although the action of the appellant might have facilitated the grantor's effort to evade such prosecution, that unlawful act could not enure to the benefit of the appellee in this action. The rights of the appellee must be determined from the facts independent of the unlawful act of the appellant, if it was so, to show a willingness to facilitate the escape of his brother from a penal or criminal prosecution. The deed recites a payment of \$500 by the appellant. The grantor and the appellant were introduced as witnesses by the appellee, and they both testified that \$500 was paid, and that after the grantor was in custody of the officers of the law they made an additional agreement, before the deed was delivered, as to the consideration for the conveyance, to the effect that the appellant was to furnish money to pay the grantor's attorneys, the cost in defense of the prosecution and any fine that might be recovered against him. They stand uncontradicted upon these questions. The proof shows that the sums paid to lawyers, etc., amounted to about \$1,200, in addition to the \$500 which had already been paid. The mere fact that the appellant knew that the grantor had assaulted the appellee did not charge him with notice that a cause of action existed in his favor against the grantor, or that the grantor was making the conveyance with a fraudulent intent to evade the payment of such judgment as might be recovered thereon. If the grantor had a fraudulent intent in making the conveyance to cheat the appellee, that fact would not deprive the appellant of his right to assert his claim against the land for the sums paid for the consideration in the purchase of it unless he actually had knowledge of the fraudulent intent.

The appellant and his brother seem to have lived together with their grandmother on a part of the land which was conveyed, and they continued to so live after the conveyance, but this fact will not justify a court in treating the conveyance as fraudulent, and this court has frequently so held. Under all the circumstances, we are of the opinion that as the exact amount which was to be paid for the land could not be told and was not agreed upon, the deed should be considered as a mortgage to secure whatever sums of money the appellant paid the grantor and for him on account of the prosecution. As the appellee did not file a petition in equity before he obtained

his judgment, this is no case for the application of section 1907a, Kentucky Statutes.

The case is reversed, with directions that the court adjudge the appellant a lien upon the land for the sums he paid to and for his brother, Talton B. Anglin, as consideration for the land, which is the \$500, and the amounts paid the attorneys, costs and fines; that the appellee be awarded a lien for his debt, interests and costs, subordinate to that of the appellant, and that the interest conveyed by Talton B. Anglin in the property be sold to satisfy these claims and for proceedings consistent with this opinion.

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RALEIGH v. CLARK.

(Filed February 6, 1903.)

Statute of limitation—Contracts—Damages—This land of appellant lies adjoining a creek, the land of appellee lies adjoining it and is higher than the land of appellant. The land of M. is higher than the land of appellee, and the drainage from the lands of M. and appellee naturally passes over the lands of appellant. M. had several years ago, by consent of appellee, dug a ditch across appellee's land, which naturally increased the flow of water over the land of appellant. This was before appellant became the purchaser of the land. Afterwards an agreement between appellant and appellee was made, by which appellee agreed to extend the ditch of M. to the creek across appellant's land, and to keep it open, and appellant and appellee were to cut a ditch on appellee's land running at right angles with the other ditch, and connecting with it the line between appellant and appellee. After several years appellee failed to keep open the ditch over appellant's land leading to the creek and the other ditch also filled up, causing the water to again overflow appellant's land, injuring his crops. Appellant brought this action to recover damages for this injury. On the trial the court instructed the jury in substance that if M. and appellee had exercised the privilege of running the water from their farms over appellant's land for more than fifteen years before making the contract, that they should find for defendant. A verdict resulted in favor of defendant, from which this appeal is prosecuted. Held —That said instruction was erroneous. Appellee had waived any rights he might have had in appellant's land prior to making the contract, and he is liable for his failure to keep said ditch open for any damage which was the proximate cause of said failure. The court instructed the jury in substance that if they found for plaintiff the criterion of damages was the value of the crops lost by him by reason of the flooding of the land, or a fair compensation for the injury to the crops and the depreciation of the rental value of the land that was not in crop. The court should have modified this instruction, to the effect that appellant could not recover for any damages which he might have avoided by ordinary care, and that for appellee's failure to keep open the ditch on appellant's land the measure of damages would be the reasonable cost of opening the ditch and keeping it open, in so far as appellant might, by cleaning out the ditch, have avoided the damages complained of.

Eli H. Brown and Miller & Todd for appellant.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hobson.

Appellant and appellee are farmers, living on Knob Lick creek in Daviess county. It is a flat country, and the stream seems to be a sluggish one. Appellant's land is lower than appellee's and lies north of it between appellee's farm and the creek; to the west of appellee's land is a tract known in the record as the Mattingly land. The drainage from the Clark and Mattingly tract is, by nature, over the land of Raleigh to the creek, but all of the Mattingly land does not drain this way. Many years ago Clark allowed Mattingly to cut a ditch through his land which turned down on the Raleigh place water that would not by nature flow there. This was before Raleigh bought it. The ditch seems to have run to a swag near the line and there stopped. The line between Raleigh and Clark runs east and west. The ditch referred to runs practically from the south to the north. Clark bedded up his land, as seems to be customary in that section, and also dug another ditch. The bed furrows and these ditches took the water down on Raleigh in greater quantities and more rapidly than it would flow on him by nature. In this condition of things, after he bought, an agreement was made between him and Clark by which Clark agreed to extend the Mattingly ditch from Raleigh's line to the creek, and to keep it open, and Clark and Raleigh each agreed to dig a ditch on Clark's land, running east and west on the line between them, to carry the water coming down off Clark's land into this ditch, which Clark was to cut out to the creek. Clark was to dig the ditch on the line on one side of the Mattingly ditch and Raleigh on the other side, and the dirt was to be thrown on the lower side of the ditch. Clark cut the ditch out to the creek, making it something like six feet wide and three feet deep. He and Raleigh also cut the ditch on the line leading into this ditch, making it four feet wide and two feet deep, and throwing the dirt on the lower side. Clark then set his fence on top of this dirt. This served as a barrier to protect Raleigh from the water above, and collect it in the ditches. Things went along very smoothly under this agreement for a number of years. Finally Clark failed to keep the ditch cleaned out across Raleigh's land, which took the water to the creek, and when this ditch filled up the east and west ditches also filled. Raleigh then brought this suit for damages against Clark for the flooding of his land. Clark defended on the ground that Raleigh would not let him clean out the ditch on his land. He also pleaded limitation, alleging that the Mattingly ditch had existed for more than fifteen years, and was in existence when Raleigh bought the place. The proof on the trial showed very clearly that a large amount of water was run over Raleigh's land, and that considerable damage had been done his crop, but the jury under the instructions of the court found for the defendant. The instruction which is chiefly complained of is in these words: "If the jury believe from the evidence that the ditch leading from the Mattingly land over the defendant's land to plaintiff's land had been constructed and maintained continually for a period of fifteen years or more next before the contract or agreement between plaintiff and defendant for a continuation of said ditch through the plaintiff's land to Knob Lick creek (if they believe from the evidence there was such an agreement) under a claim of right, then, in that event, the defendant is not liable to plaintiff for any damage that plaintiff may have



sustained by water flowing through said ditch, though he failed to comply with the agreement to keep the ditch open on plaintiff's land."

This instruction was erroneous. The contract between Clark and Raleigh was admitted by both parties; it had been carried out by them for a number of years. After getting the benefit of this contract Clark must take it with the burden. He can not be permitted to say that he had a right to maintain the Mattingly ditch, for whatever his rights may have been, he waived them rather than take the chances of standing upon them, and after the lapse of many years, when necessarily the evidence as to whether the ditch was there by permission, or as a matter of right, has been obscured by time, he can not be allowed to go back now and insist upon a matter which he then deliberately waived. We understand the petition to be broad enough to recover for all water sent down upon Raleigh in violation of the agreement between Raleigh and Clark, by reason of Clark's failure to keep the ditch open as he agreed to do, and as under this instruction the verdict of the jury may, under the evidence, have been for Clark without regard to the other matters in controversy, appellant is entitled to a new trial.

As the case must go back for another trial, it is necessary for us to determine whether instruction No. 8, which is objected to, properly defines the measure of damages, for it is to the interest of the parties that on the next trial the case may be fairly submitted to the jury. The thing complained of here is Clark's failure to comply with his agreement and keep open the north and south ditch; also the east and west ditch which he dug on his own land. The rule is elementary that a party suing for damages from the breach of a contract can only recover such damages as naturally and proximately flow from the breach. When Clark failed to keep open the ditch across Raleigh's land, Raleigh might have opened it and recovered the cost of doing the work which Clark had agreed to do, but had not done. The measure of damages for the nonperformance of work of this sort is ordinarily the cost of the work and not the loss which may result to the other party as a consequence of the work's not being done. Thus in *Miller v. Mariners' Church*, 7 Greenleaf, 51, the court said: "The purchaser of perishable goods at auction fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish, and throw the whole loss upon the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time, and if they bring less, he may recover the difference, with commissions, and other expenses of resale, from the first purchaser."

"If the party entitled to the benefit of a contract, can protect himself from a loss, arising from a breach, at a trifling expense, or with reasonable exertions, he fails in social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable. *Qui non prohibet, cum prohibere possit, jubet*. And he who has it in his power to prevent an injury to his neighbor, and does not exercise it, is often in a moral, if not in a legal, point of view accountable for it. The law will not permit him to throw a loss, resulting from a damage to himself, upon another, arising from causes for which the latter may be responsible, which the party sustaining the damage might, by common prudence, have prevented. For example, a party contracts for a quantity of

bricks to build a house, to be delivered at a given time; and engages masons and carpenters to go on with the work. The bricks are not delivered. If other bricks of an equal quality, and for the stipulated price, can be at once purchased on the spot, it would be unreasonable, by neglecting to make the purchase, to claim and receive of the delinquent party damages for the workmen, and the amount of rent which might be obtained for the house if it had been built. The party, who is not chargeable with a violation of his contract, should do the best he can in such cases; and for any unavoidable loss occasioned by the failure of the other he is justly entitled to a liberal and complete indemnity."

In 1 Sutherland on Damages, 2d edition, section 88, it is said: "When, after a contract has been entered into between two parties, notice is given by one of them that the contract is rescinded on his part, he is liable for such damages and loss only as the other party has suffered by reason of such rescinding; and it is the duty of such other party, upon receiving such notice, to save the former, as far as it is in his power, all further damages, though the performance of his duty may call for affirmative action. If a person hired for service for a given term is wrongfully dismissed, he is entitled to the stipulated wages for the term of his engagement, if that is his loss. It is *prima facie* his loss; but the law imposes on him the duty to seek other employment, and to the extent that he obtains it and earns wages, or might have done so, his damages will be reduced. (*Lewis v. Scott*, 95 Ky., 484.) In an action for damages resulting from alleged defects in the construction of a building so that the roof leaked and injured the interior work or property therein, or for breach of a contract to repair a building from which similar injuries ensued, or for injury to crops through default of the defendant in not building or repairing a fence, or his tortious opening of the same, where the party suffering from the injury is aware of the fact and the cause, and by a little timely labor and expense the damage could be avoided, the law imposes the duty on him to stay the injury, when he is in a favorable situation to do it, and enforces the duty by confining his redress for the injury thus avoidable to compensation for the necessary and proper means of prevention. The duty in such cases is not arbitrarily imposed on the injured party and exacted of him in all cases, to do or amend the work of the other party, or to finish it; but only when in view of all the circumstances of the particular case it is a reasonable duty which he ought to perform instead of passively allowing a greater damage."

In 1 Sedgewick on Damages, the rule is similarly stated: "The same principle which refuses to take into consideration any but the direct consequences of the illegal act is applied to limit the damages where the plaintiff by using reasonable precaution could have reduced them. (Section 201.)

"It is frequently said that it is the duty of the plaintiff to reduce the damages as far as possible. It is more correct to say that by consequences, which the plaintiff acting as prudent men ordinarily do, can avoid, he is not legally damaged. Such consequences can hardly be the direct or natural consequence of the defendant's wrong, since it is at the plaintiff's option to suffer them. They are really excluded from the recovery as remote." (Section 202.)

In subsequent sections it is pointed out that the law requires of the party

injured only ordinary care, and that he is not required to commit a trespass or go on the plaintiff's land. (Sections 221, 225.) The authorities on the subject as applied to a case like that before us seems uniform. By the third instruction the court in substance told the jury that if they found for the plaintiff the criterion of damages was the value of the crops lost by him by reason of the flooding of the land, or a fair compensation for the injury to the crops and the depreciation of the rental value of the land that was not in crop. The court should have modified this instruction to the effect that Raleigh could not recover for any damages which he might have avoided by ordinary care, and that for Clark's failure to keep open the north and south ditch on Raleigh's land the measure of damages would be the reasonable cost of opening the ditch and keeping it open, in so far as Raleigh might, by cleaning out the ditch, have avoided the damages complained of.

Judgment reversed and cause remanded for a new trial.

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WHINERY v. GARRETT, &c.

(Filed February 6, 1903—Not to be reported.)

Usury—Renewal of notes—C., as principal, and appellant, as surety, borrowed sums of money on notes from a bank which were renewed from time to time, the interest on each at the rate of 8 per cent. in advance being included in the renewals. C. having become insolvent, appellant gave his note for the full amount of said debts, which was renewed from time to time until the bank brought suit on said notes. In defense, appellant sought to purge the notes of all usury that had been paid. The court would not allow a recovery of usury prior to the execution of the note by him as surety, assuming payment of the debts. Held—That appellant having been surety on all the notes on which C. was principal, he can recover usury as well as if he had been sued on the note when he executed his own note in settlement of the debt.

Denton & Robinson for appellant.

O. H. Waddle for appellees.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Hobson.

On March 24, 1891, A. J. Crawford, as principal, and appellant, as his surety, executed to the Somerset Banking Co. a note for \$3,300, due two months after date. On this note Crawford paid at each renewal, from time to time, interest in advance at the rate of 8 per cent. until January 24, 1896. On September 26, 1891, they executed a like note for \$600; also on December 31, 1894, a note for \$783, on which like payments were made on the several renewals as on the larger note. On February 27, 1896, Crawford having become insolvent, Whinery executed his note to the Somerset Banking Co. for the sum of \$4,683, the full amount of these three notes, and in lieu thereof. This note he renewed from time to time, making like payments in advance of interest by way of discount, just as Crawford had done, until March 18, 1899. He was then sued on the last renewal of the note, and pleaded usury. The court purged the usury paid after February 27, 1896, when the note for \$4,683 was executed by Whinery, but refused to purge the

usury paid up to that time by Crawford, and from this judgment Whinery appeals.

Crawford had made an assignment and Whinery proved his claim against the estate and received a small dividend, but that in nowise affects his liability to the bank. The defense of usury is allowed upon the idea that to the extent of the usury paid in the old note the renewal is without consideration, in so far as the usury is brought over into the new note.

In *Kendall v. Crouch*, 88 Ky., 189, the principal obligor in a note was dropped, but it was held that this was not such a novation as would deprive the surety of the plea of usury. The court said: "Any payments theretofore made will be treated as having been paid upon the principal and legal interest without regard as to how they were, in fact, made or received. They will be so treated at the election of the debtor, although they were paid as usury; and so far as the usury has been carried into the new note it is without consideration, and can not be recovered. A change of payee or of a part of the obligors will discharge those bound upon the obligation, because it is a new contract; but it is not a payment of usury; and if it be carried into the new obligation as a part of the sum to be paid upon it, it is to that extent tainted, and the usury will, upon plea, be extracted."

This case followed *Fitzpatrick & Co. v. Apperson's Ex'or*, 79 Ky., 272, and has since been followed in *Neal v. Rouse*, 93 Ky., 151; *Hill v. Cornwall*, 95 Ky., 512; *Shirley v. Stephenson*, 20 Ky. Law Rep., 770; *Blakeley v. Adams*, 24 Ky. Law Rep., 324, and a number of other cases. In support of the judgment we are referred to the cases of *Mann v. Bank of Elkton*, 20 Ky. Law Rep., 1033; *Ryan v. Logan County Bank*, 21 Ky. Law Rep., 1518, and *Parker v. Sweigart*, 22 Ky. Law Rep., 118, but none of these cases conflict in any respect with the rule that the entire usury may be purged as long as the debt remains, and that the dropping out of one or more of the obligors or the adding of one or more new parties in nowise affects the right to purge the transaction of usury from the beginning. In *Mann v. Bank of Elkton* the surety bought the land of his principal and agreed to pay the note as part of the purchase money. He then executed his own note to the bank, and when sued on this note attempted to plead usury. It was held that the rule referred to did not apply, because the principal in the note had paid the usury in the land transaction, and the right to recover the usury was in him and not in the purchaser of the land, who received the land as the consideration of his contract, and in paying his note only paid for the land as he had agreed to do. *Parker v. Sweigart* simply follows this case, but in both the general rule, that a mere change in the obligor would not affect the right to purge the usury, is distinctly recognized. The case of *Ryan v. Logan County Bank* is similar to the case of *Mann v. Bank of Elkton*, and was decided upon its authority.

In the case before us Whinery was the surety of Crawford on all three of the notes originally given and on each renewal of them up to the time that Crawford failed. When Crawford failed he had the right to demand a credit on the notes then held by the bank for all that had been paid upon them by Crawford, and if he had then been sued and had pleaded usury, unquestionably he would have been entitled to have the transaction purged and only the balance of the notes, with interest at 6 per cent., after deducting the amounts

in fact paid, could have been demanded of him. The fact that the payments were made by Crawford in the way of discount on the several renewals did not affect the matter, for these payments were made for the use or forbearance of the money, and the court will look through the form of the transaction and not allow any mere subterfuge or change of form to defeat the statute. When Whinery gave his own note in place of the three notes which he and Crawford had given, there was no consideration for this note, except the amount due and collectible on the Crawford notes, on which he was surety and which he then took up. This want of consideration in the first note that Whinery gave went into each renewal of that note and affected the last renewal just as much as the first note. He can, therefore, plead this want of consideration when sued on the last renewal just as he might have plead it if he had failed to take up the Crawford notes and been sued for the face value of those notes.

Judgment reversed and cause remanded for a judgment as herein indicted.

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BANKS v. COUNTY OF HENDERSON, &c.

(Filed February 10, 1903—Not to be reported.)

Damages—Location of smallpox hospital—Verdict—This action was instituted to recover damages for location of a smallpox pest house near appellant's land. A verdict resulted in favor of appellee. On appeal, Held—That the verdict is not contrary to the evidence, and was rendered under proper instructions.

S. A. Banks and Montgomery Merritt for appellant.

N. P. Taylor and John F. Lockett for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Hobson.

Appellant owns a valuable tract of land near the pesthouse of appellee. She filed this action to recover damages on account of the depreciation of her property by the location of the pesthouse near it. Under instructions of the court, which are not objected to, the jury found for the defendants. The only question made on the appeal is that the verdict is palpably against the evidence.

The proof showed that the pesthouse was nine hundred feet from appellant's line and twenty-one hundred feet from her house. It also showed that the contagion of smallpox can not be carried through the air more than three hundred feet.

A number of witnesses testified that appellant's land was depreciated in value by reason of the location of the pesthouse from ten to twenty-five percent. or more. Perhaps half as many testified that it was worth as much with the pesthouse where it is as without it. The jury saw the witnesses; they were practical men peculiarly fitted to pass on a question of this sort; they heard the reasons given by the witnesses for their conclusions and were of the vicinage. There was a fair trial. The constitutional guaranty of a trial by jury is not an idle form. It rests upon the idea that one time with another the verdict of twelve practical men is more to be trusted than the

conclusions of a judge, however learned he may be, as a means of reaching practical justice. Appellant's land has not depreciated any in rental value. According to the proof it is beyond the reach of contagion, and under all the facts we can not say that the verdict of the jury is so palpably against the evidence as to warrant us in disturbing it. (*Barrett v. City of Henderson*, 94 Ky. Law Rep., 771.)

Judgment affirmed.

METROPOLITAN LIFE INSURANCE CO., &c. v. MILLER.

(Filed February 10, 1908.)

Malicious prosecution—Instructions—Appellee was an agent of the appellant insurance company, and upon quitting their employment gave his due bill to the company for what was then thought to be a balance due from him on collections, \$9.84. Appellant afterwards claimed that the shortage amounted to \$15.58, which appellee's security paid to the company. At the instance of the surety, and after consultation with an attorney, a warrant was issued, charging appellant with embezzlement, under which he was arrested and remained in custody about an hour, when he gave bond. The warrant was finally dismissed for want of prosecution. Appellant brought this action for malicious prosecution, and a trial resulted in a judgment for \$1,800 damages, from which this appeal is prosecuted. The court properly instructed the jury as to the advice of counsel constituting probable cause, but it did not give any instruction on probable cause outside of the advice of counsel. The rule is that what facts constituted probable cause is a question of law for the court, and that the court must, by its instruction, inform the jury what these facts are, and let them determine from the evidence whether the facts exist where the evidence is conflicting. The instruction of the court, as given to the jury, gave them no light as to what constituted embezzlement or fraudulent conversion. In a proceeding of this kind there must be malice in fact. This is not necessarily ill-will to defendant, but it is any evil or unlawful purpose as distinguished from that of promoting justice. An instruction should have been given to the jury to the effect that there must be both malice and a want of probable cause to justify a recovery, although as a matter of fact plaintiff was innocent of the charge, for the question in this case is not the guilt or innocence of Miller of the crime of embezzlement, but whether the defendants, at the time they took out the warrant, had probable cause to believe him guilty. If they had such cause there can be no recovery, no matter how clearly the evidence may now show that Miller was innocent.

J. D. Macquot and James Campbell for appellants.

Hendrick & Miller for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hobson.

Appellee Miller was agent for appellant, Metropolitan Life Insurance Co., and appellant, the National Surety Co., was surety on his bond. It was the duty of Miller to pay over to the company weekly all the money he collected, and his commissions were paid back to him by the company from the home office a few days later. The mode of doing the business was to collect the premiums from the policy holders weekly. The policy holder had

a book, and in this his weekly payments were entered by the agent when made. The agent had a similar book in which the payments were also entered, and he settled weekly with the superintendent by his book. Once in three months the agent's book was compared with the policy holders' books to see if he had accounted to the company on his book for all the money that he had collected as shown by the policy holders' books. Miller left the service of the company in December, 1899. The superintendent then went around with Miller, comparing his book with the policy holders' books and found that Miller had not entered on his book some collections he had made, amounting to \$9.84, and Miller executed to the company his due bill for the amount. Subsequent investigation showed that he was behind in a larger amount, and while he says that he did not agree as to the correctness of the settlement, the weight of the evidence is the other way. Still he paid nothing, and on January 25, 1900, his surety in his bond, the National Surety Co., wrote him a letter telling him that it had paid the insurance company \$15.58 for a shortage in his account, and calling on him to reimburse it. To this letter he made no reply. On February 20 the surety company again wrote him in regard to the shortage it had paid, and to this letter he made no reply. The agents of the insurance company had some interviews with him near this time about settling the remainder of the shortage, but nothing came of it. Things ran along for some months, and then at the request of the surety company the insurance company directed its agent to institute a criminal proceeding against Miller for embezzlement. A consultation was held with an attorney, and on his advice a warrant was issued on July 14, 1900. Miller was arrested under the warrant, remained in custody about an hour before he gave bond. This was on Saturday; the case was called on Monday morning, and laid over until Thursday, one of the witnesses having left the State. On Thursday morning before the county attorney reached the courthouse the case was called again, and there being no witnesses present, and no one to prosecute, the case was dismissed. Miller then filed this suit to recover damages of the two corporations and their agents, taking the proceeding against him, on the ground that the prosecution was malicious and without probable cause. The jury found in favor of the plaintiff, and assessed the damages at \$1,800, and the defendants have appealed.

The court properly instructed the jury as to the advice of counsel constituting probable cause, but he did not give any instruction on the probable cause outside of the advice of counsel. The rule is that what facts constitute probable cause is a question of law for the court, and that the court must by its instruction inform the jury what these facts are, and let them determine from the evidence whether the facts exist, where the evidence is conflicting. (*Anderson v. Columbia Finance and Trust Co.*, 90 Ky. Law Rep., 1799; *Ahrens & Ott Manufacturing Co. v. Hoehner*, 81 Ky. Law Rep., 299.)

Appellant was charged in the criminal proceeding with the crime of embezzlement, under section 1802, Kentucky Statutes, which provides, among other things, that if an agent of any corporation shall embezzle or fraudulently convert to his own use, or the use of another, any money, property or effects of the corporation coming into his hands as such agent, he shall be confined in the penitentiary not less than one nor more than ten years.

Embezzlement is defined as the fraudulent appropriation or conversion of the property of another by one who is entrusted with the possession. (2 Bishop Criminal Law, section 325, 2; 10 Am. and Eng. Ency. of Law, 978.) The words, therefore, "embezzle and fraudulently convert," are synonymous. To constitute the offense it is necessary there must be a criminal intent; but where the money of the principal is knowingly used by the agent in violation of the duty, it is none the less embezzlement because at the time he intended to restore it. (10 Am. and Eng. Ency. of Law, 996-997, and notes.) The proof before the jury showed very clearly that Miller had collected the money of the insurance company, and had not charged himself with it, or accounted for it, and had failed to make good the amount after the default was discovered. It is true he testified that the balance against him did not arise in this way, but under the proof this was a question for the jury, and the court should have instructed them that if the agent or agents of the company in taking out the warrant believed, and had such grounds as would induce a man of ordinary prudence to believe, that Miller, while agent for the insurance company, had collected and received money belonging to the company, and had fraudulently kept the same, and had failed to pay it to the company or its authorized agent, then there was probable cause for taking out the warrant, and they should find for the defendants.

The instructions of the court as given to the jury gave them no light as to what constituted embezzlement or fraudulent conversion, and although the defendants may in the judgment of the jury have shown that they had reasonable cause to believe Miller in fact guilty as above defined, the jury were required by the instruction to find for the plaintiff. Instruction "F.," asked by the defendants, is not as favorable to them as the law warrants, in that the definition of malice therein is not as favorable to the defendants as that established by the authorities elsewhere and heretofore sanctioned by this court. In a proceeding of this kind there must be malice in fact. This is not necessarily ill-will to the defendant, but it is any evil or unlawful purpose as distinguished from that of promoting justice. (Ahrens & Ott v. Hoeher, 21 Ky. Law Rep., 299.) With this modification, instruction "F." should have been given, to the effect that there must be both malice and a want of probable cause to justify a recovery, although as a matter of fact plaintiff was innocent of the charge, for the question in this case is not the guilt or innocence of Miller of the crime of embezzlement, but whether the defendants, at the time they took out the warrant, had probable cause to believe him guilty. If they had such cause, there can be no recovery, no matter how clearly the evidence may now show that Miller was innocent.

Judgment reversed and cause remanded, with directions to grant appellants a new trial.

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CHINN, &c. v. CURTIS.

(Filed February 10, 1908—Not to be reported.)

1. Assignment for benefit of creditors—Fraudulent conveyances—Jurisdiction—In 1896 A. made a deed of assignment for the benefit of his creditors to B. A short time thereafter C. obtained a judgment in the Harrison Cir-



cuit Court against A., and had a return of no property found, after which she brought this suit to set aside as fraudulent a deed of conveyance of a tract of land made by A. to his son, which was without any consideration, except \$400 paid by the son. An attachment was levied on said land subject to an execution levy in favor of D., who was made a defendant in the action. D. answered, alleging that the conveyance of land from A. to his son was without consideration, and asked to set aside the deed as fraudulent. C. afterwards dismissed her petition, and the action having been tried on the issues raised by D. in her answer and cross petition, the court set aside the deed and subjected the land to the payment of the debt. This appeal is prosecuted from that judgment. It is urged that after the dismissal of the action by C., D. could not prosecute her claim; furthermore, it is urged that the Harrison Circuit Court has no jurisdiction of the action. Held—That the dismissal of the action by C. did not prejudice the claim of D. The judgment in favor of D. was rendered in the Harrison Circuit Court, and that court had jurisdiction to set aside the deed as fraudulent. The court properly set aside the deed as fraudulent.

2. Statute of limitation—Evidence—The action was not barred by the five years' statute of limitation as the proof shows that D. did not learn of the conveyance until within five years before bringing the action. The recording of the deed is not conclusive evidence of notice to D., although it is competent evidence on that issue. The other facts and circumstances prove that she had no notice of the execution of the deed until within five years before the institution of her action, and as her debt existed at the time of the conveyance she had the right to subject the land to the payment of it.

Ward & Lafferty, B. D. Berry and J. I. Blanton for appellants.

W. S. Pryor and Swinford & Osborne for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Hobson.

In January, 1896, appellant, H. C. Chinn, made a general deed of assignment of all his property to P. P. Cummins for the benefit of his creditors. On February 28 thereafter Mary E. Holliday recovered a judgment against him in the Harrison Circuit Court, on which she took out execution that was regularly returned by the sheriff "no property found." She then filed on March 13, 1896, this suit against H. C. Chinn, his son, Harry C. Chinn, and P. P. Cummins, as his assignee, in which she took out an attachment, charging that Chinn, in the year 1890, had made a deed to sixty-three acres of land owned by him to his son, Harry C. Chinn, which was voluntary, except to the extent of \$400 paid by the son. She sought to set aside the deed and subject the land to her debt. She alleged that the assignee refused to sue, and for that reason he was made defendant. The attachment was levied on the land by the sheriff subject to the execution lien of appellee, Sarah E. Curtis. The plaintiff then filed an amended petition, making Mrs. Curtis a defendant, and calling on her to set up her lien. Mrs. Curtis, on September 19, 1896, filed her answer and cross petition, in which she set up her execution levy on the land, and charged in substance that the land was conveyed to the son by his father without any consideration. At the June term, 1897, Mrs. Holliday dismissed her petition without prejudice. Mrs. Curtis amended her cross petition so as to put in it in substance all the allegations that Mrs. Holliday had made. The defendants answered, denying

all the allegations and pleading limitation, after their objection to the jurisdiction of the court had been overruled. On final hearing the court subjected the land to the debt.

By section 63 of the Code an action for the sale of real property must be brought in the county in which the subject of the action, or some part thereof, is situated. A part of the land lay in Harrison county. By section 70 of the Code an action upon a return of no property found must be brought in the county in which the judgment is rendered, or in which the defendant resides or is summoned. Mrs. Holliday's judgment was recovered in the Harrison Circuit Court. It does not appear that the defendants were not summoned in that county, and the presumption is in favor of the jurisdiction of the circuit court. Mrs. Holliday's action was, therefore, properly brought in the Harrison Circuit Court. While section 84, Kentucky Statutes, gives the assignee the right to set aside a fraudulent conveyance, there is nothing in it to modify the sections of the Code above referred to. Mrs. Holliday's action having been properly brought in Harrison county after Mrs. Curtis had filed her answer and cross petition therein, the action of Mrs. Holliday could not be dismissed on her motion so as to deprive Mrs. Curtis of the right to prosecute her claim in that forum. The court, therefore, did not err in overruling the special demurrer.

The deed which H. C. Chinn made to his son was made and recorded in the year 1890, or more than five years before the action was brought. By section 2519, Kentucky Statutes, the cause of action for relief for fraud shall not be deemed to have accrued until its discovery, but the action can not be brought after ten years from the perpetration of the fraud. Appellee, Mrs. Curtis, aptly pleaded and introduced proof tending to show that she did not discover, and could not by ordinary diligence have discovered, the fraud until within five years before her suit was brought. In *Ward v. Thomas*, 81 Ky., 452, the court held that constructive notice arising from the recording of the deed was insufficient to set the statute in motion. It said: "The recording of such conveyance is important in establishing the time of the perpetration of the fraud, but it throws but little light of itself upon the question of discovery. It is admissible evidence on that question; and when the manner of its execution and registration and other facts and circumstances in the case would be sufficient to put a person or prudent mind upon inquiry, the law declares this to be notice because he should have made the inquiry, and will be held to have done so whether he did or not." (*McGehee v. Cox*, 23 Ky. Law Rep., 619.)

In the case before us the father and son lived together; there was no change in the possession of the property so far as appearances went; the son did not give it in for taxation in his own name, and there was nothing in the way in which the property was held and used to put a creditor on notice. Mrs. Curtis lived in an adjoining county, and had in fact no notice of the deed until about the time she filed her suit. Under all the circumstances we do not think the court erred in refusing to apply the bar of the statute. It is true Mrs. Curtis had a relative in the county who made the loan for her, but it does not appear from the evidence that he was thereafter her agent. He only acted for accommodation in making the loan, and even he, though living in the county and well acquainted with the parties, did

not learn of the deed until within five years before the bringing of the action. The evidence satisfies us that the deed must be treated as fraudulent as to the existing creditors of H. C. Chinn, although it might not have been fraudulent as to debts thereafter created. The fact that his wife had many years before let him have money, which he was to pay back to her, and for which afterwards he agreed to convey this land to the son, would not make the deed any less void as to his creditors. The deed recites on its face that it is made in consideration of love and affection and \$400 paid by the son. The court adjudged the son a lien for the \$400. He properly refused to allow him anything for his improvements, offsetting the use of the land against the improvements. The son stated, after the deed was made to him, that his father had given him the land. The stale transaction with the wife, had when the son was four years old, can not be upheld as a valid consideration for this deed, made after the debts sued for were created and after the husband was involved far beyond his ability to pay.

P. P. Cummins, the assignee, does not appeal from the judgment. H. C. Chinn is the only appellant. The words "&c.," after his name in the statement of parties are insufficient to make any one else a party to the appeal. (Board of Councilmen v. Farmers Bank, 22 Ky. Law Rep., 1738; Brodie v. Parsons, 23 Ky. Law Rep., 831.) H. C. Chinn can not complain of the judgment as he is not prejudiced by the money being adjudged to the appellee instead of to all his creditors ratably, for by this he is not prejudiced. The assignee has not appealed, and it is unnecessary, therefore, for us to pass on his rights, as he is not before the court. The same is true of the objection in regard to Mrs. Chinn's right of dower in the land. She was not a party to the action in the circuit court, and is not a party here. Her rights are in nowise affected.

On the whole case we see no substantial error in the proceeding. The judgment complained of is, therefore, affirmed.

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LOUISVILLE & NASHVILLE R. R. CO. v. LOGSDON.

(Filed February 10, 1908.)

Railroads—Negligence—Measure of damages—Appellee was engaged in assisting his father in loading lumber into a car which he had hired from appellant company, when the employee in switching cars jerked a car onto the side track against the car in which appellee was at work with such violence as to throw the lumber against appellee's leg and ankle, inflicting severe and permanent injuries, for which he recovered a judgment for damages, from which this appeal is prosecuted. It is urged that the court erred in giving instructions to the prejudice of appellant. Held—That the court should have told the jury that if they found for the plaintiff, the measure of damages was the reasonable expenses of his cure, including any expense that it was reasonably certain he would thereafter necessarily incur; the fair value of the time lost by him, or which it was reasonably certain he would thereafter lose, and a fair compensation for the physical and mental suffering endured by him, or which it was reasonably certain he would endure as well as for any permanent reduction of his power to earn money by reason of his injuries. The court correctly defined the word negligence as meaning the failure to use ordinary care. The court should have defined ordinary care as

being such care as a man of ordinary prudence might reasonably be expected to exercise under like circumstances. The court properly instructed the jury as to gross negligence.

B. D. Warfield, E. W. Hines and J. A. Mitchell for appellant.

W. S. Pryor and S. M. Payton for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Hobson.

Appellee Logsdon, who is twenty-two years of age, was helping his father load a car with lumber at Munfordville, Ky., in April, 1901, on a side track of appellant's road at that point. While they were in the car loading it a freight train pulled in on the main line, about opposite to them. The engine then went up to the switch with a flat car loaded with rock, and sent it down on the side track on which the car stood in which they were working. A brakeman was on the rock car and undertook to stop it before it reached the car in which they were working; but, either from the force with which it was sent in or its weight, or the fault of the brake or of the brakeman, the car was not stopped and collided with the other car with great force. The brakeman jumped off just before the collision; appellee's father also jumped off their car and called to appellee to jump, but he did not understand, and before he could get out the collision occurred, jamming the lumber against his ankle, breaking one of the bones and painfully injuring it. The freight car had been set there by the company for them to load, and the trainmen saw it there before they jerked the rock car in. By jerking a car in is meant giving it a jerk with the engine, and letting it run without the engine being attached to it. The jury found for appellee, and fixed his damages at \$8,000. Instruction 1, given by the court, is in these words: "If you shall believe from the evidence that the plaintiff came upon the premises of the defendant at the request of his father, and at his request engaged in loading a car with lumber that had been engaged by his father from the defendant for the shipment of his lumber over the road of the defendant, and that while plaintiff was so there and so engaged the defendant, its agents or employees in control and management of its engine and cars, did negligently push, shove or throw one of its said cars against the one which had been let to his father, and in which plaintiff was located in loading said car, if he was so located, and thereby catch and injure him in said lumber and car, you should find for the plaintiff the damages which he sustained thereby, taking into your consideration the time he has lost, or may hereafter lose, if any, the pain and suffering he has endured, or may hereafter endure, if any, the disability to labor, move about and enjoy life which he has suffered, or may hereafter suffer, if any, directly resulting to him from said injuries and the expense he has incurred, or may hereafter necessarily incur, if any, in the treatment of his said injuries, not to exceed in all the amount sued for herein, which is \$20,000."

This instruction did not correctly define the measure of damages. In *L. & N. R. R. Co. v. Case's Adm'r*, 72 Ky., 786, this court said: "The term compensation when applied to damages has a fixed legal signification much more restricted than its common or general acceptance. In actions for personal injuries where death does not ensue it is confined to the expense of

cure, the value of time lost, a fair compensation for the physical and mental suffering caused by the injury, and for any permanent reduction of the power to earn money."

This was followed in *L. & N. R. R. Co. v. Fox*, 74 Ky., 509; *Muldraugh's Hill, &c., Turnpike Co. v. Maupin*, 79 Ky., 101; *Kentucky Central R. R. Co. v. Ackly*, 87 Ky., 278; *Standard Oil Co. v. Tierney*, 92 Ky., 867, and many subsequent cases. The authorities elsewhere are uniform to the same effect. (2 *Shearman & Redfield on Negligence*, 758.) The case of *L. & N. R. R. Co. v. Mitchell*, 87 Ky., 327, does not conflict with this rule, as the question was not considered there by the court, or, so far as appears, made by counsel. The case went off on other grounds. The court here should have told the jury that if they found for the plaintiff, the measure of damages was the reasonable expenses of his cure, including any expense that it was reasonably certain he would thereafter necessarily incur; the fair value of the time lost by him, or which it was reasonably certain he would thereafter lose, and a fair compensation for the physical and mental suffering endured by him, or which it was reasonably certain he would endure, as well as for any permanent reduction of his power to earn money by reason of his injuries. The court defined the word "negligence" as meaning the failure to use ordinary care, and with this definition we see no objection to the use of the word "negligently" in this instruction. The question of contributory negligence was aptly submitted to the jury by another instruction.

The definition of ordinary care should have been such care as a man of ordinary prudence might reasonably be expected to exercise under like circumstances. The question of gross negligence was properly left to the jury under the evidence, in view of the violence of the collision and the fact that the car was jerked in by the crew with the knowledge that the other car in which the men were working was standing on the side track and so near the switch. Rule 117a and 117b should not have been read to the jury, as they do not illustrate anything in the case. Rule 203 was properly allowed to be read.

Judgment reversed and cause remanded for a new trial.

#### CITY OF LEXINGTON, &c. v. KENTUCKY CHAUTAUQUA ASSEMBLY.

(Filed February 10, 1903.)

**Municipal taxation—Purchase of park**—This appeal involves the question as to the authority of a city of the second class to issue bonds and levy taxes for the purchase of grounds for a public park. By section 3033, Kentucky Statutes, such cities are created bodies-politic and corporate, with the usual powers of buying and holding property for corporate purposes, and by subsection 16, section 3058, Kentucky Statutes, such cities are authorized to acquire and use property as it may deem proper for the public welfare. Held—That the purchase and dedication of a public park for the benefit and use of its citizens is properly within the scope of the powers of the council for the public welfare as it conduces to the preservation of public health, and the council may properly issue bonds to pay for same after the proper steps as to passage of the necessary ordinances and submission to the people has been had with a favorable result.

W. S. Bronston for appellants.

Morton, Darnall & Wilson and J. H. Beauchamp for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, the city of Lexington, has appealed in this case from a judgment of the Fayette Circuit Court overruling a general demurrer to the petition of appellee in a suit brought to require the defendant, H. T. Duncan, as mayor, to carry out a contract made with the city council of Lexington for the purchase of Woodland Park. The facts alleged in the petition, and conceded by the demurrer to be true, are that the Kentucky Chautauqua Assembly, a corporation, through its president, proposed in writing to H. T. Duncan, mayor of the city, on the — day of September, 1902, to sell to the city the grounds of the company, known as Woodland Park, for the purpose of a public park for the sum of \$38,000, which was to be paid within a reasonable time after the city of Lexington should be authorized to make the purchase under the provisions of the charter of the city, but not later than February 1, 1903; that this proposition was duly submitted by the mayor to the council of the city, who, on the 11th of September, by an ordinance authorized the mayor to submit to the voters of the city of Lexington, at an election to be held for that purpose, the question of accepting the proposition, and issuing bonds sufficient to pay therefor the sum of \$38,000; that pursuant to the ordinance an election was duly held, after giving the notice required by the statute, on the 4th of November, 1902, the same being the day on which the regular annual election was held; and that at this election 1,601 voters voted in favor of the purchase, and 688 against it. More than two-thirds of the entire number of votes so cast were in favor of the proposition, which vote was duly ascertained by the board of election commissioners of Fayette county, on or about the 10th day of November, 1902, and so certified to the general council of the city of Lexington, and to H. T. Duncan, mayor of the city; that the general council thereupon authorized the city solicitor of the city to institute legal proceedings to test the validity of the bonds authorized by the vote before placing them upon the market; and plaintiff, in conformity with their proposition to sell, executed and tendered to the city, through its mayor, a sufficient deed to the land and demanded the payment of the contract price. It is further alleged that the assessed value of the taxable property of the city, previous to incurring the indebtedness, was \$17,635,916.32; that the rate of taxation fixed by the city for the fiscal year in which the indebtedness was incurred was \$1.16%. All steps looking to the consummation of the agreement by the city to purchase the property seem to be in strict conformity with the constitutional and statutory provisions applying thereto. The whole question, at last, is one of power in the council to make the purchase, for if they had the power, it will not be contended that their discretion, judgment or prudence in making it, if honestly exercised, can be controlled or revised by the courts. Section 2088 of the Kentucky Statutes reads as follows: "The cities of Covington, Newport and Lexington are hereby declared to be cities of the second class, and the inhabitants thereof, and such other cities as may hereafter be declared cities of the second class, respec-

tively, are created and continued bodies-corporate and politic, within their respective limits, with perpetual power to govern themselves in all fiscal, prudential and municipal concerns, by such ordinances and resolutions as they may deem proper, not in conflict with this act or the Constitution of the State of Kentucky, or the Constitution of the United States; to acquire property for municipal purpose, by purchase or otherwise, within their corporate limits or elsewhere; to hold the same and all property and effects now belonging to said cities, held either in their own name or in the name of other, for the use of each of said cities, for the purpose and interest for which the same were granted or dedicated; to use, manage, improve, sell, convey, rent or lease the same; and to have like power over property hereafter acquired, and as such, by their respective names, shall be capable in law of contracting and being contracted with, of suing and being sued, of pleading and being pleaded, answering and being answered, in all courts and places, and in all matters whatsoever; and shall have and use, respectively, a corporate seal, and make, change, alter and renew the same at pleasure."

And by subsection 16 of section 8058 they are given power "to purchase or lease within the limits of the city, or elsewhere, any real or personal property for the use of the city, to control, manage, improve, sell or lease, or otherwise dispose of the same for such purpose and consideration as it may deem proper for the public welfare."

So far as we are able to find in the charter this authority to purchase land for the public welfare is subject to no restriction or limitation, except that a limitation is placed upon the amount of indebtedness which the city may incur, and the amount which shall burden the city in any one year. These limitations in nowise affect any question involved in this appeal. The authority to buy is granted in express terms; the obligation incurred is within the limitation, and the only question which remains is, was the authority exercised for a city purpose?

It seems to us that there can be no doubt that the acquirement of lands for the purpose of a public park is a city purpose. The health and comfort of the inhabitants of a city is necessarily one of the chief concerns of municipal government. No one at this late date would for a moment question the power of a city to furnish pure water, light, clean streets and proper sewerage, and the obligation to furnish pure air and a place for healthful exercise and recreation stands upon the same footing, and is a city purpose. In *re Mayor, &c.*, to acquire parks, 99 N. Y., 569, the words "city purpose" are defined and held to include the purchase of lands adjoining a city, but beyond its boundaries, for a park. The court said: "It is impossible to formulate a proper definition of what is meant by a 'city purpose.' Yet two characteristics it must have. The purpose must be primarily the benefit, use and convenience of the city, as distinguished from that of the public outside of it, although they may be incidentally benefited, and the work be of such a character as to show plainly the predominance of that purpose, and then the thing to be done must be within the original range of municipal action. Acquiring and maintaining parks is within that range."

In *Murphy v. Kelly*, 76 N. Y., 487, the court says: "The acquirement of land for purposes of a city park is a city purpose."

An analogous question was before the court in the *City of Owensboro v. Commonwealth*, 20 Ky. Law Rep., 1281. The question in that case was as to the power of the Commonwealth to compel the city to pay taxes on a public park belonging to the city. It was held exempt from taxation as public property used for public purposes. The court said: "The municipal authorities are charged with the duty to maintain the public health, and in the judgment of scientific men it is essential to the public health that cities have and maintain parks where the people can have pure, wholesome air. They are just as much public property, used for public purposes, as are the streets and trees planted therein, and it would be just as proper and reasonable to tax the one as the other. In our opinion the public park is public property used for a public purpose, and necessary to the proper government of a city."

Dense populations require these breathing places. We are, therefore, of the opinion that the acquirement of Woodland Park by the city authorities of Lexington is a city purpose, and within the provisions of the charter. It, therefore, follows that the demurrer was properly overruled, and the defendant, Duncan, as mayor of the city required to carry out the provisions of the ordinance, and sell in pursuance thereof the bonds provided for, and out of the proceeds of such sale to pay to the appellee, the Kentucky Chautauqua Assembly, the sum of \$38,000, as agreed to be paid for the park property. Judgment affirmed.

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PATTERSON v. T. J. MOSS TIE CO., &c.

(Filed February 10, 1903—Not to be reported.)

1. Title—Trespass—Instructions—This action of trespass involves the proper location of the boundary line between lands claimed by appellant and appellee, and the instructions of the jury should have been confined to that question. The court erred in giving an instruction as to adverse holding, as there was no proof authorizing such instruction.

2. Jurisdiction—Although the action of trespass was brought to recover \$100 for timber removed from the land, the defense was a denial of title of plaintiff to the land. This court properly has jurisdiction of the case.

Glenn & Ringo and Neal & Barnes for appellant.

M. L. Heaverin for appellees.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Paynter.

This is an action in trespass *quare clausum fregit* brought by the appellant against the appellees, T. J. Moss Tie Co. and Eliza J. Taylor. The appellee, Eliza J. Taylor sold certain timber to her co-appellee, and the trespass complained of was committed by it in removing the timber which it had purchased. The defendant pleaded *liberum tenementum*, and the jury returned a verdict for the defendants.

The sum sought to be recovered is \$100, and the first question to be disposed of is as to the jurisdiction of this court of the appeal. The plaintiff claimed that he was the owner and in possession of the land when the trespass was committed. The defendants denied this and pleaded that Mrs. Taylor was the owner and in possession of it, hence the title was directly



involved in the action, and the court has jurisdiction of it. (*Stillwell v. Duncan*, 19 Ky. Law Rep., 1701.)

The next question to be determined is as to the instructions of the court. In order to determine that it is well to state briefly some of the facts as they appear from this record. The land claimed by Mrs. Taylor is situated within the William May patent for 5,000 acres granted June 28, 1787, though she does not seem to have connected her title with that patent. The land claimed by appellant is situated in the John Adair patent granted July 8, 1796. It calls to run with the William May survey. The appellant claims his 100 acres under the Adair patent and connects his title therewith. The land claimed by Mrs. Taylor was conveyed to her by title bond more than fifty years ago, but was not deeded to her until some years afterwards. To run the courses and distances called for in her deed it does not embrace any of the land claimed by the appellant. To run appellant's boundary as called for by his deed it does not embrace any part of the land embraced in the deed of Mrs. Taylor. The controversy is really over the location of the boundary line between the two pieces of land. There is no conflict between the May and Adair patents. There is but one point upon which the testimony agrees and that is the location of the southwest corner of Mrs. Taylor's land, which is the northwest corner of the appellant's. This corner is the corner to four tracts of land, being what is commonly called in this record the Austin corner.

The court gave the following instructions, both of which are erroneous, although the appellee is not complaining:

"1st. The court instructs the jury that they should find for the plaintiff the damage he sustained by reason of the cutting and appropriation of the timber, described in his petition, by defendants, not exceeding the amount claimed by plaintiff, \$100.

"2d. Unless they believe from the evidence that the defendant, Elisa J. Taylor, was, and had for a period of fifteen years or more next before this suit was brought, been in the continuous, actual possession and occupancy of said land, openly and notoriously claiming it as her own to a well defined and marked boundary, including the land from which the said timber was cut, adversely to all others, in which case they shall find for the defendants."

No. 1 is prejudicial to the appellees and No. 2 to the appellant. No. 1 is prejudicial to the appellees in this: Although the appellant may have shown a legal title to the boundary embraced in his deed, still it was a question for the jury to determine whether or not that boundary embraced the land in controversy. There does not seem to be any question of adverse possession in this case.

Mrs. Taylor has never been in actual possession of the boundary claimed by her, nor has any tenant of hers been in actual possession of it, except that at one time there was a small field within the boundary, upon which there was a cabin, but the fences that enclosed it seem to have disappeared as well as the cabin, and there is no evidence to show for what length of time it was occupied. That clearing does not seem to have embraced any part of the land in controversy in this action. It is true that Mrs. Taylor, for a time, lived with a brother on an adjoining tract of land, but the fact that she lived upon an adjoining tract in the possession of another could not

give her actual possession of the land which she claims. Had she been in the actual possession of the boundary claimed by her she would not have been in actual possession of the strip in controversy; if the title to it was in appellant's vendors, because the constructive, if not the actual, possession would have been in them.

There was no testimony upon which to predicate the second instruction as to an adverse holding of the land by Mrs. Taylor. The occasional removal of timber from the disputed strip did not give her an adverse holding of the land. From the facts shown the only question to be submitted to the jury is as to whether the plaintiff's boundary embraced the land in dispute. Of course, upon the return of the case, if the appellees can present a different state of facts with reference to possession, the court then can determine whether the question of adverse holding should be submitted to the jury.

The judgment is reversed for proceedings consistent with this opinion.

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HALE v. COMMONWEALTH.

(Filed February 10, 1908—Not to be reported.)

Judgment—Revivor—Striking case from the docket—This appeal is prosecuted from a judgment of the circuit court assessing a fine of \$51 against the appellant. Appellant died pending the appeal, and a motion was made to abate the action. The court overruled this motion. More than a year after the death of defendant appellee moved to dismiss the appeal on account of no revivor having been had. Held—That the court properly overruled the motion. Had it prevailed it would have been an injustice to defendant as his estate would have been liable for the debt. The motion to dismiss for want of a revivor is equivalent to a motion to strike the action from the docket. Under sections 509 and 510, Civil Code of Practice, the action should be stricken from the docket for want of revivor, as it is too late to revive same unless by consent of the personal representative, and no consent has been given.

Sweeney, Ellis & Sweeney for appellant.

C. J. Pratt and Hays & Wells for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Paynter.

This appeal is prosecuted from a judgment of the circuit court assessing a fine of \$51 against the appellant. Pending the appeal appellant died, and the Commonwealth moved the court to abate the action for that reason, which motion was overruled.

Had the action been abated then the estate of decedent would have been liable for the judgment and costs, although the record had shown that the judgment should be reversed. This would have worked such an intolerable hardship that the court could not give its sanction to it. The death of the appellant was suggested April 8, 1901. No steps have been taken to revive the action in the name of the personal representative of the decedent. On January 5, 1908, more than one year thereafter, a motion was entered by the appellee to dismiss the action because it had not been revived. This motion

is equivalent to a motion to strike the action from the docket. The question is, should it prevail?

The provisions of the Civil Code apply to this case. Section 767 reads as follows: "The provisions of title 11 shall, so far as applicable, regulate cases in the Court of Appeals." Sections 509 and 510 are parts of title 11. They read as follows:

"An order to revive an action in the name of the representative or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made, except that if the defendant shall also have died, or his powers have ceased, in the meantime the order of revivor on both sides may be made in the period limited in the last section.

"If it appear to the court, by affidavit, that either party to an action has been dead, or, if he sue or be sued as a personal representative, that his powers have ceased, for a period so long that the action can not be revived in the name of his representative or successor without the consent of both parties, it shall order the action to be stricken from the docket."

More than one year had elapsed since the order of revivor might have been made, and under section 509 the right to have it revived is barred. The appellee not consenting to the revivor, the case must be stricken from the docket as provided by section 510.

The clerk will enter an order to that effect.

#### MURPHY, ASSESSOR v. CITY OF LOUISVILLE.

(Filed February 10, 1908.)

Municipal taxation—Construction of statutes—Franchises—Constitutional law—The question presented on this appeal is whether the revenue law of 1902 repeals the act of 1898, which expressly confers on assessors of cities of the first and second classes the authority to assess the franchises and intangible property of corporations; also the act authorizing assessors of cities of the third class to assess franchises of certain corporations for taxation. The title of the revenue law of 1902 is a long one, and recites the revenue act of 1892; also numerous acts amending same, but omits mentioning either the act of 1898, relative to assessment of franchises in cities of the second class, or the act relative to assessment of franchises in cities of the third class. Held—That it is a familiar rule of construction, both in England and America, that a statute can only be repealed by an express provision of a subsequent law or by necessary implication. There must be such a positive repugnancy between the provisions of the statutes that they can not stand together or be consistently reconciled. This rule applies when both statutes are of a general nature, but when one is local in its nature or application, or relates to particular places or persons, and the other is general, they will both be upheld and construed as forming one consistent whole. Under this rule of interpretation the court should hold the act of 1898 was not repealed, but the title to the act furnishes an additional reason for so holding, because it manifests an intention to only substitute the new for the previous acts to which reference is made in the title and kindred acts of a general nature. The general repealing clause of the act can only apply to any purely general law affected by the act, and not to laws of local applica-

tion. It is urged that article 3, section 8 of the act of 1902, used substantially the same language as was contained in the act of 1898, which authorized the board of valuation and assessment to assess franchises in question for taxation. The language so used was to embrace the cities other than those of the first, second and third classes. It was not necessary to attempt to except these cities from the operation of the act because that had been done by the previous acts. By the act of 1902 the legislature was dealing with the act of 1898 as it found it, with the cities of the first, second and third classes excluded from its provisions with reference to the assessment of certain franchises. It is, therefore, possible to uphold the act of 1898 and the act of 1902, as amended by the act of 1902, and to construe them as forming one consistent whole. The act of 1898 does not violate section 51 of the Constitution, as the title to the act concerns the assessment and valuation for taxation of corporate franchises and intangible property by cities of the first and second classes. There is but one subject to the title, and that is the assessment and valuation for taxation of corporate franchises and intangible property. The mere fact that it applies to cities of different classes can not make the act relate to more than one subject. The act of 1898 does not violate section 156 of the Constitution, requiring cities and towns to be classified and all laws applied to cities of a given class. The act of 1898 is not invalid as an attempt to revise or amend the general law in regard to revenue. Section 60 of the Constitution was not violated by the act of 1898. The act of 1898 did not indirectly, but directly, repeal part of the act of 1899. That section does not mean that a general law can not be passed in reference alone to cities of two classes. If a general law applies to cities of all classes, it necessarily must apply to cities of the same class.

Helm, Bruce & Helm and Humphrey, Burnett & Humphrey for appellant.

Henry L. Stone, John F. Lockett, J. G. Covington, G. W. Jolly, W. S. Bronston, W. H. Julian and F. J. Hanlon for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Paynter.

The question involved is, shall the city assessor of Louisville, a city of the first class, assess the franchises of certain public service corporations for taxation for city purposes, or the board of valuation and assessment?

The solution of this question depends upon whether the general revenue act of 1902, Session Acts 1902, pages 281 to 393, inclusive, repeals the act of March 19, 1898, Session Acts 1898, pages 96 to 102, inclusive. The latter is an act concerning the assessment and valuation for taxes of corporate franchises and intangible property by cities of the first and second classes. This act expressly confers upon the city assessor the authority to assess the franchises and intangible property of the corporations in question, but franchises of railroads are not included in this list. Previous to that time, under the general revenue law which went into effect November 11, 1892, such franchises were assessed by the board of valuation and assessment, composed of the auditor, treasurer and secretary of state.

It is admitted that the act of 1898, if constitutional, repeals so much of the act of 1893 as authorized the board of valuation and assessment to assess these franchises, and that it was in force when the act of 1902 was passed. The act of 1902 is a general revenue act, the title of which is extraordinary, in that it purports to be an amendment to the revenue law approved No-

venber 11, 1892, as amended by twelve acts specifically enumerated in the title. Each of these amendments were general laws, and amendatory of the act of 1892. The title concludes: "That such act of November 11, 1892, and as amended by the above stated subsequent acts and amendments thereto as now amended and re-enacted will read as follows." It would appear from the title of this act that the legislature intended that there should be no mistake as to the purpose intended to be accomplished by the new enactment, and that there could be no question but what it was intended to be a substitute for the acts to which reference is made in the title.

The act of March 19, 1898, applied only to cities of the first and second classes, and does not purport to be an amendment to the revenue act of 1892 or amendatory to any of the amendments thereto. If the legislature had intended that the act of 1902 should also be substituted in lieu of the act of 1898, it seems extremely strange that in its enumeration of the acts it would have failed to refer to it as one of the acts proposed to be changed.

In 1900 an act was passed authorizing the city assessors of cities of the third class to assess the franchises of certain corporations for taxation, and no reference is made to that act. Then there were two acts, which in a certain sense were general, but in application purely local, that were not mentioned or referred to in the act of 1902. These acts were only general in the sense that they referred to all cities of the classes mentioned therein, but they are local in the sense that they apply alone to certain cities.

In construing an act the important thing is the ascertainment of the intention of the legislature. To do this we must consider the title of the act, its context and the purpose of its enactment. It is well to bear in mind that the universal rule is that repeals by implication are not favored; and further, that when an act is local in its nature or application, or relates to particular places or persons, and the other a general one, they will both be upheld and considered as forming one consistent whole.

It is said in *Cope v. Cope*, 137 U. S., 682, that "nothing is better settled than that repeals, and the same may be said of annulments, by implication are not favored by the courts, and that no statute will be construed as repealing a prior one unless so clearly repugnant thereto as to admit of no other reasonable construction." The same rule was recognized in *McChord v. L. & N. R. R. Co.* 188 U. S., 488.

If under this rule it could not be held that the acts of 1898 was not repealed, it is certain that the rule for the interpretation of statutes with relation to the effect of a general upon a local law does control. The legislature evidently did not have its attention directed to the subject of the act of 1898, and did not intend to derogate from that act when it made no special mention of its intention to do so. This court has universally recognised this rule of interpretation. In *Commonwealth v. Cain*, 14 Bush, 588, the court said: "It is a familiar rule of construction, both in England and America, that a statute can only be repealed by an express provision of a subsequent law or by necessary implication. There must be such a positive repugnancy between the provisions of the statutes that they can not stand together or be consistently reconciled. This rule applies when both statutes are of a general nature, but when one is local in its nature or application, or

relates to particular places or persons, and the other is general, they will both be upheld and construed as forming one consistent whole."

Endlich on Interpretation of Statutes recognizes the same rule, as section 223 reads as follows: "It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute to say that a general act is to be construed as not repealing a particular one, that is, one directed towards a special object or a special class of objects. A general later (affirmative) law does not abrogate any earlier special one by mere implication. *Generalia specialibus non derogant*. The law does not allow the exposition to revoke or alter, by construction of general words, any particular statute, where the words (of the two acts, as compared with each other, are not so glaringly repugnant and irreconcilable as to indicate a legislative intent to repeal), but may have their proper operation without it. It is usually presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special act, or, what is the same thing, by a local custom. Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the legislature had been turned to the special act, and that the general one was intended to embrace the special cases within the previous one; or something in the nature of the general one making it unlikely that an exception was intended as regards the special act. The general statute is read as silently excluding from its operations the cases which have been provided for by the special one (for as was said of the relation of a general act to a local one applying to a single county of the State, 'it is against reason to suppose that the legislature in framing a general system for the State intended to repeal a special act which the local circumstances of one county had made necessary. The fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of this rule of construction).'"

Independent of the unusual title of the act, under this rule of interpretation, we should hold the act of 1898 was not repealed: but the title to the act furnishes an additional reason for so holding, because it manifests an intention to only substitute the new for the previous acts to which reference is made in the title and kindred acts of a general nature. The general repealing clause of the act can only apply to any purely general law affected by the act, not to laws of local application.

On behalf of the appellee much importance is attached to the fact that article 3, section 8 of the act of 1902, used substantially the same language as was contained in the act of 1892, which authorized the board of valuation and assessment to assess franchises in question for taxation, but this language is used because all the cities, other than the first, second and third classes, were affected by the act, and the franchises therein were to be assessed by the board of valuation and assessment. The language used in the section and article referred to was to embrace the cities other than those of the first, second and third classes. It was not necessary to attempt to

except these cities from the operation of the act, because that had been done by the previous acts. Besides, to have employed such language, making such exceptions, might have invited criticism to the effect that it was in conflict with section 60 of the Constitution, which provides that the "general assembly shall not indirectly enact any special or local act by the repeal of any part of a general act, or by exempting from the operation of the general act any city, town, district or county, but laws repealing local or special acts may be enacted." It must be understood that the court is not expressing an opinion on that question, as it is not here.

By the act of 1903 the legislature was dealing with the act of 1892 as it found it, with the cities of the first, second and third classes excluded from its provisions with reference to the assessment of certain franchises. It is, therefore, possible to uphold the act of 1898 and the act of 1892 as amended by the act of 1902, and to construe them as forming one consistent whole. It is insisted upon behalf of the appellee that the act of 1898 is violative of sections 51 and 156 of the Constitution. Section 51 of the Constitution reads as follows: "No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred shall be re enacted and published at length."

The title to the act of 1898 concerns the assessment and valuation for taxation of corporate franchises and intangible property by cities of the first and second classes. There is but one subject to the title, and that is the assessment and valuation for taxation of corporate franchises and intangible property. The mere fact that it applies to cities of different classes can not make the act relate to more than one subject.

Section 156 of the Constitution requires cities and towns to be classified, and the same law applies to all the cities of a given class. This does not mean that a general law could not be made applicable to all the cities and towns of the Commonwealth.

The proposition is urged that the act of 1898 is invalid because it is an attempt to revise or amend the general law in regard to revenue. This proposition is answered in *Purnell v. Mann*, 20 Ky. Law Rep., 1146. In that case the court said: "There is no direct reference made in the act in question to any particular section of the general election law amended or repealed by it, nor do we think section 51 expressly or impliedly requires it done. The act as passed and published is full and specific enough, as to all subjects embraced by it, to show for what part of the general election law it is substituted, and those parts are in both terms and by implication repealed, leaving the residue unaffected and in full force. Manifestly neither members of the general assembly nor the people could misunderstand or be deceived as to the purview, purport or effect of the act."

Section 60 of the Constitution was not violated by the act of 1898. The act of 1898 did not indirectly, but directly, repeal part of the act of 1892. That section does not mean that a general law can not be passed in reference alone to cities of two classes. If a general law applies to cities of all classes, it necessarily must apply alike to the cities of the same class. Such a law would not be violative of the provisions of the Constitution. As illustra-

tive of this, counsel for appellant suggest section 1486 of the Kentucky Statutes, which provides that "in all cities and towns of the first, second, third and fourth classes there shall be registration of all the qualified voters of the respective cities and towns, which registration shall be held and conducted as herein provided." This section is certainly constitutional. We are of the opinion that the act of 1898 is constitutional, and that the act of 1902 did not repeal it.

Judgment is reversed for proceedings consistent with this opinion.

Whole court sitting.

Judges Hobson and Nunn dissenting.

Judge Hobson delivered the following dissenting opinion:

The act of November 11, 1892, provided a system for the taxation of the franchises of public service corporations by the State and the several counties, cities, towns and taxing districts. It vested the power of assessing these franchises in the board of valuation and assessment. Their assessment was the basis of taxation by the State and by all the counties, cities, towns and taxing districts where the franchises were exercised. (Session Acts, 1891-2 3, 981-1002.) On March 19, 1898, an act, entitled "An act concerning the assessment and valuation for taxation of corporate franchises and intangible property by cities of the first and second class," was passed, providing for the assessment of these franchises by the city assessor for the purposes of city taxation. (Session Acts, 1898, page 96-102.) On March 29, 1902, the legislature enacted a general revenue act. (Session Acts, 1902, pages 231-392.) The question in this case is whether the last act repealed the act of March 19, 1898, by which the city assessor was authorized to assess for taxation in cities of the first and second class the franchises of these corporations.

Article 3, subdivision 1 of the act, provides for the taxation of the franchises of these corporations. (Pages 305-318.) In section 1 the corporations to be assessed are specified; the auditor, treasurer and secretary of state are constituted a board of valuation and assessment for fixing the value of the franchises, and where more than one jurisdiction is entitled to a share of the taxes the board is authorized to determine how the tax shall be apportioned. By section 2 reports are to be made to the auditor of a number of facts necessary to an intelligent assessment of the franchises. By sections 3, 4 and 5 rules as to the apportionment of taxes are given "in each county, incorporated city, town or taxing district." And in section 5 these words are used: "Such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into which such lines pass or are operated in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in this State."

Section 6 provides for a like system of taxation of any association not incorporated engaged in the business mentioned in the first article. Section 7 provides for a hearing before the board by any of the companies as to the valuation. Section 8 then follows in these words: "The auditor shall, at the expiration of thirty days after the final determination of such values, certify to the county clerk of the counties, when any portion of the corporate franchise of any such corporation, company or association shall be liable to



local taxation as herein provided, the amount thereof liable for county, city, town or district tax; and such certificate shall be by each county clerk filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection, and all county, city, municipal and other taxes shall be due and payable thirty days after the notice of the amount of such tax is given by the officer whose duty it is to collect the same."

Sections 9, 10, 11, 12, 13 and 14 make provisions in regard to the reports required of these corporations designed to secure the making of the reports. Section 15, after setting out that "all county, municipal, school and other taxes shall be due and payable thirty days after notice of the amount of the tax is given, adds: "Every such corporation, company or association failing to pay its taxes, receiving thirty days' notice, shall be deemed delinquent, and a penalty of 10 per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of 10 per cent. per annum; any such corporation or association failing to pay its taxes, penalty and interest after becoming delinquent shall be deemed guilty of a misdemeanor, and on conviction shall be fined \$50 for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction." (Page 311.)

The last section of that act is in these words: "All acts and parts of acts in conflict with this act are to the extent of such conflict repealed."

It will be observed that the act creates a board to make the assessment of the franchises of these companies, and authorizes that board to apportion the taxes between the several counties, cities, towns and taxing districts entitled thereto, expressly providing that all county, city, municipal, school and other taxes shall be due and payable thirty days after the certificate of this board is filed in the clerk's office in the county, and notice of the amount of the tax is given by the officer whose duty it is to collect it. It will also be observed that the act provides a 10 per cent. penalty, as well as the payment of interest at 10 per cent., upon all county, municipal, school and other taxes which are not paid when due as above provided. And then, finally, it is provided that all acts or parts of acts in conflict therewith are to the extent of such conflict repealed.

The act of 1898 authorizing the assessment of the franchise of these corporations in cities of the first and second class by the city assessor for municipal taxation is clearly inconsistent with these provisions, for they require the assessment to be made by the board created thereby, not only for State purposes, but for "taxation in each county, incorporated city, town or district through or into which such lines pass or are operated in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in this State." They necessarily regulate the entire subject of the assessment of the franchises of these corporations for State and municipal purposes, for nothing is excepted out of their operation, and, on the contrary, all acts or parts of acts in conflict with them are expressly repealed. Can it be believed that section 15, regulating the penalty and the interest to be paid on these taxes, if delinquent, was not intended by the legislature to apply to all cities of the Commonwealth?

And if section 15 applies to cities of the first and second classes, why does not section 1 of section 8?

That the legislature intended the act as a general revenue law is apparent from other provisions in it. The next subdivision of article 8 provides for the assessment of the stock of national banks, and manifestly applies to the "State, county, city, town and district." The next subdivision regulates building and loan associations; the next turnpikes. Article 4 regulates railroads, and is applicable by its express terms not only to State taxes, but to "all county, city, municipal, school and other taxes." Article 5 regulates the distillery bonded warehouses, and by its terms covers the taxes due the county, city, town or taxing district as well as the State. When it is conceded that as to railroads, distilleries and the like the act applies to all cities, how can it be maintained that it does not as to franchises of the public service corporations, where precisely the same words are used, and by the express terms of the act all laws in conflict with it are to the extent of such conflict repealed?

"It is not in accordance with settled rules of construction to ascribe to the law-making power an intention to establish conflicting and hostile systems upon the same subject, or to leave in force provisions of law, by which the later will of the legislature may be thwarted or overthrown. Such a result would render legislation a useless and idle ceremony, and subject the law to the reproach of uncertainty and unintelligibility." (*Lyddy v. Long Island City*, 104 N. Y., 218.)

In *Payne v. Connor*, 6 Ky., 108, this court had before it the effect of a repealing clause, which was in these words: "All acts or parts of acts coming within the purview hereof shall be, and the same are hereby, repealed." Speaking of the meaning of the word "purview," the court said: "The meaning usually attached to this term by writers on law seems to be the enacting part of a statute in contradistinction to the preamble, and we think the provision of the act repealing all acts or parts of acts coming within its purview should be understood as repealing all acts in relation to all cases which are provided for by the repealing act."

In the case before us the words of the repealing clause are broader. All acts in conflict with the last act are to the extent of such conflict repealed; and the case we have before us is in express terms provided for by the repealing act. The statute before us being a general revenue law, must be held to repeal all other statutes inconsistent with it then in force. In the *Encyclopædia of Law*, volume 28, page 477, the rule is thus stated: "Where an act is passed covering the whole of a particular subject or field of legislation it is customary to insert a general clause repealing all acts or parts of acts inconsistent therewith. Such a clause is effective in repealing inconsistent enactments."

In *Patterson v. Caldwell*, 1 Met., 489, this rule was enforced by this court, where it was held that section 875 of the Code of Practice, repealing all laws inconsistent with its provisions or applicable in any case provided for by the Code, abrogated certain provisions of the Revised Statutes as to taking out an attachment. This was followed in *Grigsby v. Barr*, 77 Ky., 330.

The authorities elsewhere are uniform to the same effect. (*U. S. v. Cheeseman*, 8 Sawy., 424; *McRoberts v. Washburn*, 10 Minn., 23; *Ogden v. Wither-*

spoon, 2 Hayw., N. C., 227; Prince George County v. Laurel, 21 Md., 464.)

Two grounds are relied on to distinguish this case from those cited:

1st. The title of the act is very unusual. It is entitled "An act to amend the act of November 11, 1892," as amended by twelve subsequent acts, each entitled "An act to amend the act referred to," and after setting out all these in the title, it concludes with these words: "So that said act of November 11, 1892, and as amended by the above stated subsequent acts and amendments thereto, as now amended and re-enacted, will read as follows."

The title of an act may properly be looked to in construing the language of the act. But where there is no ambiguity in the terms used, the title can not be allowed to override the express provisions of the act itself. Everything in the act in question is germane to the subject expressed in the title. The fact that the act of 1898 was not referred to in the title is wholly immaterial. The only unusual thing is that so many amendments of the act of 1892 were set out in the title. If all the acts intended to be affected had been set out in the title, then it would have been entirely superfluous to have added the section repealing all laws in conflict with the act, for if there was nothing for this section to operate on, why was it inserted? There were many learned lawyers in the general assembly who were acquainted with the previous legislation and if all acts, so far as they were in conflict with this act, were not intended to be repealed by it, are we to assume that the legislature meant nothing by the repealing clause? All acts similar to the act of 1898, which had been passed since November 11, 1892, were not set out in the title. Act, entitled "An act to regulate the sale and assessment of lands for taxation owned by nonresidents of this Commonwealth" (Acts 1894, page 199); also an act extending the same (Acts 1894, page 212); also an act, entitled "An act regulating the mode of assessing building associations." (Acts 1894, page 342.)

Are all these acts, so far as they are inconsistent with the act of 1902, still in force? If not, how is the act of 1898 to be distinguished from the other inconsistent acts which are repealed to the extent they are inconsistent?

Besides all this, the legislative purpose seems plain enough. There had been a number of amendments to the act of 1892, so that the real law on the subject had to be spelled out from a number of inconsistent enactments. The legislature desired to make further changes and to show that the act it now passed superseded not only the original act, but all the amendments to it, placed in the title of the act all the acts intended to be blotted out, so that it would be understood that the law of the State was not to be spelled out in part from these acts and in part from the act which they passed. The act of 1898 was not one of those thus consolidated in the new act, and, therefore, was not mentioned in the title. But it was one of the acts coming within the purview of the repealing clause, because inconsistent with the provisions of the act.

2d. The rule is invoked that a general law does not repeal a special law on the same subject, and that both will be read together where this is practicable.

The rule is admitted, but it is not perceived that it has any application to the case before us. It rests upon the presumption that the legisla-

ture in making a law for the entire State did not have in mind the question of changing a special act applicable to a single town or county. But the act in question is not of this character. It applies to all cities of the State, of the first and second class. All cities having a population of twenty thousand or more must belong to one of these classes. So that the act applied to all cities in the State having a population of as much as twenty thousand. (Constitution, section 156.) By amendment it was made applicable to cities of third class having a population of eight thousand. The court knows judicially that this embraces all the more important cities in the State, and that in these cities the public service corporations are mainly located. Banks, trust companies, guaranty companies, gas companies, water companies, street railway companies, electric light companies, and the like, in the main have their headquarters at the centers of capital, and to exempt all of them in cities of the first, second and third classes from the operation of the bill would have been to exempt most of this capital from municipal taxation in the manner provided by the statute. It is incredible that the legislature could have overlooked such an exception, if it had intended to make it, for the reason that as to municipal taxes the exception would have been larger than what was left in the act. To apply the rule referred to in such a case would be to ignore the reason for the rule and to refuse proper effect to the express terms of the statute, repealing all other acts inconsistent therewith.

The general rule is that a statute revising the entire subject-matter of a previous act repeals it by implication. (*Bartlett v. King*, 7 Am. D., 99; *State v. Wilson*, 82 Am. D., 163; *Rogers v. Watrous*, 58 Am. D., 100; 7 *Lawson on Rights and Remedies*, section 3779.) The argument for appellant which is adopted by the court treats the case as dependent on the question whether that rule should be applied here. But that is not the case we have. Here the statute does not leave to implication what was meant, but in express terms declares that all inconsistent acts are, so far as they conflict with this act, repealed. In *Endlich on Interpretation of Statutes*, after stating the rule as to implied repeals, in section 206 it is said: "Yet where a statute contemplates in express terms that its enactments will repeal earlier acts by their inconsistency with them, the chief argument or objection against repeal by implication is removed, and the earlier acts may be more readily treated as repealed. \* \* \* Thus a declaration in a general law that all acts or parts of acts, whether local or special, or otherwise inconsistent with its provisions, are to be deemed repealed, will repeal inconsistent provisions, even in special acts."

If there had been no repealing clause in the act in question it would have been a matter of construction for the court on the whole act, how far the provisions of the statute were intended to supersede other acts not named in the title covering the same subject-matter. But when the legislature went further, and repealed all inconsistent acts, there is no room for the doctrine of implied repeal, and the only question is whether the former act is consistent with the latter. The acts set out in the title are by its express terms reduced to one, and embraced in the act in question. The repealing clause can not have reference to these acts, for by the terms of the act the new act is substituted for them; and if the repealing clause does not apply

to other acts than those named in the title it was merely surplusage. No rule is better settled than that the court must presume that the legislature meant something by a section of the bill, else it would not have been added to it. If in the title the bill had been designated merely as an act to amend the act of November 11, 1892, would there be any doubt that the section repealing all other acts inconsistent with it, would have embraced the act of 1898? But if the title had so read other amendments to the act of 1892, so far as they were not inconsistent with this act, would have been left in force. To avoid this and incorporate in one act these various amendments, the title of these acts was inserted in the caption, and to reach other inconsistent acts, so far as they were in conflict with the act in question, the last section was added, repealing them so far as they conflicted with this act.

If the repealing clause of this act had provided that all acts, special or general, in conflict therewith were to the extent of said conflict repealed, then under all the authorities this would have included the act of 1898. But the legislature of this State is by the Constitution forbidden to enact special or local laws. The subjects embraced in the act of 1902 must, under the Constitution, be regulated by general laws. The authorities from other States where general legislation is prohibited, to the effect that a general repealing clause does not include special acts, has no place in this State. It would never occur to any one to insert now in a bill, covering a subject which must be regulated by general laws, words repealing special acts inconsistent therewith, and it can not be expected the legislature should do a vain thing. To say that the act of 1902 could have contemplated that it was only to apply to the cities and towns of the State other than those of the first, second and third classes as to municipal taxation of franchises is to presume that the legislature, when it used general words including all the cities intended to exempt from this mode of municipal taxation at least three-fourths of this class of capital in the State. If the statement of the proposition is not a sufficient answer to it, then it is submitted that the presumption no longer exists that the legislature acts intelligently, and uses words in its enactments advisedly.

I, therefore, dissent from the opinion of the court.

Judge Nunn concurs in this dissent

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#### THACKER v. COMMONWEALTH.

(Filed February 11, 1903—Not to be reported.)

Criminal law—Instructions—Self-defense and defense of another—Evidence—Appellant was convicted and sentenced to confinement in the penitentiary for life under an indictment for the murder of G. On the trial he claimed that the killing was done in self-defense and in defense of his son, R. Errors in the instructions and admission of incompetent evidence are urged as grounds for reversal. Held—That the court erred to the prejudice of appellant in giving instructions to the jury on the right to kill in self-defense; also on the right to kill in defense of another, as fully set out in the opinion. The court erred in admitting testimony as to the particulars of a difficulty which occurred between appellant and W. a short time before the arrival of deceased on the grounds, as there was no connection between

these difficulties. Evidence as to previous acts and conversation of appellant at another place was improperly admitted without admonition to the jury that said evidence was competent only to show the intent or state of mind of appellant at the time he fired the shot that killed deceased.

L. F. Johnson and W. G. Dearing for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Nunn.

The appellant, W. J. Thacker, was tried at the January, 1902, term of the Fleming Circuit Court on a charge of murder and convicted and sentenced to the penitentiary for life.

Near Foxport, in Fleming county, on July 30, 1900, the appellant shot and killed John Gordon. At the trial, as shown by the record, the appellee claimed it was a case of willful murder, and appellant that it was a case of self-defense and defense of his son, Robert Thacker. There was evidence introduced to sustain both these contentions. Appellant claims that the lower court erred to his prejudice in its instructions to the jury and in admitting incompetent evidence.

We have carefully examined all the instructions given, and find that the court gave the law of the case, except instructions 2, 4 and 6. No. 2 was prejudicial in this, "and not in his necessary self-defense, or reasonably apparent necessary self-defense." The court should, instead, have used these words, "and not in his or his son, Robert's, necessary, or apparently necessary, self-defense, and under provocation ordinarily calculated to excite passion beyond control."

No. 4 was erroneous in this: "Defendant believed and had reasonable grounds to believe that he was in danger." The court should have used these words: "Defendant had reasonable grounds to believe, either real or apparent, and did in good faith believe, that he was then in imminent danger of losing his life or suffering great bodily harm at the hands of said Gordon, and there were no other apparently safe means of escape from the impending, or to him apparent impending, danger, then the defendant had the right, etc."

No. 6 was very prejudicial to the substantial rights of the accused. Under this instruction, before he could act in the defense of his son, Robert, or before the jury could acquit him on that ground, the jury was required to believe beyond a reasonable doubt that his son was not in fault or the aggressor, and that defendant must have believed beyond a reasonable doubt that it was necessary to kill Gordon to save his son, and that Gordon was not acting in his self-defense when he was about to kill his son. In other words, the instruction required the jury to convict defendant unless the jury believed beyond a reasonable doubt that he killed Gordon in defense of his son.

Instead of the 6th instruction the court should, in substance, have said this to the jury: "If the jury believe from the evidence that when the defendant shot and killed John Gordon, if he did so, he had reasonable grounds to believe, either real or apparent, and did in good faith believe, that his son, Robert Thacker, was then in imminent danger of losing his

life or suffering great bodily harm at the hands of the deceased, John Gordon, and there were no other apparently safe means of escape by Robert Thacker from the impending danger, then the defendant had the right, and it was lawful for him, in the exercise of a reasonable judgment, to use such force as was reasonably necessary, or apparently necessary, to save and protect his son," Robert Thacker's, life or his person from great bodily harm, even to the taking of the life of said Gordon. On such grounds, and under such circumstances, the defendant is excusable under the law of defense of another. The danger to one's life or great bodily harm to his person which authorized defendant to act in his defense, or in the defense of his son as herein indicated, may be real danger or apparent danger."

And the court should have further instructed the jury in substance: "That if they believed from the evidence beyond a reasonable doubt that defendant's son, Robert Thacker, made a demonstration to assault John Gordon with a knife, for the purpose of killing the said Gordon or inflicting upon him great bodily harm, then the jury can not acquit the defendant upon the ground that he acted in the defense of his son Robert. But if the jury believe from the evidence that Robert Thacker approached Gordon, if he did so, not for the purpose of assaulting him and killing him, or inflicting upon him great bodily harm, and that Gordon first made a demonstration to strike Robert Thacker with a deadly weapon, if he did so, and then the defendant believed, and had reasonable grounds to believe, that Gordon was then and there about to kill his son Robert or inflict great bodily harm upon him, then the defendant had the right to use such means in defense of his son as in the exercise of a reasonable judgment were apparently necessary for his safety, as set out in the instruction, on defense of his son."

It was also error for the court to allow the particulars of the difficulty between defendant and Wycoff, that occurred before Gordon arrived at the place of the killing, to be detailed to the jury, as there was no connection between these difficulties. This had a tendency to draw off the minds of the jury from the real issue, the killing of Gordon, and possibly may have caused the jury to fix the punishment of defendant greater, if they believed from the detailed statement of the facts of that difficulty that Wycoff was innocent of any wrong, and that defendant had imposed on him. It was proper that evidence be introduced that the trouble between them took place and in view of Gordon and Earls, who were about three hundred yards away, as a reason why they went to the scene of the difficulty.

The court should have admonished the jury that they should only consider the evidence as to the conversation and acts of the defendant at Foxport some time prior to the killing as tending, if it tended in any way, to show the intent or state of mind of the defendant at the time he fired the shot that killed Gordon.

For these reasons the case is reversed and the cause remanded for further proceedings consistent with this opinion.

VAUGHT, &amp;c. v. MURRAY, &amp;c.

(Filed February 11, 1903—Not to be reported.)

Pleading—Fraud and surprise—P. sold to S. a tract of sixty-four acres of land, for which he paid the purchase money except \$852.65, for which he executed his note. Five years later S. sold said land, also another tract containing 142 acres, for \$4,993.80 to M., who paid \$3,000 and executed his two notes for \$996.90 each, which were transferred, one to V. and the other to C. A., the administrator of P., filed a suit to enforce his lien for the payment of the purchase-money note on the sixty-four-acre tract of land. S. filed his answer, setting up an indebtedness to him from P. of \$3,500, and that on a settlement made between him and the administrator it was agreed that the note for \$852.65 should be cancelled, and that the administrator should pay him \$400, and he prayed judgment for this amount. The administrator, after considerable delay, offered to file a reply to this answer, but the court refused to permit him to do so and rendered judgment in favor of S. for \$400. On appeal that judgment was reversed. After this suit was instituted V. and C. instituted their actions to enforce the collection of the two purchase-money notes held by them. A judgment was finally rendered in favor of V. and C., and the land was ordered sold to pay same. The land was sold to pay said debts, leaving M. owning forty-one acres, and it was ordered that V. and C. should receive said money upon executing refunding bonds to pay the amount of any judgment in favor of P.'s administrator against S., then pending in the Court of Appeals. After the return of the former case from the Court of Appeals S. filed an amended answer, and the administrator filed a reply. S. offered to file a rejoinder, but objection was made thereto. This case had, by order of court, been consolidated with the latter case, and the next step taken was by P.'s administrator, who took two depositions on his behalf five days before the court convened, at which term the court rendered a judgment adjudging to the administrator the amount of the note, and directed V. and C. to refund \$674.19 each to pay said judgment as they had agreed to do. V. and C. have prosecuted an appeal, contending that the court erred in refusing to permit the rejoinder to be filed; also that as they were parties to the consolidated actions they were entitled to notice of the taking of depositions, and that by a fraudulent agreement between the administrator and S., S. would not resist said claim and permit judgment to go against him, and that this agreement was a fraud upon their rights; that S. had a valid defense and that his abandonment of said defense was a surprise to them, and that they should have been granted a continuance in order to enable them to make defense. Held—That the court erred in refusing to grant V. and C. a continuance on the ground of surprise, as they were parties to the action and interested in the result and entitled to make defense and to have notice of the taking of depositions. If the claim of the administrator was correct the court did not err in requiring V. and C. to refund an amount sufficient to pay same. While this note was a lien on the sixty-four acres of land, V. and C. had agreed to protect said land from the payment of the note, and they should not complain.

J. A. Sullivan for appellants.

W. J. Williams for appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1889 Alva Pullins sold and conveyed to one John W. Smith a



tract of land, containing sixty-four acres, in Madison county, Kentucky, for the price of \$1,945. Smith at the time paid all the purchase price, except \$852.65, for which he executed his note to Pullins.

In the year 1894 said J. W. Smith sold this tract of land, together with another survey adjoining it, both pieces containing 142 acres, to the defendant, James P. Murray, for the price of \$4,998.60, and Murray paid at the time \$3,000, and executed to Smith his two notes, in equal amounts, \$999.90 each, for the balance, due in one and two years. J. W. Smith sold and transferred one of said notes to one Price, and by him it was assigned to appellant Vaught; and the other one was assigned by Smith to the appellant, Citizens National Bank of Lancaster, Ky. But before Price and the bank became the owners of these notes, or at least before James P. Murray had any notice thereof, he (Murray) made another payment to Smith of \$410.

In the early part of the year 1896 Jack Adams, as the administrator of Alva Pullins, filed suit on the said \$852.65 note against J. W. Smith, and sought a personal judgment and the enforcement of a vendor's lien on the sixty-four acre tract of land. Smith filed an answer, claiming that the estate of Pullins was indebted to him in the sum of \$3,500 for services rendered Alva Pullins as his agent in transacting his business for him; and further, that after the death of Pullins he had a settlement with his administrator, Jack Adams, and it was agreed that the said \$852.65 note should be cancelled, and the administrator was to pay him \$400, and prayed judgment therefor. The administrator delayed filing a reply to said answer, and when he offered to file same the court refused to allow him to file it, and rendered judgment in favor of Smith, the defendant, for \$400, and cancelled said note, from which judgment the administrator appealed to this court, and the same was reversed. (20 Ky. Law Rep., 1898.)

In the latter part of 1896 the appellants, Vaught and the bank, commenced proceedings against James P. Murray on the two notes referred to, seeking a personal judgment and the enforcement of their liens on the 142-acre tract of land. Murray answered, setting up the payment of the said \$410, and also setting up the prior lien of \$852.65 claimed by Pullins' administrator, and that the case was pending in the Court of Appeals and undetermined, and that J. W. Smith, his vendor, was insolvent. The court rendered a judgment directing a sale of Murray's land to pay said two debts, interest and costs, and the commissioner made a report that he had sold 101 acres of said land to defendant, James P. Murray, to pay said amount, about \$2,600, leaving forty-one acres of the whole tract unsold, the forty-one acres being a part of the tract sold to Smith by said Alva Pullins.

On the 14th day of December, 1900, the appellants, Vaught and the bank, filed an agreed judgment, in which it is stated that the master commissioner will credit each of Murray's sale bonds with \$205 and collect the balance of the bonds from Murray, with interest, "and pay over to C. H. Vaught and Citizens National Bank of Lancaster the amount of their judgments, and upon their executing to him a bond to refund or repay to the commissioner, under the orders of this court, the amount respectively paid to them, or so much thereof as may be necessary to satisfy a judgment in favor of Alva Pullins' Adm'r v. J. W. Smith as a lien on the land in controversy, or any part thereof, in the event such judgment is rendered."

Under this agreed order the money was paid by Murray and the refunding bond executed.

On January 30, 1900, the mandate of this court in the case of Alva Pullins v. J. W. Smith was filed in the lower court, and on the 5th day of March thereafter Smith filed an amended answer, and on the 6th of April Alva Pullins' administrator filed reply to said answer and amended answer. On the 12th day of December, 1900, defendant Smith offered to file a rejoinder, to which objection was made, and the court at that term did not pass on said objection. This case had, by order of court, been consolidated with the Vaught and bank case against Murray, from 1897 to the judgment appealed from. The next step taken in the case was by plaintiff, Alva Pullins' administrator, who took two depositions in his behalf on the 30th of March, 1901, in Garrard county, about five days before the court convened, at which term the judgment complained of was rendered.

The appellants complain and ask a reversal of this judgment because the court refused to allow the rejoinder of defendant Smith to be filed, and refused to allow them to file pleadings controverting the plaintiff's claim, and also they were parties to the consolidated actions and were interested in the result of the claim of Pullins, and they were not served with any notice of the time and place of the taking of said depositions, and asked that they be suppressed. The court overruled their objections and permitted them to be read. They filed affidavits, setting forth the above statements, and also stated that they had just been informed for the first time, and charged it as true, "that Alva Pullins' administrator and the defendant, John W. Smith, had recently entered into a fraudulent agreement, by which the said Smith was not to resist said claim and was to permit judgment to go against him at that term of the court, and that said agreement was a fraud upon their rights; that said Smith had a good defense to said claim; that he did not owe any part of it, and that his abandonment of his defense was a great surprise to them and they asked a continuance. The court refused same and rendered judgment for the full amount of said claim, interest and costs, and directed Vaught and the bank to refund \$674.19 each to pay said judgment, as they had agreed to do by their said refunding bonds.

Appellants contend that they ought, under the circumstances of the case, to have had notice of the taking of the said depositions. We think that they were correct, for after the execution of the said refunding bonds they were real parties in interest on the question as to whether Pullins' claim was a just one. The actions were consolidated and it appeared that J. W. Smith was insolvent, and the court, at appellants' instance, should have granted them a continuance on their affidavits charging collusion between Pullins' administrator and J. W. Smith, and their recent knowledge thereof and great surprise in Smith abandoning his defense to said claim. They also contend that the court erred in directing them to refund, and say that the court should have directed a sale of the forty-one acres of land to pay this debt, and then directed them to refund the balance, if any of the debt was left unpaid. The appellants are in error on this proposition. They overlook the fact that James P. Murray had paid every dollar that he contracted to pay for the whole 142 acres of land, and more in the way of costs, and that Murray would have retained in his hands enough of the purchase price to

have paid the Pullins' claim but for the fact that the appellants induced him to pay to them by the execution of the refunding bond, and by said agreed order they promised to refund the money when ordered by the court.

It is true that Pullins' claim, if just, is a lien, and a prior lien, on the sixty-four acre tract of land, but as appellants agreed with James P. Murray to protect him against it, the lower court did right in ordering them to refund instead of incurring the expense of a sale of the land and then requiring James P. Murray to proceed against appellants to reimburse himself.

For these reasons the judgment of the lower court is reversed and the cause remanded to the lower court for proceedings consistent with this opinion.

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LITHGOW MANUFACTURING CO. v. SAMUEL.

(Filed February 11, 1903—Not to be reported.)

**Contracts—Ratification—Master and servant—**This appeal involves the question of liability of appellant for the services of a surgeon who attended an employee who was severely injured while in the discharge of his duties. **Held—**That while there is no legal obligation resting on a master to pay for medical attention to his servant who may be injured while in the discharge of his duties, yet if he authorizes the employment of a surgeon, or ratifies such employment after the services are rendered, he will be liable for same. In this case both the question of employment and ratification were submitted to the jury under proper instructions, and the evidence being conflicting, their finding will not be disturbed. Where a party offers no instruction on a given point, his objection to an instruction given on that point will not be considered on appeal. Objections to instructions will not be considered on appeal unless same were made grounds for a new trial.

W. W. & J. R. Watts for appellant.

Simrall & Doolan for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge O'Rear.

This suit was brought by appellee, Dr. F. W. Samuel, a surgeon, against the appellant corporation to recover for his services rendered to one of appellant's employees, who had been seriously injured in an accident in their foundry.

The issue was made as to whether appellee had been employed by any one authorized to represent appellant in that matter. The question was submitted to the jury. A number of witnesses were heard. Whilst the evidence is not as clear and conclusive as is desirable, yet it presents about such a state of case as might not unreasonably be expected under the circumstances attending a sudden and horrible accident, endangering probably the life of one to whom the corporation owed certain peculiar duties as master. At such a time it is not expected that parties should stop to negotiate a formal contract. There is evidence to the effect that appellant's superintendent and general manager authorized the employment of appellee, and that subsequently, with full knowledge of the fact that he had rendered the services to the injured man, and was continuing to do so, and was expected to continue, he ratified that employment.

It is true that is now denied by appellant's superintendent. It is one of the cases that is peculiarly within the province of the jury to decide. We adhere to the doctrine stated in *Godshaw v. Struck*, 22 Ky. Law Rep., 820, that an unauthorized employment of a physician or surgeon to wait upon an injured servant can not bind the master for payment of the surgeon's services, although the master may have been aware that the surgeon was rendering the services. In such case ordinarily the master is not bound to employ a surgeon to wait upon one in his employment who may be injured while engaged in his work. However, if the cause of the injury is such that the master would be liable to the servant for damages, including medical bills, because of the master's negligence in any particular, and where the master recognizes this liability, and does employ medical attention, or ratifies the employment made in his name, with full knowledge of the fact that it has been so made, we perceive no sound reason why he should not pay for them.

The question of ratification was, we think, fairly presented by the pleadings, and the instructions to the jury submitted simply the two propositions for determination: First, whether the employment was authorized by appellant; and, second, if not authorized at the time, was it subsequently ratified? The complaint that the court did not define to the jury by a further instruction the legal meaning of "ratification" can not be available to appellant on this appeal, because it offered no instruction on that point nor did its grounds for new trial make the giving of instructions by the court one of the reasons on which a retrial was asked. (*McLain v. Dibble*, 18 Bush, 298; *Alexander v. Humber*, 66 Ky., 569; *Bailey v. L. & N. R. R. Co.*, 19 Ky. Law Rep., 1617.)

The judgment in favor of appellee for the value of his services as fixed by the jury must be affirmed.

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SIMS v. COMMONWEALTH.

(Filed February 11, 1903.)

Insurance agents—Foreign insurance companies—Criminal law—Appellant was convicted of the offense of soliciting life insurance as agent of a foreign company without first having procured a license and authority to conduct such business from the insurance commissioner. The defense interposed is that the company represented by appellant is not an insurance company, but a fraternal society. Held—That said company is a foreign insurance company within the meaning of section 641, Kentucky Statutes. No lodges were established in this State by said company until after 250 policies had been written. Filing articles of incorporation in Jefferson county by said company did not constitute it a domestic corporation as no copy thereof was ever filed in the office of the secretary of state, as required by section 880, Kentucky Statutes. The conviction of appellant was proper.

Sweeney, Ellis & Sweeney for appellant.

LaVega, Clements and Hazelrigg & Chenault for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Settle.

Appellant was convicted and fined in the lower court for the offense of

soliciting life insurance, as the agent of a foreign company, without first having procured a license and authority to conduct such business from the insurance commissioner.

The defense interposed was that the company represented by the appellant is not an insurance company, but merely a fraternal society, and though the contract it makes with its members is a contract of insurance, it is claimed that the insurance is only incidental to such fraternal society, and that the corporation is exempt from the jurisdiction of the State insurance department, because it does not transact its business through soliciting agents, but only such as undertake the work of organizing and supervising local unions and lodges.

Section 641, Kentucky Statutes, declares that the words " 'insurance company' or 'insurance corporation' shall include any association, individual, company, corporation, partnership or stock company engaged in or carrying on in any manner the business of insurance in this State, except that the provisions of this chapter or article shall not apply to secret or fraternal societies, lodges or councils which are under the supervision of a grand or supreme body and secure members through the lodge system exclusively, and pay no commission nor employ any agent except in the work of local subordinate lodges or councils." So the question presented for the consideration of this court is, is the appellant the agent of a corporation whose business is that of insurance or benevolence?

We know of no better definition of an insurance contract than is found in *Commonwealth v. Wetherbee*, 105 Mass. Rep., 160, wherein it is said: "A contract of insurance is an agreement by which one party for a consideration (which is usually paid in money either in one sum or at different times during the continuance of the risk) promises to make certain payments of money upon the destruction or injury of something in which the other party has an interest. All that is requisite to constitute such a contract is the payment of the consideration by the one and the promise of the other to pay the amount of the insurance upon the happening of an injury to the subject by a contingency contemplated in the contract."

Tested by the foregoing definition, we find that the certificate of membership contained in the record (which is the form of contract used between the corporation represented by appellant and its members) is neither more nor less than a contract of insurance, for it recites that in consideration of the payment by one Wm. Smith, named therein, of a certain sum of money each and every week, during the existence of the contract, the corporation would pay him a certain sum of \$3 per week in case of sickness or accident, and in case of his death the sum of \$55 to the beneficiaries or assigns named in the contract, upon satisfactory proof of death filed in the office of the corporation.

The certificate or policy further provides that the insured must have been in good health and free from disease at the time of application for membership. It declares that "no invalids of any kind can hold a policy in this company." It also provides that if a member shall fail to pay his "premiums" for thirty days he forfeits all money paid to the company, and that members in arrears receive no benefits while sick. A medical examination is required of all applicants for membership. The application is

made a part of the contract, and it will be found to contain the questions that appear in all other applications for life insurance, such as the usual inquiries as to age, birth, health, family and personal history, habits, etc.

In Supreme Commandery of the United Order of the Golden Cross v. Hughes, 24 Ky. Law Rep., 984, it was decided by this court that such a society or company as is represented by appellant is an "assessment or co-operative company," declared by section 664 of the statute to be an insurance company engaged in the business of life insurance on the co operative or assessment plan.

Between April 1 and July 1, 1901, 250 members were insured by this company in Owensboro, and these members did not attach themselves to a lodge to become insured, but were secured by employed agents of the company through whom they received certificates or contracts of insurance. The lodge so called, which seems to have been organized by those claiming membership in the company, was not established until after this prosecution was commenced against appellant. It must, therefore, have been a mere after-thought. It is apparent, too, that the filing of articles of incorporation in Jefferson county by the company represented by appellant did not constitute it a domestic corporation, as no copy thereof was ever filed in the office of the secretary of state as required by section 890, Kentucky Statutes. Upon the other hand, it is shown beyond question that the company is a foreign corporation, for it styles itself The National Industrial Benefit Endowment Co. of Lynchburg, Va., and was originally incorporated at Lynchburg, Va., where its chief office is yet located. All the contracts of insurance are made in that city, all moneys that are collected and all reports that are made are sent there.

Although appellant's company may be deemed an assessment or co-operative insurance company, as defined in section 664 of the statute, that fact will not relieve him from the penalty imposed by the judgment of the lower court, for as it is beyond doubt a foreign corporation, and in law and in fact an insurance company, he was required by section 633 of the statute supra to obtain of the State commissioner of insurance a license to represent it as agent before transacting any business for the company in this State.

As it was admitted on the trial that appellant had not procured a license of the insurance commissioner the judgment of conviction is affirmed.

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LOUISVILLE & NASHVILLE R. R. CO. v. COMMONWEALTH.

(Filed February 11, 1903.)

Railroads—Long and short hauls—Constitutional law—Construction of statutes—Railroad commission—Appellant was indicted for a violation of section 820, Kentucky Statutes, commonly known as the long and short haul statute. A trial was had and a motion was made for a peremptory instruction for defendant on the ground that the railroad commission had made no charges that appellant had violated that statute, and recommended an indictment, which motion was refused. The legality of the action of the court is involved on this appeal. Held—That the lower court erred to the prejudice of appellant in refusing said peremptory instruction. It was the evident in-

tent of the people of the State in adopting section 218 of the Constitution providing for the creation of a railroad commission to authorize them to investigate all charges for a violation of the rules for charges for hauling freight long and short distances. This was also the object of the legislature in the adoption of the statute in question. The railroad commission being composed of men of ability, with peculiar means of information as to all questions of competition and management of railroads, was thought to be better suited to investigate these charges than the grand jury. As the guilt or innocence of the corporation depends on the existence or nonexistence of facts which are, or at least may be, ever varying, it follows as a logical sequence that if the corporation is to have the benefit of these ever varying conditions before it is indicted, that such investigation must be had in every case as a prerequisite to an indictment. The investigation of the railroad commission, and an adverse decision by it against the railroad, is necessary in every case before an indictment can be had under the statute, and this statute is not unconstitutional. Section 820, Kentucky Statutes, gives the remedy for violation of section 218 of the Constitution, and it comes within the familiar rule of construction, that when a statute gives a remedy it is usually exclusive, and it is not a cumulative remedy. It is no answer to the argument in favor of this previous investigation by the railroad commission to say that four years before the indictment in question was found the commission had decided other cases under this statute involving freight rates between the same localities against the railroad, and recommended its indictment and punishment therefor.

Concurring opinion by Paynter, Judge:

The legislature in the enactment of section 820 had gone further than it was authorized to go by section 218 of the Constitution. The decision of this court in the case of the Illinois Central R. R. Co. v. Commonwealth is the law of this case; it should be respected by this court and the court should not allow a punishment to be inflicted upon a carrier in disregard of the law as adjudicated therein. This provision of the Constitution authorizing the railroad commission to consider special cases, etc., is not for the purpose of allowing it to determine whether the carrier shall be indicted for past offenses, but is for the purpose of allowing it to determine whether or not it shall be entitled to charge less for the longer than for the shorter distance for the transportation of passengers, property, etc., and to determine to what extent the common carrier should be relieved from the operation of the section. This section does not attempt to confer upon the railroad commission the right to relieve against previous acts, but to give it the authority to make it lawful for the carrier to charge more for the short than for the long haul. Section 820, Kentucky Statutes, has reference to past acts, while section 218 of the Constitution is dealing with future ones.

W. C. McChord, E. W. Hines, T. B. Harrison, Jr., and B. D. Warfield for appellant.

H. W. Rives for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Barker.

The appellant was indicted by the grand jury of the Marion Circuit Court at its January term, 1899, for a violation of section 820 of the Kentucky Statutes, commonly known as the long and short haul statute. It will not be necessary in this case to examine the indictment further than to say that

its allegations are sufficient, and that it contains, among other things, a statement that it was found upon the recommendation of the railroad commission. The case came on for trial in the Marion Circuit Court in 1902, and the only evidence introduced by the Commonwealth in support of the allegation, that the indictment was found upon the recommendation of the railroad commission, was a report of the commission to the Marion Circuit Court and grand jury, made in 1895, charging the appellant with violations of section 820 of the statute, and recommending its indictment in some fifteen specially named cases, none of which was the case at bar. The appellant, at the close of the Commonwealth's testimony, moved the court for a peremptory instruction to the jury to find it not guilty. This motion was overruled. The court then gave written instructions to the jury, and the case having been submitted, a verdict of guilty was returned, and a penalty of \$300 imposed upon appellant. The motion for a new trial having been overruled the case is here on appeal.

The conclusion which we have reached regarding the law of this case makes it unnecessary to examine or discuss any other questions than such as are involved in the proposition as to whether or not the court erred in overruling appellant's motion for a peremptory instruction. In order to obtain the meaning and intent of section 820 of the Kentucky Statutes it is necessary to take a brief survey of the history of its enactment.

There had been much complaint, of long standing, throughout the Commonwealth that the railroads were habitually engaged in the business of discriminating between localities in the matter of freight rates; that cities and communities were being pushed forward in the march of material progress by friendly discrimination on the part of the railroads at the expense of other cities and communities, which were being retarded and repressed by unfriendly discriminating rates. Whether or not this was true is immaterial; it was believed to be true, and this belief on the part of the people of the State was crystallized in section 218 of the Constitution, and in the subsequent enactment of section 820, providing a remedial procedure to carry into effect the provisions of the Constitution on this subject.

But while there was ardent desire on the part of the people and their representatives to repress the offense of unjust discrimination by railroad corporations, there was also a wholesome fear of unjustly and wantonly injuring these great and necessary agencies of the material prosperity of the Commonwealth, by hasty and ill-informed zeal, in the matter of applying the remedy to the supposed wrong. It was recognized that the subject of transportation in railroad business involves one of the most profound and abstruse problems with which the railroad managers have to deal. It was seen that with this problem the average jurymen, whether grand or petit, would be helpless and impotent; that he would neither have the trained power nor the necessary data to enable him to understand the difficult subject involved in the expression "substantially similar circumstances and conditions;" and that a jury, organized in a community smarting under the exasperation of a supposed invidious discrimination of rates against it, would be unable to take any but a narrow and sectional view of the acts, from the effects of which they were suffering. Therefore, it was deemed wise to take the whole subject out of the danger of sectional bias and



place it in the hands of a commission, representing not one community, but the whole State; a commission which should be elected, in the aggregate, by all of the people of the Commonwealth, and which, for this reason, would represent the interest of the whole State, and not the interest of any single city or locality; a commission which would take into consideration the needs of the manufacturer, the miner the lumberman and the railroads, as well as the interest of the people at large; and which would lift the subject out of the realm of sectionalism, and place it in the realm of commercial statesmanship. In order that the commission should do this they were to be elected for a term of years, that they might have ample time to study all of the questions involved in their duty; they were given a salary adequate to warrant the devotion of their whole time to the questions of railroad management; and it was made the duty of every railroad corporation in the State to make an annual report to them, embracing every fact concerning the affairs of the corporation which were presumed by the framers of the law to be necessary to a proper understanding of the whole problem of regulating the railroad corporations of the Commonwealth; and for fear that the statutory report required had overlooked some data necessary or useful to this end, it was provided that the corporation should answer any other questions propounded to them by the commissioners. The commissioners were invested with the power to summon any person or persons they pleased, and to examine them, under oath, touching any subject connected with the affairs of the operation of a railroad in the State.

It is impossible to read the whole law, the substance of which is here sketched, without being impressed with the fact that the commissioners were to be prepared to grapple with problems which no grand or petit jury of the Commonwealth could successfully compass, and that the duty of making the investigation, which involved the exercise of all this knowledge, so laboriously acquired, lies at the very root of, and is precedent to, an indictment by a grand jury for an offense which could only be properly investigated by an intelligent and well-informed commission.

It would, indeed, be a vain and useless thing to establish a railroad commission, to be elected by the people of the whole State, and put into their hands all the data concerning railroads which the owners and managers thereof possessed, if the problems to be solved were such as an average jury would be competent to grasp and understand. If there was nothing in the problem but the respective distances of the localities, and the respective rates charged thereto, the proposition would, instead of being profound and abstruse, be reduced to the simplicity of the equation that two plus two equals four. But there was recognized to be far more in the problem than the distance of the two localities from the point of shipment and the respective rates imposed; the question of competition was to be considered, and was recognized as being involved in the problem of "substantially similar circumstances and conditions;" and this being a subject with which the commission could, and the jury could not, deal, it was required, as a condition precedent to an indictment in any particular case, that the commission should first decide whether or not the circumstances and conditions were substantially similar. If, after examination, this question was decided adversely to the railroad, then the remaining facts necessary to be es-

established, to constitute its guilt, were peculiarly within the province of the jury. If this question was decided in favor of the railroad, then there was nothing for the jury to do in the premises.

In the case of the Illinois Central R. R. Co. v. Commonwealth, 23 Ky. Law Rep., 1159, it was held by this court that an investigation by the railroad commission was a condition precedent to an indictment by a grand jury for a violation of the provisions of section 820 of the Kentucky Statutes. In the case cited the court said: "In the construction of statutes the cardinal aim of the court is to arrive at the intention of the legislature. The court will presume that the legislature meant something by all the provisions of the statute, and will endeavor to give them all a fair effect. If the legislature had intended indictments to be found for each offense regardless of action by the railroad commission, we see no reason why the section might not have stopped with the first sentence defining the offense and providing for its punishment, for by the next section (Kentucky Statutes, section 831) it is made the duty of the commission 'to see that the laws relating to all railroads, except street, are faithfully executed;' and under this provision it would be the duty of the commission to see to violations of the preceding section. Not only so, but it provided in section 820 that if the commission deems it proper to exonerate a carrier from the operation of its provisions, an order to that effect shall be made, and after such order the carrier shall not be prosecuted for that matter. To indict the carrier, in the first place, without action by the railroad commission would be to deprive it of all benefit of this provision. If the commission had only power to pass on the same facts as the grand jury, it might, perhaps, be maintained that the legislature intended to provide a cumulative remedy, and that a preliminary hearing before the commission was not essential. But such is not the fact."

The court, then, after discussing various decisions of this court on kindred propositions, goes on to say: "It will be observed that the constitutional convention did not adopt a hard and fast rule, making the charge of more for the short than for the long haul unlawful, but expressly empowered the commission to authorize the railroad to charge less for longer than for shorter distances, and to prescribe from time to time the extent to which the carrier might be relieved from the operation of the section. There were many industries in the State whose interests required this. More than one coal famine had occurred. The only security against a recurrence of this trouble was our domestic coal; but this could not be available unless given lower rates so that it could compete in the market with the coal shipped by water. If it could not thus compete, it could not be relied on as a supply in an emergency. The low rate in this case was given on coal shipped to Louisville, because it there came in competition with coal brought down the Ohio river. The railroad commission was the only tribunal authorized to relieve appellant from the operation of the section. No such power was vested in the courts. The question of competition could not be examined there, nor could it be shown that a proper case existed for exoneration from the section. The legislature, therefore, provided for the preliminary hearing before the railroad commission, not as a cumulative remedy, but that it might determine whether the carrier should be exonerated or not, and,

therefore, it was provided that if the commission relieved the carrier from the operation of the section no prosecution should be had on account of the matter complained of. It also further provided that if the commission failed to exonerate the carrier it should make an order in writing to that effect, and furnish 'a statement of the facts, together with a copy of its order to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense.' The requirement that the commission should furnish the grand jury a copy of its order, in order that the railroad company might be indicted for the offense, must be read in connection with the previous clause, that if the company was exonerated the railroad company should not be prosecuted. The plain meaning of the two together is that the railroad company may be indicted for the offense if not exonerated, and may not be indicted if it is exonerated, and the copy of the order of the commission refusing to exonerate it is required to be furnished to the grand jury in order that the company may be indicted."

It is no answer to this reasoning to say that four years before the indictment in question was found the commission had decided other cases under section 820, involving freight rates between the same localities, against the railroad, and recommended its indictment and punishment therefor.

The problem of competition in railroad traffic is an ever varying one, and the decision of the commission at any given time could, of necessity, only determine the condition of the question at the time of its promulgation, and prior thereto. Of the future, unless they possessed the gift of prophecy, they could not determine. The same necessity for a thorough examination of the circumstances and conditions of competition would exist at any subsequent time as at the original investigation unless we are to suppose that there are never any changes in the status of railroad competition. On the contrary, common experience teaches us that what would be a righteous decision on the question of competition of freights between localities at any given time, might be iniquitously unjust at a subsequent time, and, therefore, it is impossible to suppose that the law-making power meant that the declaration of the commission in refusing to exonerate appellant from the provisions of section 820, at any given time, was to act as a formal declaration of war on it, under which letters of marque and reprisal were to be issued and enforced by the grand jury along its line until such time as peace might be declared by a new edict of the commission. Such a conclusion would be crude and unscientific, and does violence to the plain letter of the statute.

Section 820 gives the remedy for violation of section 218 of the Constitution, and it comes within the familiar rule of construction, that when a statute gives a remedy, it is usually exclusive, or, as said in the *Illinois Central R. R. Co. v. Commonwealth*, supra, "the legislature provided, therefore, for the preliminary hearing before the railroad commission, not as a cumulative remedy, but that it might determine whether the carrier should be exonerated or not."

There is nothing in the principles enunciated in the cases of the *Louisville & Nashville R. R. Co. v. Commonwealth*, 104 Ky. 226; the *Louisville & Nashville R. R. Co. v. Commonwealth*, 106 Ky. 633, or the *Louis-*

ville & Nashville R. R. Co. v. Commonwealth, 21 Ky. Law Rep., 239, inimical to the views herein expressed. In each of these cases a trial was had before the railroad commission, and a judgment refusing to exonerate the railroad rendered as a prerequisite to the indictment by the grand jury. In each case the indictment was returned on the advice, or suggestion, of the commission.

So far as these cases illustrate anything in the case at bar they tend to bear out the necessity for an investigation by the commission as a condition precedent to an indictment in every case; they certainly do not militate against this view, as the slightest examination will show.

The question of the necessity for an investigation by the commission as a prerequisite to an indictment never arose in this court until the I. C. R. R. Co. v. Commonwealth, supra. The principle announced in the case at bar is the principle of the I. C. R. R. Co. v. Commonwealth carried to its natural and legitimate conclusion. The guilt of the railroad in any given case does not depend on the commission, or on its rules or regulations, but on the question whether the corporation has or has not violated the provisions of section 218 of the Constitution. The investigation of the commission only establishes the fact as to whether it has, or has not, violated said section. In reaching their conclusion as to whether the corporation is guilty or innocent, the commission examines into the question as to whether or not the conditions and circumstances are substantially similar. If so, the corporation is guilty; if not, it is innocent.

As the guilt or innocence of the corporation depends on the existence or nonexistence of facts, which are, or at least, may be, ever varying, it follows, as a legal and logical sequence, that if the corporation is to have the benefit of these ever-varying conditions before it is indicted, that such investigation must be had in each and every case as a prerequisite to an indictment.

We conclude, therefore, that the investigation of the railroad commission, and an adverse decision by it against the railroad, is necessary, in every case, before an indictment can be had under section 820 of the statutes; that no declaration of the commission on the subject of competition in freights can be projected into the future, but must act alone on the present and the past.

This construction, we think, is in harmony with the act in question. We believe that it puts into the hands of a brave, intelligent and zealous commission ample power to repress the wrongs of the railroads sought to be remedied, and yet relieves these corporations from the wanton assaults of narrow sectionalism, or of greedy cupidity; it gives opportunity for the development of the mines and the manufactories of the State, for the expansion of its commerce, and affords to every locality such protection against invidious discrimination as is consistent with the general uplift and prosperity of the State, and uplift and prosperity whose reflex benefit, it is believed, will more than repay the given locality for any sacrifice it makes in favor of the common good.

The court below should have sustained the motion of appellant for a peremptory instruction.

Wherefore, the case is reversed for proceedings consistent with this opinion.  
Whole court sitting.

Judges Hobson, Nunn and Settle dissenting.

Judge Paynter separate concurring opinion.

Judge Hobson dissenting opinion in which Judge Settle concurs.

Judge Paynter delivered the following concurring opinion :

The only part of this opinion in which I concur is that the case of the Illinois Central R. R. Co. v. Commonwealth, 23 Ky. Law Rep., 1159, controls in this case, and that, therefore, the peremptory instruction should have been given to find for the appellant. I do not assent to some of the statements and expressions in the opinion, nor do I agree with any statements therein which are, or seem to be, in conflict with previous opinions of this court, construing section 218 of the Constitution.

I dissented from the opinion of the court in the Illinois Central R. R. Co. v. Commonwealth, 23 Ky. Law Rep., 1159, upon the idea that the legislature in the enactment of section 820 had gone further than it was authorized to go by section 218 of the Constitution. Section 218 of the Constitution reads as follows: "It shall be unlawful for any person or corporation owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: Provided, That upon application to the railroad commission such common carrier, or person or corporation, owning or operating a railroad in this State, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation, owning or operating a railroad in this State, may be relieved from the operation of this section."

Section 820, Kentucky Statutes, reads as follows: "If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than \$100 nor more than \$500, to be recovered by indictment in the Franklin Circuit Court, or the circuit court of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the pro-

visions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission, and after such order the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the commission shall use proper efforts to see that such company or carrier is indicted and prosecuted."

In *Illinois Central R. R. Co. v. Commonwealth* the question before the court, as stated by it, was "whether, under the statute, the carrier may be indicted by the grand jury before the railroad commission has refused to exonerate it." In that case complaint had not been made to the railroad commission before the indictment was found, and the court decided that it was necessary that the railroad commission should act upon a complaint and refuse to exonerate the carrier before an indictment could be found. In discussing the matter the court said: "If the legislature had intended an indictment to be found for each offense regardless of action by the railroad commission, we see no reason why this section might not have stopped with the first sentence, defining the offense and providing for its punishment. \* \* \* To indict the carrier, in the first place, without the action of the railroad commission would be to deprive it of all benefit of this provision. \* \* \* The legislature, therefore, provided for the preliminary hearing before the railroad commission, not as a cumulative remedy, but that it might determine whether the carrier should be exonerated or not, and, therefore, it was provided that if the commission relieved the carrier from the operation of the section, no prosecution could be had on account of the matter complained of." Again the court said: "To allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration."

As I understand the facts, no complaint was ever made to the railroad commission that the appellant had been guilty of the unlawful act for which it was indicted. The railroad commission, therefore, never had an opportunity to determine whether or not an indictment should be found against it. The court refusing to recede from its position in that case, the question then arises, should a member of this court disregard that opinion in order to sustain this prosecution? I am unwilling to do so. It appears that complaints in other cases were filed with the railroad commission, to the effect that the appellant had violated section 810 of the Kentucky Statutes, in the matter of the transportation of coal to Lebanon, and as the railroad commission refused to exonerate in those cases, therefore, it must be held as having refused to exonerate the railroad company from its unlawful act here in question.

The court in the Illinois Central case held that section 820 of the statute was constitutional. This act denounces a penalty for any violation of it. It means to make a carrier liable to prosecution for any violation of it in the transportation of the property of any individual, corporation, etc. It is contemplated by the section that some one shall make complaint to the railroad commission so that it shall act upon the complaint. It is called upon under that section to determine whether the carrier shall be exonerated from the act of which complaint is made. It is provided in the section that if the commission refuses to exonerate the carrier, an order in writing to that effect shall be made, and a copy thereof made and delivered to the complainant and the carrier, and it is further the duty of the commission to make a statement of the facts and furnish that, together with its order, to the grand jury of the county, etc.

If the opinion of the court is correct in the Illinois Central case, then the carrier is entitled to a hearing before the railroad commission on any complaint that is made of its violation of the section of the statute, and the grand jury can not return an indictment until the railroad commission has passed upon the question and refused to exonerate.

Section 218 of the Constitution authorizes the railroad commission in special cases, after investigation, to allow carriers to charge less for the long than the short distance, etc., and may prescribe the extent to which such common carrier may be relieved from the operation of that section of the Constitution. A "special case" referred to in that section might embrace a case for all the coal hauled to Lebanon from some point south of there, or it might embrace a case for the transportation of all wheat that might be transported there. It was not intended to restrict it simply to permission to some carrier to make a single shipment and charge less for the long than for the short haul.

This provision of the Constitution authorizing the railroad commission to consider special cases, etc., is not for the purpose of allowing it to determine whether the carrier shall be indicted for past offenses, but is for the purpose of allowing it to determine whether or not it shall be entitled to charge less for the longer than for the shorter distance for the transportation of passengers, property, etc., and to determine to what extent the common carrier should be relieved from the operation of the section. This section does not attempt to confer upon the railroad commission the right to relieve against previous acts, but to give it the authority to make it lawful for the carrier to charge more for the short than for the long haul.

If the carrier charges more for the short than for the long haul under substantially similar circumstances and conditions, under section 218 of the Constitution it is guilty; it can only be guiltless under that section for such acts when the railroad commission has authorized it to charge less for the longer than for the short distance, or it has been relieved from the operation of the section. This section is dealing with the future, not the past, acts of the carrier.

Section 820 of the statute allows the commission to exonerate the carrier from a single act which it has done in violation of the statute, although the carrier had not previously been authorized to charge less for the long than for the short haul. This section is predicated upon the idea that the rail-

road commission has not given the carrier the right to charge less for the long than the short haul; that the carrier for that reason may have violated section 218 of the Constitution. Section 820, Kentucky Statutes, has reference to past acts, while section 218 of the Constitution is dealing with future ones.

My opinion is that section 820 of the statute did not conform to the requirements of the Constitution for reasons in part above indicated, hence I dissented in the Illinois Central case. The pardoning power is not vested in the railroad commission by the Constitution, but in the governor. However, as that opinion is the law, it should be respected by this court, and the court should not allow a punishment to be inflicted upon a carrier in disregard of the law as adjudicated therein. If this court refuses to follow the law as determined by it, such refusal is not calculated to beget respect for its opinion.

Being of the opinion that, under the rule of the Illinois Central case, the appellant was entitled to peremptory instruction, I concur in the opinion in this case to that extent only, as the opinion in that case is as binding upon me as if I had originally agreed to it.

Judge Hobson delivered the following dissenting opinion:

To properly understand the questions before us in this case it is necessary to review the previous decisions of this court construing the section of the statute in controversy, and the provision of the Constitution it was designed to carry into effect. In the first case, *Louisville & Nashville R. R. Co. v. Commonwealth*, 104 Ky., 226, it was insisted that the existence of competition at the terminus of the longer haul of itself took the case out of the operation of the statute and the constitutional provision, but it was held that the difference of circumstances and conditions contemplated by these provisions did not include extrinsic facts not connected with the carriage in any way, such as existence of competition at one point and not at another. In that case it was also contended that the special case from which the carrier might be exonerated meant a special shipment, and that, therefore, it was necessary to be averred in the indictment the amount charged and received for the longer haul, and the name of the person thus favored. The court held otherwise, on the ground that the gravamen of the offense is charging for the shorter haul a greater rate than the prevailing rate for the longer haul. The court said: "Nor was it necessary to designate any particular person or persons, probably numerous, than whom Shreve had been charged and required to pay greater compensation, for section 218 was intended to prevent discrimination rather between localities than between persons. So in order to convict of an offense like the present, it suffices to state in the indictment that the specified amount charged or received for the shorter distance was greater than that charged or received from persons generally or usually for the longer distance, and to support the allegation by the carrier's published schedule of rates or other competent evidence of the fact."

In the next case, *Louisville & Nashville R. R. Co. v. Commonwealth*, 106 Ky., 633, the preceding case was adhered to. But that case had been prepared with a view to an appeal to the United States Supreme Court, and the question was again raised as to what was the special case referred to in sec-



tion 218 of the Constitution, and what was the meaning of the words complaint and exoneration in section 830 of the statutes. The question before the court was whether these words referred to each shipment of freight, or to discrimination in rates between localities. In other words, could the carrier be exonerated as a special case on certain class of freight between given points, or must he be exonerated on each shipment to any individual, whether a barrel of pork, a box of dry goods or a car of coal. If the latter, it was said that the statute gave the carrier no practical protection at all because he could not be exonerated on any shipment until it was made and his exoneration on that shipment was of no effect on any other shipment, so that he could never know how to conduct his business, and, therefore, the statute was not in accord with the Constitution because it afforded no practical means of exoneration from the section. In answer to all this the court said: "It was the aim of the Constitution to require the railroads in the State to treat all localities fairly and with equality; but as differences of condition ever varying would constantly arise, it prescribed no fixed rule, but created a tribunal to act as umpire between the railroads and the people, and decide when, and to what extent, a greater charge might be made for a short than for a long haul under like circumstances and conditions, with full power in special cases, from time to time, to prescribe the extent to which such common carrier or person or corporation owning or operating a railroad in this State may be relieved from the operation of this section. It is not confined in its power to each shipment as it may be made, but may prescribe from time to time a suspension of the section on freight of a given character between given points, as the public interest and the ends of justice may require."

In the third case, *Louisville & Nashville R. R. Co. v. Commonwealth*, 21 Ky. Law Rep., 239, the question was made by the railroad company that the order of the railroad commission was improperly admitted in evidence against it. On the other hand, it was insisted by the Commonwealth that the order of the commission was properly admitted in evidence as it was the basis of the proceeding. Although there had been some differences in the court on the other questions, on this question the whole court concurred in the judgment, that the order of the commission was properly admitted in evidence. This question had been made by the railroad company before in the first case, which had been affirmed, but in that case the railroad company insisted that the averments of the indictment were not sufficient to show that the railroad commission had refused to exonerate it. The court held the indictment sufficient. Of course it was not claimed by the court or by counsel that the order of the railroad commission was competent to be read to the jury, unless it was a prerequisite to the prosecution and the basis of it, for it could not be competent on any other ground, and the admission of it was very prejudicial, if it was incompetent, for it served to put the defendant in a bad light before the jury, and in that case the jury had inflicted a very heavy fine.

Taking these three cases, in which all the court concurred, so far as the questions now before the court go, what do they establish?

1st. That section 218 of the Constitution, and the statute made to enforce it, were "intended to prevent discrimination rather between localities than

between persons; that it was the aim of the Constitution to require the railroads of the State to treat all localities fairly and with equality."

2d. That in special cases the commission might exonerate the carrier, but it was not confined in its power to each shipment as it might be made, but might prescribe, from time to time, a suspension of the section on freight of a given character between given points, as the public interest and the ends of justice required.

3d. That the order of the railroad commission refusing to exonerate the carrier was the basis of the prosecution.

After all this had been settled, the case of Illinois Central R. R. Co. v. Commonwealth, 23 Ky. Law Rep., 1159, arose, and in it the court was urged, notwithstanding what it had previously decided, to hold that the order of the railroad commission was not the basis of the proceeding, and that a prosecution might be maintained before any order had been made by the railroad commission refusing to exonerate the carrier. The court refused to recede from its previous opinion, and this is all that was decided in that case.

No question was made in that case by court or counsel as to the necessity of an exoneration of the carrier or a refusal to exonerate him for the shipment of a particular car load of coal, or a shipment to a particular person. The court had previously held unanimously, so far as that question went, that the exoneration need not be on each shipment, but might be on a given character of freight between given localities. In the opinion of the court the precise question that was in the mind of the court is shown by its statement of the case in these words: "Appellant was indicted in the Hardin Circuit Court and fined \$200 for charging more for hauling a car load of coal from Deanfield, Ky., to Stephensburg, Ky., than from Deanfield through Stephensburg to Louisville. The indictment was returned June 10, 1898. At that time the railroad commission had not determined whether appellant should be exonerated as provided by statute. The first question to be determined on the appeal is whether under the statute the carrier may be indicted by the grand jury before the railroad commission had refused to exonerate it."

When the court used the word "exonerate," and "exoneration," it used them in the sense in which those words had, after the fullest deliberation, been defined by the entire court as not referring to a particular shipment, but to a difference of rate between localities. This case merely adhered to the rule that had been before laid down, changing it in no particular, and with the preceding cases made out what seems to be a reasonable construction for both the carrier and the shipper, giving both some practicable protection from the statute. When it was decided the railroad commission pursuant to the rule before laid down had made general orders exonerating carrier on coal between certain points, but the Illinois Central Co. was indicted before action was taken as to it. The carrier need not be exonerated from each shipment that he makes, but may be exonerated on the rate of a given class of freight between certain points, and this exoneration remains in force until changed by the railroad commission. So that the carrier, when his rights have thus been defined, can safely carry on his business without incurring criminal liability until the commission makes some further order,

and after that is made he must conform to it. On the other hand, the shipper, when the commission has refused to exonerate the carrier, may appeal for his protection to the grand jury of his county to indict the carrier for extorting money from him, which it has no right to charge. In this way obedience to the orders of the commission is secured, shippers are protected, and at the same time the carrier can not be put to the cost of criminal prosecution without action by the railroad commission determining that a state of facts does not exist justifying the exoneration of the carrier from the operation of the long and short haul clause; nor can he be deprived of a hearing on this question as he would be if he might be indicted in advance of action by the railroad commission, for the evidence on this subject can not be introduced before the jury, as only the railroad commission has power to exonerate from the section.

In the majority opinion, as well as in the separate concurring opinion, none of the three first cases decided by the court are criticised or overruled, and it must be assumed from this that the court does not mean to overrule those cases. Putting those cases by the side of the opinion which is now delivered, the court places itself in a very anomalous position. It is thus held on the one hand that the word "complaint," and the word "exonerate," in the statute, where the carrier is exonerated, do not refer to the particular shipment by a particular shipper, but to a discrimination between localities in giving a less rate for the long than for the short haul. And it is at the same time held that the same words in the same statute, where the carrier is not exonerated, do refer to the particular shipper, and not to the discrimination between localities by the giving of a lower rate for the long than for the short haul. Certainly the court can not maintain such a position, that the same words in the same statute have one meaning in favor of the carrier and a different meaning against the carrier.

But if the court's decision in this case is to be taken as overruling the previous cases and determining that the words "complaint" and "exonerate" in the statute refer to the particular shipper, either in favor of the carrier or against it, then it will follow that the exoneration of the carrier is of no service to it, except as to the particular shipment in controversy, and he can be indicted for the next shipment, and will never know in advance how intelligently to carry on his business. If such had been the legislative intent, there was no need in the statute to require action by the railroad commission before the carrier could be indicted, nor reasonably would such a heavy penalty have been imposed. The court's opinion construing the statute to mean that the carrier could not be indicted before the commission had declined to exonerate it, rests in the end upon the construction of the statute made in the previous cases, that the exoneration was not from a particular shipment, but as to the rate on the article in question between the localities.

Much has been said in the case about the hardship of it, but when the court of last resort is influenced by such considerations as this in the construction of a statute, who shall stand up for the sanctity of the law, which, after all, is the protecting axis of life, liberty and property? But there is no such hardship as supposed. If the commission exonerates the carrier, this order continues in force until revoked by the commission, and until

then both the carrier and the shipper know how to order their affairs. It is the duty of the carrier to conform to the order of the commission, where it refuses to exonerate. If a change of circumstances arises, either the carrier or the shipper can bring this matter to the attention of the commission, and have the question reinvestigated. In the first case it was objected to the statute, among other things, that it gave the carrier no right to complain, and was, therefore, inconsistent with the Constitution, but the court held that the provision of the Constitution was to this extent self executing, and that either the carrier or the shipper could complain. (*L. & N. R. R. Co. v. Commonwealth*, 104 Ky., 232.) If after the commission refuses to exonerate the carrier he, in disobedience of its order, continues his discrimination, the state of case arises which the legislature contemplated in section 820, and which it, by its severe penalties, undertook to prevent. To construe the statute to mean that the carrier can not be indicted without action by the railroad commission, and that it can only be indicted then as to the particular shipment it has investigated, is to deny the people of the State all reasonable protection from the statute. It seems to me that there is no reason for departing now from the conservative middle line, which the court has heretofore laid down, to which the business of the State has been adjusted, and which gives a reasonable protection to both the shipper and the carrier.

The separate concurring opinion is devoted mainly to showing that the court was wrong in the case of the *I. C. R. R. Co. v. Commonwealth*. Space does not permit a re-argument of the question then decided. Suffice it to say that if the statute is unconstitutional, it is the only authority of the court for inflicting criminal punishment. The penalties therein denounced are the punishment of the acts therein provided for, and it does not follow by any means that the legislature would have provided these penalties for a greater charge for the short than for the longer haul unless it had provided for an exoneration of the carrier, for the plain purpose of the section was to provide a modus for carrying into effect the provisions of the Constitution, and to provide an adequate penalty to secure respect for the orders of the commission. It is not one of those cases, therefore, where the court could reject part of the statute as unconstitutional and enforce the remainder.

The case of *Illinois Central R. R. Co. v. Commonwealth* was written upon the idea that this court had settled that the exoneration of the carrier was not as to each shipment, but as to the rate between localities, and that an exoneration once made thereon protected the carrier until this order of the commission was revoked. The court then merely followed its previous ruling; it did not decide that there must be a refusal to exonerate on each shipment before an indictment of the carrier could be had. The doctrine now announced is not warranted by anything in that opinion, but, on the contrary, is a departure from the principles on which that opinion is based.

The ground of that decision was simply that as the exoneration or refusal to exonerate went to the rate between the localities, the commission was to pass on the rate before the carrier could be indicted. If the commission approved the rate there could be no indictment. If it refused to exonerate the carrier, he might be indicted, not only for what he had done, but for

what he might do thereafter in violation of the ruling of the commission. One reason which the legislature probably had in mind in framing the statute as it did was that emergencies might arise when immediate action by the carrier might be necessary before the commission could decide, and it was allowed, at its peril, to trust to the commission giving an exoneration if it saw fit, where the public necessities demanded it, as in the case of a coal famine or the burning of a town or the like. The commission was given general supervision over the matter as it had been before, and it was supposed that no great harm in this way could be done as complaint might be made any time to the commission. As heretofore construed by the court the carrier can not suffer unduly, and may safely carry on his business after the commission has once acted; and, on the other hand, the shippers are adequately protected by the power to indict and punish the carrier, not only for all violations of the order of the board, but for his previous acts, if he is not exonerated.

The order of the board made in 1899 in this case, by its terms following the decision of this court, exonerated the carrier from that time and for the future, and until the further order of the board. It does not purport on its face to have any retroactive effect. The commission did not assume to exercise condoning power. It has no such power. It has only the power of exoneration, and when it refuses to exonerate its order must be obeyed while in force, and if it is not obeyed the carrier can only appeal for pardon to the executive as to acts done in violation of the orders of the commission.

I, therefore, dissent from the judgment of the court.

Judge Settle concurs in this dissent.

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LOUISVILLE & NASHVILLE R. R. CO. v. COMMONWEALTH.

(Filed February 11, 1903—Not to be reported.)

W. C. McChord, E. W. Hines, T. B. Harrison, Jr., and B. D. Warfield for appellant.

H. W. Rives for appellee.

Appeal from Marlon Circuit Court.

Opinion of the court by Judge Barker.

This case being identical in all respects with case 186, ante, 1593, is reversed for the reasons given, and the opinion therein.

Whole court sitting.

Judges Hobson, Settle and Nunn dissenting.

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LOUISVILLE & NASHVILLE R. R. CO. v. COMMONWEALTH.

(Filed February 11, 1903—Not to be reported.)

W. C. McChord, E. W. Hines, T. B. Harrison, Jr., and B. D. Warfield for appellant.

H. W. Rives for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Barker.

This case being identical in all respects with case 186, ante, 1598, is reversed for the reasons given, and the opinion therein.

Whole court sitting.

Judges Hobson, Settle and Nunn dissenting.

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ILLINOIS CENTRAL R. R. CO. v. EBLEN, &c.

(Filed February 11, 1908.)

Common carriers—Negligence in transporting live stock—Evidence—Appellees entered into a contract with appellant for the shipment of horses from Omaha, Neb., to Henderson, Ky., by which it was stipulated that said horses were to be shipped from Omaha to Decatur, Ill., within not less than thirty-two hours, and that at that point they should remain not less than twelve hours, with ample opportunity to unload, feed, water and rest them, and it was further agreed that said horses should then be delivered at Henderson within twenty-four hours. This action was instituted to recover damages for a breach of said contract, in which it was alleged that plaintiffs' horses were kept in the cars between Omaha and Decatur for forty-six hours without food, water or rest, and after leaving Decatur were kept for more than thirty hours without food, water or rest, and that by reason of this treatment on the part of defendant their horses were famished and starved to such an extent that they lost flesh rapidly, and in their extreme hunger and thirst devoured their manes and tails; and that when they landed in Henderson they presented a gaunt and famished condition, which materially depreciated their usefulness and saleable value; that two of them died on the road, and altogether they were damaged in the sum of \$600. Issue having been made and a trial had, a verdict for \$600 in favor of appellees resulted, from which this appeal is prosecuted. It is insisted that the verdict is contrary to the evidence, and that the court erred in the admission of evidence. Held—That the statements and representations made to the plaintiffs by the agents of the defendant at Omaha as an inducement to ship over their line was competent testimony, as it did not tend to vary the contract or alter the terms of the bill of lading. The statutes of the United States fixing the limit of twenty-eight hours for continuous travel in transportation of live stock without food, water or rest is competent only as evidence upon the question of defendant's negligence in keeping the horses in transit for forty-six hours between Omaha and Decatur and thirty hours between Decatur and Henderson. No errors in instructions are urged, and as the proof is sufficient to support the verdict the judgment is affirmed.

Lockett & Lockett, S. B. & R. D. Vance, Pirtle & Trabue and J. M. Dickinson for appellant.

Yeaman & Yeaman and A. O. Stanley for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Burnham.

This is an appeal from a judgment of the Henderson Circuit Court in an action instituted by the appellees, Frank Eblen, &c. v. The Illinois Central

R. R. Co., for damages alleged to have been done to two car loads of horses while being transported over the defendant's line of road from Omaha, Nebraska, to Henderson, Ky. As their cause of action the plaintiffs allege in their petition that at the time of making the contract for the shipment of their horses the defendant, through its authorized agents, agreed to deliver the horses at Decatur, Ill., in not less than thirty-two hours after leaving Omaha; and that they would furnish at that point ample opportunity for unloading, feeding and watering the horses; and that the horses should remain at Decatur not less than twelve hours in the pens of the company for feeding, watering and resting; and that thereafter they would be transported to Henderson, Ky., in not less than twenty-four hours after leaving Decatur; and that the defendants failed to perform their agreement to deliver the horses at Decatur in thirty-two hours, and also failed to furnish sufficient means for feeding and watering them at that point, or to afford facilities for their remaining at that point twelve hours, and that they also failed to transport them to Henderson within twenty-four hours after leaving Decatur; and that by reason of this breach of contract on the part of the defendant their horses were kept in the cars between Omaha and Decatur for forty-six hours without food or water or rest, and after leaving Decatur were kept for more than thirty hours without food, water or rest; and that by reason of this treatment on the part of the defendant their horses were famished and starved to such an extent that they lost flesh rapidly, and in their extreme hunger and thirst devoured their manes and tails; and that when they landed in Henderson they presented a gaunt and famished condition which materially depreciated their usefulness and salable value; that two of them died on the road, and altogether they were damaged in at least the sum of \$600.

The railway company, by way of answer, alleged that it was expressly provided in the contract of shipment that the cars containing the stock were to be in charge of the shipper or his agent while in transit; that the railroad company should not be liable for any injury the animals might do to each other, or loss not resulting from the gross negligence of the railroad company; that the shipper should at all times feed, water and take care of said stock at his own expenses and risks; that the railroad company should not be liable for damages resulting from the delay of trains unless the same was caused by their gross negligence, and put in issue all the affirmative allegations of the petition for relief tending to show a breach of the contract of shipment. The issues were made up by reply and rejoinder, and a trial before a petit jury resulted in a verdict for plaintiff for \$600, and the defendant appeals.

The chief grounds relied on for reversal are that the trial court erred in admitting evidence of the statements of the agent of defendant at Omaha as to what the company would do in the way of furnishing facilities for watering and feeding the stock while en route, and the time that would be required for the journey; and that the verdict is flagrantly against the weight of evidence and contrary to the instructions.

The testimony for the plaintiff is to the effect that the horses were shipped from Baker City, Oregon, to Omaha, Neb., a distance of about 1,700 miles in eight days; that during the journey they were stopped and unloaded

three times, and allowed to rest and feed each time about twenty-four hours; that they arrived at Omaha in good condition; that the agent of the defendant company at Omaha represented to the plaintiff that they would deliver the cars in Decatur, Ill., in thirty-two hours, where abundant facilities for feeding and watering them would be furnished, and where they would be allowed to remain in the pens for rest and exercise, after being unloaded, twelve hours, and would then reach their destination at Henderson, Ky., in twenty-four hours after leaving Decatur; that as a matter of fact the horses left Omaha at 11.30 Tuesday night and arrived at Decatur at 9.30 p. m. Thursday, having been on the road about forty-six hours; that when they arrived at Decatur they were directed by the agents of the company to unload their stock in a lot of about thirty-five feet square, which contained no mangers or water troughs; that although they had ordered six hundred pounds of hay before they got to Decatur the company only furnished about one hundred and fifty pounds, which was scattered around the edges of the lot; that the only facilities for watering the horses were two washing tubs; that the water was carried in two buckets from an engine and poured into the tubs; that the horses soon broke down one of the tubs, also one side of the pen fences, compelling them to remain to prevent their escape; that only a part of the horses got any water at all; that the lot was so crowded that many of them got no hay; that after remaining in Decatur about four hours they were directed to load their horses; that they left Decatur at 1.30 a. m., on Friday morning, and arrived at Henderson at 7.30 on Sunday morning; that when they arrived at Henderson two of the horses were dead and that all were poor, gaunt and famished, and had eaten off each others manes and tails. The testimony for the plaintiff also fixes the depreciation in their value at from \$10 to \$20 per head.

Whilst the testimony of the defendants is to the effect that plaintiffs were notified at the time they shipped their horses that the schedule time between Council Bluffs and Evansville, Ind., a point in transit to Henderson, was sixty-one hours; and that they were also informed that they could feed and water at Decatur, Ill., that being about half the distance, and that this was satisfactory to the plaintiffs. The testimony of their employes at Decatur is to the effect that the horses were given six hundred pounds of hay and all the water needed; and that plaintiffs were given the privilege of remaining at that point for twenty-four hours, if they desired. But it is perfectly apparent, even from the testimony of the defendants, that the lot in which the horses were turned at Decatur was wholly insufficient, and that there were really no facilities for taking care of stock at that point.

We are of the opinion that the statements and representations made to the plaintiffs by the agents of the defendant at Omaha as an inducement to ship over their line was competent testimony, as it did not tend to vary the contract or alter the terms of the bill of lading. It is not denied that the horses were on the car in transit between Omaha and Decatur about forty-six hours without food or rest; and that they were more than thirty hours in transit from Decatur to Henderson without being fed or watered.

The Revised Statutes of the United States provides as follows:

"Section 4366. No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine or other



animals are conveyed from one State to another, or the owners or master of steam, sailing or other vessels of any description, for longer period than twenty-eight consecutive hours, without unloading the same for rest, water and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated.

"Section 4387. Animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company or owners or master of the boats or vessels transporting the same, at the expense of the owner or person in custody thereof; and such company, owners or masters shall in such cases have a lien upon such animals for food, care and custody furnished, and shall not be liable for any detention of such animals.

"Section 4388. Any company, owner or custodian of such animals who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than \$100 nor more than \$500. But when animals are carried in cars, boats or other vessels in which they can and do have proper food, water, space and opportunity for rest, the provisions in regard to their being unloaded shall not apply.

"Section 4389. The penalty created by the preceding sections shall be recovered by civil action in the name of the United States, in the circuit or district court of the United States, holden within the district where the violation may have been committed, or the person or corporation resides or carries on its business; and it shall be the duty of the United States marshals, their deputies and subordinates to prosecute all violations which come to their notice or knowledge."

This prohibition against the confinement of stock transported for more than twenty-eight consecutive hours without unloading for food and water and rest, and prescribing a penalty therefor, and for the recovery of damages was intended to prevent cruelty to animals in interstate commerce as well as danger to the public from diseases in animals which are to be used for food. (*Brook v. The American Express Co.*, 168 Mass., 259.) So rigorously has the statute been enforced in some jurisdictions that the fact that the stockyards of the railroad company at a station were on fire when the train arrived is not held a sufficient excuse for not furnishing to a person in charge of the animals being transported thereon proper facilities for unloading them for food, rest and water, and for not stopping the cars for five hours in accordance with the provisions of the act. (*N. C. & St. L. R. R. Co. v. Heggie*, 86 Ga., 210.)

And a carrier will not be relieved from liability for a violation of the statute by the mere fact that a special contract existed under which the shipper assumed the duty of feeding such stock unless the railroad company in fact furnished the necessary facilities to enable the shipper to do so, as the negligence belongs to that class against which a common carrier is not per-

mitted to contract. (C. & O. R. R. Co. v. The American Exchange Bank, 30., 93 Va., 492, and Commer v. Columbia, N. & L. R. R. Co., 53 S. C., 36.)

In the Virginia case it was held that while the penal features of the Federal statute could not be enforced in a State court, this did not prevent one who had been specially injured by its violation from recovering damages therefor. And in support of their conclusion cited Cooley on Torts (1st edition), 654; Shearman & Redfield on Negligence, section 3; Dennish v. Central R. R. Co., 10; U. S., N. C. & St. L. R. R. Co. v. Heggie, 86 Ga., 210; Gray v. Mobile Trade Co., 55 Ala., 887, and numerous other authorities. The common law rule on this subject is stated by Mr. Ray in his work on Imposed Duties in these words: "The carrier is liable for injuries to stock delivered it for transportation, arising from a failure to furnish proper facilities for feeding and watering them, though the shipper has agreed to accompany his stock and feed and water them at his own risk." (Hutchinson on Carriers, 222a, and Wood on Railroads (Minor), section 452b, are to the same effect.)

Whilst we entertain no doubt that a civil action for damages for injuries resulting from a violation of the Federal statute by a railroad can be maintained in a State court, plaintiffs have not sought to do so in this proceeding. On the contrary, they admit in their petition that they consented to a thirty-two hour run from Omaha to Decatur without stopping for water or food. And the statute is only considered in this proceeding as evidence upon the question of defendant's negligence in keeping the horses in transit for forty-six hours between Omaha and Decatur, and thirty hours between Decatur and Henderson, and in failing to provide suitable and convenient facilities for feeding and watering them while at Decatur. There is no conflict in the proof that the horses were in good condition when they started from Omaha, or that they were in very bad condition when they arrived at Henderson, and that this was due to appellant's negligence is clear.

The jury, under our system, are the sole judges of the weight and credibility of the testimony; our duty is performed when we see that there is sufficient evidence to support their finding. We do not feel that we would be justified in disturbing the verdict on the ground that it was not supported by the proof, and appellant has failed to point out any error in the instructions in the case. In fact they seem to state the law as favorably to appellant as the facts warrant.

Judgment affirmed.

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#### HOLBURN v. PFANMILLER'S ADM'R.

(Filed February 11, 1903.)

**Homestead—Claim for support of lunatic—Personal representatives—P. died intestate an inmate of a State insane asylum in December, 1899, having been admitted after an inquest held on May 4, 1897. At that time he had a family, his wife and one infant child. There were other children who were grown and had left home. The old folks were unable to provide for themselves and were extremely poor. P. owned a small piece of real property in Louisville, worth about \$700 or \$800. He was admitted into the asylum as a**

pauper patient, and properly so, under section 256, Kentucky Statutes. After his death, on motion of the asylum, appellee was appointed his administrator, and brought this action against the heirs of P. to subject the house and lot to the payment of his debts. The wife had died before P. The only debt asserted or claimed against the estate was for \$515 by the asylum for board of P. until his death, at \$200 per annum. In defense it is claimed that the property is not subject to the payment of the claim as it was the homestead of P., and can not be subjected under section 257, Kentucky Statutes. Held—That said property is not subject to said claim, as it was the homestead of P. until his death, although he had been removed from it on account of being a lunatic, and the law does not authorize the sale of a lunatic's homestead during his lifetime to pay this claim, nor does it subject it in the hands of his heirs to such payment. The claim of the asylum is not a debt. It is true it is a charge provided by law against certain estate of the lunatic, not against him, to be enforced in rem in the contingency and manner only prescribed by the statute. There was no necessity for the appointment of an administrator of P., as there was no debts to be paid, and no personal property whatever. The claim for taxes was not a debt; it was not due, and no suit against the land should have been brought before there had been a default by those legally chargeable therewith. It was improper for the parties to subject the estate to costs of attorneys and other costs when there was no necessity for same. Although the court had authority to appoint an administrator, it does not mean that an administrator is necessarily to be appointed in the case of every one who dies intestate. The opinion contains a full discussion of the necessity of appointment of administrators, their powers and responsibilities.

O'Neal & O'Neal for appellant.

N. R. & H. M. Peckinpah for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge O'Rear.

Lawrence Pfanmiller died intestate, an inmate of the Central Lunatic Asylum for the Insane of this State, on the 2d of December, 1899. He had been admitted under a verdict and judgment of the Jefferson Circuit Court (Criminal division) May 4, 1897. At that time he had a family, his wife and one infant child. There were a number of children who were grown and had left home. Pfanmiller owned a small piece of real property in the city of Louisville, worth about \$700 or \$800. He had owned it for a number of years and occupied it as a homestead. A short while before he was found to be a lunatic he and his wife, because of their old age and infirmities, induced one of their married daughters to move into the house with them, and to assume its expense and care. The old folks were unable to provide for themselves, and were extremely poor. After Lawrence Pfanmiller was adjudged a lunatic and sent to the asylum his wife continued to live at the home until her death, February 13, 1898. Something over three months after the death of Lawrence Pfanmiller appellee was appointed his administrator by the Jefferson County Court upon the motion of the Central Lunatic Asylum for the Insane, and within a few days afterwards brought this suit against the heirs of Pfanmiller to subject the house and lot to the payment of the debts of the decedent. The only claim asserted or filed against his estate was one for \$515 by the Central Lunatic Asylum, being the charge at

the rate of \$200 per annum for the board and support of Pfanmiller for the period during which he was confined there.

Formal and somewhat elaborate preparation of the action was had, in which the above claim was allowed, as a result of which the commissioner reported costs incurred in the action to the extent of \$261.65, \$150 of which was a fee to the administrator's attorney, and \$25 to the administrator for his services. The court allowed \$100 only for attorney's fee, but allowed the remainder of the costs and subjected the property to sale for the payment of the claim of the asylum and the costs above named.

The State has provided these charitable institutions at its expense for the care of those unfortunates whose mental condition requires them to be forcibly restrained. The system provides that those who are, or whose parents are, able financially to support them must pay to the asylum the same charge for their keeping as is allowed by the State for the maintenance of pauper lunatics kept there.

Section 256, Kentucky Statutes, reads as follows: "An insane person shall be held to be a pauper if unable to pay six months' board in advance, or, if married, be unable to pay said board besides providing for others naturally dependent; or, if a minor, the parent of said persons are unable to pay board besides supporting others naturally dependent on them. The court holding the inquest shall require the jury to return a finding on this subject, and this verdict shall be binding upon the superintendent."

Lawrence Pfanmiller was admitted under this section as a pauper, and properly so. The jury had found, and the judgment of the circuit court had adjudged, him to be a pauper. He was manifestly unable to pay the board besides providing for the others naturally dependent upon him, namely, his wife and minor child.

Section 257 of Kentucky Statutes is: "Where patients, who have been or may be supported in either of said asylums, have or shall acquire estate which can be subjected to debt, the board of commissioners of such asylum, when reliably informed of the fact, is authorized and directed, in every such case, to sue for, in the name of the asylum, and recover the amount of said patient's board, at the rate of \$200 per year, or so much thereof as such estate will suffice to pay for the time they shall have been respectively kept and maintained therein, and not otherwise paid for, and by proper proceedings to subject their estates, respectively, to the payment thereof," etc.

In this action it is claimed by the asylum, and by counsel for appellee, that under the section last above quoted the property of the decedent is liable for this claim. It is not contended that Pfanmiller had acquired this property after his commitment to the asylum. It is admitted that the property sought to be subjected was owned by Pfanmiller at the time of his commitment. The question then is, did Pfanmiller have an estate which could be subjected to debt?

The court is of opinion, under the facts stated in this case, that Pfanmiller was a housekeeper with a family, so as to entitle him to the benefit of the homestead exemption provided by the laws of this State, and that notwithstanding the death of his wife, and of his enforced absence from his home by reason of his commitment to the asylum, he did not lose the character of homesteader, nor any of its rights. We, therefore, conclude that there was

no period during the life of Lawrence Pfanmiller, and since his commitment to the asylum, when he owned any "estate that could be subjected to debt." It is true that our statute (section 1707) allows the homestead of a decedent to be sold subject to the occupancy of his widow and infant children, if a sale is necessary to pay his debts. But, strictly speaking, the claim of the asylum is not a debt. It is true it is a charge provided by law against certain estate of the lunatic, not against him, to be enforced in rem in the contingency and manner only prescribed by the statute. (*Central Lunatic Asylum v. Penick*, 102 Ky., 533; *Schroer v. Central Lunatic Asylum*, 24 Ky. Law Rep., 150; *Central Lunatic Asylum v. Drane*, 24 Ky. Law Rep., 176.) The court declined to enlarge by the process of construction the terms of this statute intended primarily as a regulation of the State's charitable purposes toward this class of unfortunates so as to make it include estates not clearly and specifically subjected by its terms. If the legislature should hereafter deem it wise and just to subject the homesteads of deceased pauper lunatics to the payment of the charge for their support while kept in the asylum, they will probably do so as explicitly as they have allowed all homesteads to be subjected to the payment of the debts contracted by the deceased himself, i. e., after his death, subject to the right of occupancy by the widow and his infant children.

Without noticing certain features of the improper charge embraced in this claim of the asylum, the court is of opinion that it should have been rejected in toto. This brings us to the consideration of another feature of this suit, that is, the right of the administrator to maintain this action under the circumstances, and especially of the liability of decedent's real estate to the rather extraordinary bill of costs brought about by this suit. No one could have died with less of personal estate than Lawrence Pfanmiller had, for he had none. The record shows that he had not even a rag, nor was it supposed that he had. He had been admitted to the asylum as a pauper. It knew that fact, and had so entered it upon its books. It procured the appointment of the administrator, and doubtless apprised him of the condition of the decedent's estate so far as it had information. Nor is there a suggestion in the record, save as to the item of taxes, which we will notice presently, that the decedent owed anything besides the claim to the asylum. Indeed there does not appear to have been the slightest necessity for an administrator to this estate. Under this state of facts appellant contends that the appointment of the administrator was void. In this we can not concur. Unless the statutes so require, and except in the case of nonresident decedents, the possession of an estate by the decedent is not a prerequisite to the jurisdiction for the appointment of an administrator. (Section 93, *Schouler on Executors and Administrators*, and cases collated at page 762; 11 Am. & Eng. Encyc. of Law, 2d edition.)

Our statutes on this subject are as follows:

"Section 3894. When any person shall die intestate, that court shall have jurisdiction to grant administration on his estate that would have jurisdiction to probate his will, had he made one.

"Section 4849. Wills shall be proved before, and admitted to record by, the county court of the county of the testator's residence; if he had no known place of residence in this Commonwealth, and land is devised, then in the

county where the land, or part thereof, lies; if no land is devised, then in the county where he died, or that wherein his estate, or part thereof, shall be, or where there may be any debt or demand owing to him."

The decedent's place of residence in this Commonwealth was Jefferson county. Therefore, under these statutes, that court had jurisdiction to appoint an administrator. Jurisdiction to appoint an administrator, however, does not mean that an administrator is necessarily to be appointed in the case of every one who dies intestate. If the court deem it proper, or probable, even, if it have doubts about the propriety of the appointment, it should be made. The rights and duties of such administrator are another question. His right is to have the possession and custody of the personal property of the decedent not exempt under the statute from distribution and sale; to collect the debts and demands due the decedent; to pay same to the creditors and distributees, and to represent his estate in litigations against it seeking to charge it with a personal liability. Under section 428 of the Civil Code "a representative, legatee, distributee or creditor of a deceased person may bring an action in equity for the settlement of his estate."

If personal estate has come to the hands of the administrator which is insufficient to satisfy all of the debts of the decedent, and if there is real estate descended, the personal representative is authorized by this section to institute an action for the settlement of the estate, for he is interested therein; his own accounts, the priority of claimants to the funds in his hands for distribution, the extent of the pro rata that may be adjudged against the personal estate in favor of creditors, are matters about which he is entitled to have the conclusive judgment of a court of competent jurisdiction for his own protection. For simplicity, and to avoid numerous suits, he is permitted to bring in the heirs at law, and have the real estate subjected in so far as the personal property is insufficient to pay the debts. But where there is no personalty, when nothing has come or can come to the hands of the administrator (in this State he having neither right nor duty to take charge of the realty of the decedent or rents accruing after his death), it is doubted if he should bring a suit for a settlement of the estate. The Code authorizes any creditor or distributee of a deceased person to bring such an action in their own behalf. In the case at bar there is no excuse for the intermeddling of an administrator. He has no accounts for settlement, no liabilities from which to be discharged, no interest to be protected. The sole apparent purpose of such a litigation can be only either to aid at the extraordinary expense of the heirs at law some claimant in the litigation against the decedent's estate, or to get for the administrator or his counsel certain fees for their services.

In the absence of some tangible personal estate, choses in action, or debts owing to the decedent, the administrator may properly refrain from bringing such an action; but if he should have doubts as to his duties in the premises, and as to the assets and liabilities of his intestate, the action will be brought subject to the relief finally granted, that is, if it should be finally adjudged that the decedent owed nothing, and there was nothing that came, or could come, to the hands of the personal representative for administration, the action should be dismissed as to the defendants with a

judgment to them for their costs. If the administrator fails to make good the allegations of his petition he should not be allowed to burden the heirs at law with an onerous bill of costs, but should be turned out of court upon the same terms as other unsuccessful litigants.

An effort was made to show that the decedent owed taxes to the city of Louisville when the suit was brought. The taxes had been assessed, it is true, on the first of September, but were not due until some time after this suit was brought. The city did not present a claim, and is not claiming in this action that decedent owed it anything for taxes or otherwise. The tax was against the real property and a lien thereon, it is true, but it is not a debt, and, at any rate, there was no excuse for this premature suit to have the property subjected to its payment by a suit in chancery before there had been default by those legally chargeable therewith.

The judgment is reversed and cause remanded, with directions to dismiss the petition as well as the cross petition of the Central Lunatic Asylum for the Insane.

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BAXTER, &c. v. ISAACS, &c.

(Filed February 11, 1903—Not to be reported.)

Wills—Fee-simile title—B., by the terms of his will, bequeathed to his wife 210 acres of land during her life or widowhood. By a subsequent clause of the will he devised this tract of land, subject to the life estate given to his wife, to his son, J., and in a still later clause of the will he provides that if either of his children, naming them, should die without issue living at their death, the portion above devised to them respectively should go and pass to the survivors equally. After the death of the wife J. sold and conveyed the land, and this appeal involves the validity of the title conveyed by J. Held—That J. took under his father's will a defeasible fee, subject to be defeated by his death without living issue before his mother. As he survived her he became invested with the complete fee-simple title, which passed under his deed to his vendee.

W. J. Lisle, W. C. McChord and T. L. Edelen for appellants.

J. H. Thurman for appellee Isaacs.

Thompson & Spaulding for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Burnam.

This is an appeal from a judgment of the Marion Circuit Court construing certain clauses of the will of William Baxter. By the first clause in his will he bequeathed to his wife, Elizabeth Baxter, a tract consisting of 210 acres, on which they resided at the date of the execution of the will, during her life or widowhood. By a subsequent clause of the will he devised this tract of land, subject to the life estate given to his wife, to his son, James H. Baxter, and in a still later clause of the will he provides that if either of his children, Lafayette, Edward B. W. A., James H. or Elizabeth Baxter, should die without issue living at their death, the portion above devised to them respectively should go and pass to the survivors equally. The will was probated in the Marion County Court in 1857. The wife of deceased

died in 1859. In June, 1865, J. H. Baxter conveyed his interest in the tract of land devised to him by general warranty deed to his brother, Lafayette Baxter. During the same year Lafe Baxter executed a note to the Marion National Bank for \$4,600, which his brother, W. A. Baxter, signed as his security, and to protect him from loss on account of his suretyship upon this note, and to secure the payment thereof, Lafe Baxter mortgaged to him this 210 acres of land, which had been conveyed to him by his brother, J. H. Baxter. W. A. Baxter died in April, 1889, leaving the note to the bank unpaid, and it was renewed by Lafe Baxter, with his brother, E. B. Baxter, as surety, and Lafe Baxter executed to him also a mortgage on the same tract of land to protect him as surety. In November, 1890, Lafe and E. B. Baxter made a general assignment of all their property to J. Q. Brown for the benefit of their creditors, including this 210 acres. On the 9th of February, 1891, Brown sold it as assignee at public outcry to Mat Isaacs for \$6,280 88, and conveyed it to Isaacs by general warranty deed, in which Lafe Baxter and E. B. Baxter and his wife united. The clerk's office of Marion county, and all the records and documents filed therein were burned in 1863. In January, 1901, the appellants, children of W. A. Baxter and grandchildren of William Baxter, procured what purported to be a certified copy of the will of William Baxter, from their uncle, Lafe Baxter, and again put it on record, just forty-four years after the death of their grandfather. They then instituted this suit, in which they claim that under the will of their grandfather their father, W. A. Baxter, inherited one-fourth of the 210 acres of land devised to their uncle, J. H. Baxter, who they allege died childless and unmarried in 1872; and that their father, W. A. Baxter, did not dispose of this interest during his lifetime; and that as his heirs at law they are entitled to be put in possession of it.

Four distinct issues are raised by the pleadings in the case: First, it is denied that the alleged copy of the will of William Baxter put on record in 1901 was ever duly probated; second, that J. H. Baxter, under the will, took a defeasible fee which ripened into a fee simple at the death of his mother in 1859, which passed to his brother, Lafe, under the deed made to him by J. H. Baxter in 1865: third, they rely upon an estoppel; fourth, they interpose a plea of limitation. But our view of the law only makes it necessary for us to determine what interest J. H. Baxter took under the will of his father in the 210 acres of land, one-fourth of which appellants seek to recover.

As this court has so frequently considered clauses in wills similar, if not identical, with those in the will at bar, we deem it unnecessary to enter into an elaborate discussion of the question. In the early case of *Birney v. Richardson, &c.*, 35 Ky., 424, the language of the will construed is in these words: "I lend unto my beloved wife, Mary Richardson, all my estate, both real and personal, during her widowhood, and if she marries, at her marriage my whole estate, as above mentioned, to be taken out of her hands by my executors hereinafter mentioned and equally divided among my children (naming children). \* \* \* If any or either of the above-mentioned children die without lawful heirs begotten of their body, then his or her part of the estate to be equally divided among my surviving children."

Chief Justice Robertson, in construing this clause of the will, said: "The



testator directed and seemed to contemplate but one division, and that was on the marriage of his widow. In directing his executors in that event to take his whole estate and divide it equally among his five children, he added, in effect, that if any of them should in the meantime die without issue, the division should be made among the others, that is, the division directed to be made upon the marriage of his widow for, after such division, he directed no other distribution. The dying without issue seems to have been intended not as a qualification of the right of each legatee after actual distribution among them, but as an explanation merely as to the mode of division, and a restriction upon the preceding and legatory sentence as to the persons who should be entitled to participate in the division directed to be made on the widow's marriage; in other words, the dying without issue was to affect that division, but not the right of the legatees after distribution, according to the will."

In the very recent case of *Forsythe v. Lansing*, Ex'or, 29 Ky. Law Rep., 1064, the devise was to the husband for life, and at his death to the three sons of testatrix. In the seventh clause of her will she provided that: "If either of my sons die childless, then in that event, his interest in my estate, and the above devises, is to go to the other living brothers, and in the event two of my sons should die childless, then their interest is to go to the others."

It was held that under this will the three sons of testatrix were devised a defeasible fee, which ripened into a fee simple at the death of the father. In more recent case of *Lewis v. Shropshire's Trustee*, 24 Ky. Law Rep., 333, the clause of the will construed was as follows: "I bequeath to my beloved wife, Katherine Darnaby, the whole of my estate, both real and personal, during her natural life, and at her death to be equally divided among my children. \* \* \* If any of my children should die leaving no heir or heirs of their body begotten, then I desire that their portion of my estate be equally divided between my surviving children; but should any of my children die leaving heirs, then my grandchildren to have their parent's portion of such child dying without issue."

In that case it was held that the children took a fee simple subject to be defeated only in the event of their death prior to that of the mother. This rule of construction is in harmony with section 2343 of the Kentucky Statutes, which reads as follows: "Unless a different purpose appear from express words or necessary inference, every estate in lands created by deed or will, without words of inheritance, shall be deemed a fee simple, or such estate as the grantor has power to dispose of." And is supported by numerous other decisions. (*Pol v. Benning*, 48 Ky., 623; *Trakton v. Woodson*, 84 Ky., 206; *Duncan v. Kennedy*, 72 Ky., 582; *Furgerson v. Thompson*, 87 Ky., 519; *Wills v. Wills*, 85 Ky., 486; *Dickerson v. Odgen's Ex'or*, 89 Ky., 162; *Prewitt v. Holland*, 92 Ky., 641; *Banks v. Ballard's Ass'ee*, 83 Ky., 481; *Aultman Co. v. Gibson's Guardian*, 23 Ky. Law Rep., 2296.)

We are, therefore, of the opinion that J. H. Baxter took under his father's will a defeasible fee, subject to be defeated by his death without living issue before his mother. As he survived her, he became invested with the complete fee-simple title, which passed under his deed to Lase Baxter in 1866.

Judgment affirmed.

(Previous publication omitted by mistake.)

ROSS v. COMMONWEALTH.

(Filed November 22, 1900—Not to be reported.)

Criminal law—Continuance—Evidence—Instructions—Conspiracy—Appellant prosecutes this appeal from a conviction for murder, and insists that the court erred to his prejudice in refusing to grant him a continuance on account of absence of a witness for him, but permitted said deposition to be read as evidence instead of requiring the attorney for the Commonwealth to admit the truth of the statements. Held—That under amendment to section 189, Criminal Code of Practice, the court at a term subsequent to that at which the indictment was found may permit the affidavit as to the statements of an absent witness to be read as the deposition of said witness, and while the court may, in order to promote the ends of justice, require that the statements shall be admitted as the truth, the court did not, in this case, abuse its discretion in refusing to require said statements to be read as true. This court is not disposed to reverse the lower court on this point unless its abuse was flagrant. The Commonwealth was properly permitted to introduce a witness to prove that a witness introduced by the defendant had, previous to the trial, admitted that she was not present at the difficulty about which she had testified. It was not error for the court to admit this contradictory testimony without admonishing the jury that it was competent merely for the purpose of contradiction. It was not prejudicial for the court to use the language "that there were no other safe means of escape." As the evidence tended to show that appellant inflicted the fatal wound, it was not error to refuse to give an instruction defining conspiracy.

John K. Hendrick, J. W. Bush, C. W. Watts and J. C. Hodge for appellant.

Robt. J. Breckinridge for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Paynter.

This is the second appeal in this case. (Ross v. Commonwealth, 21 Ky. Law Rep., 1844.) The appellant filed an affidavit, and moved the court for a continuance of the case because of the absence of Haggard Nickell, whose testimony, as stated in the affidavit, would have had the effect of contradicting one Howell, who was a witness for the Commonwealth. The indictment had been returned several terms before the one during which the motion for a continuance was made, and the court ruled that the affidavit could be read as the deposition of the absent witness. Section 1 of the act (Act May 15, 1886) amendatory of section 189 of the Criminal Code of Practice reads as follows: "That whenever, in any criminal or penal action pending in any of the courts of this Commonwealth, an application shall be made by the defendant for a continuance, based upon affidavits stating the absence of one or more material witnesses, and the facts which such absent witness or witnesses would, if present, prove, the attorney for the Commonwealth shall not be compelled, in order to prevent a continuance, to admit the truth of the matter which it is alleged in the affidavit such absent witness or witnesses would prove, but only that such absent witness or witnesses would, if present, testify as alleged in the affidavit. In which event the defendant may, on the trial, read such affidavit as the deposition of such

absent witness or witnesses, subject, however, to exception for irrelevancy or incompetency; and the attorney for the Commonwealth shall be permitted to controvert the statement of such affidavit so read by other evidence, and to impeach such absent witness or witnesses to the same extent as if he were personally present: Provided, however, the court may, when, from the nature of the case, it shall be of the opinion that the ends of justice require it, grant a continuance, unless the attorney for the Commonwealth will admit the truth of the matter which it is alleged in the affidavit such absent witness or witnesses would testify to." The attorneys for the appellant certified that it was important to have the absent witness present in court to testify, so the accused might get the full benefit of his testimony. Section 1 provides that the court may, when it shall be of the opinion that the ends of justice require it, grant a continuance, unless the attorney for the Commonwealth will admit the truth of the matter which it is alleged in the affidavit such absent witness or witnesses would testify to. This section places it within the discretion of the trial court to determine whether or not the ends of justice require the granting of a continuance unless the attorney for the Commonwealth will admit the truth of the matter alleged in the affidavit. This court would not reverse the court below in the exercise of the discretion authorized by the section unless its abuse was flagrant. It was intended that the trial judge should have a very large discretion in the matter, because the peace of the Commonwealth requires a speedy trial of those who are charged as being guilty of offenses against the criminal and penal laws of the State. In this case the court properly exercised the discretion conferred upon it. Other witnesses testified to substantially the same thing to which it was stated in the affidavit that Nickell would testify.

Nola Miller was introduced as a witness for the defendant, who testified that she saw some part of the difficulty in which the deceased lost his life. The Commonwealth introduced witnesses to prove that she told them that she had not seen any of the difficulty. It is insisted that the court erred in permitting this to be done, without instructing the jury that this evidence could only be considered by it for the purpose of affecting her credibility. If she had testified to facts beneficial to the defense, and the Commonwealth had introduced testimony to prove that she had made other statements with reference to the occurrence, which, if testified to by her, would have tended to establish the guilt of the accused, then it would have been the duty of the court to have told the jury that the statements which the Commonwealth proved she had made, tending to establish the guilt of the accused, could not be taken as evidence against him, except for the purpose of contradicting her. In other words, it would not have been substantive testimony. The rule sought to be applied here has no application, because the statements which the Commonwealth proved that she made did not tend to establish the guilt of the accused, but were offered simply to impeach her testimony by showing that she had admitted a lack of knowledge as to the circumstances attending the difficulty.

Without going into a discussion of the question as to whether instruction No. 5 was erroneous, it is sufficient to say that it embodies the exact language suggested by this court on the former appeal as being appropriate to be used in the instruction. It is the law of this case, whether it was errone-

ous or not. Even if it had been error to use the language, to wit, "that there were no other apparently safe means of escape, it was not prejudicial to the rights of the accused."

From the testimony in the case the Ross boys brought on the difficulty, and did not retire from it until after the fatal wound was inflicted. The indictment charges that the appellant and his brother Tom conspired to murder Walter Hooks by stabbing him with a knife, etc. It is insisted that the court should have given an instruction defining conspiracy. It was unnecessary to do so, because it was admitted on the trial that the appellant inflicted the wound which resulted in Hook's death, and the jury found that he did not do it in his own or his brother's defense. Whether he did or did not conspire with another to slay the deceased, if he did it, not in an affray or sudden heat of passion, or in his necessary self-defense, or that of his brother, he was guilty of murder. We do not think the court erred in failing to give an instruction defining conspiracy.

The appellant is under twenty-one years of age, and established a good character; and while the penalty fixed by the jury is heavier than that fixed by some juries in similar cases, we can not say that the defendant has not had a fair trial.

The judgment is affirmed.

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LOUISVILLE & NASHVILLE R. R. CO. v. MASON.

(Filed February 11, 1903—Not to be reported.)

Railroads—Negligence—Instructions—Pleading—Appellee brought this action for damages for injuries sustained by him by reason of having been jerked or thrown from the train as he was about to alight therefrom at his destination as a passenger. A judgment was rendered in his favor, from which this appeal is prosecuted. The complaint is urged as to the instruction defining the measure of damages. The first point made is that it submitted to the jury the right to assess damages for loss of time suffered by appellee. Held—That the claim for loss of time is not specially pleaded, therefore, neither proof can be heard nor a recovery allowed therefor. The instruction fixing the measure of damages is erroneous in that it uses the following words: "And all such further injury, if any, temporary or permanent, which they may believe from all the evidence has accrued, or is reasonably certain to accrue, as the direct result of said injury. Said words should have been omitted, as it leaves the jury no guide except their conjecture in fixing the other damages. The permanent damages to which appellee is entitled is a permanent reduction of appellee's power to earn money resulting from the injury. As appellant was a man of middle age and for some years had been in feeble health and not able to do more than half a man's work, the jury should have been told that in estimating the amount of damages they should take into consideration the age and situation of the plaintiff and his earning capacity sustained to the injured limb. Appellant complains because the court refused to give an instruction, to the effect that appellee was not entitled to recover any sum for damage resulting from improper treatment of the injury. Held—That said instruction was properly refused as the pleading was insufficient to authorize a finding on this issue. Upon a return of the case the plaintiff should be allowed to amend his petition concerning the loss of time, and defendant should be allowed to amend

its answer concerning the special matter of contributory negligence, the neglect of treatment of the injury after it was inflicted.

E. M. Dickson, E. W. Hines and B. D. Warfield for appellant.

Kennedy & Williamson for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee, a passenger on one of appellant's trains, sues for an injury done to him by reason of having been jerked or thrown from the train as he was about to alight therefrom at his destination. He alleges that he sustained a serious injury to his hip, inflicting great and constant pain, and permanently impairing that member, so as to destroy, or at least materially affect, his ability to work.

Appellee claims that after the station had been announced the train had stopped, and that he was in the act of going down the steps when it suddenly started again with a violent jerk, and without warning, whereby he was thrown to the ground and caught between the steps of the moving train and the platform and dragged some distance, inflicting the injury complained of. A number of witnesses testify to having seen the accident, substantially corroborating appellee's version of it. An equal or possibly greater number, with apparently equal opportunities for seeing the occurrence, testify that the train had not stopped when appellee stepped from it, still holding to the iron railing at the steps, and that he was thereby thrown to the ground and injured. This question, however, was properly submitted to the jury for its determination, and they have found in favor of appellee. We can not say that there is not sufficient evidence to support the jury's finding, or that it is palpably against the weight of the evidence.

The following instruction was given to the jury:

"1st. It is admitted by the pleadings that on the 11th day of August, 1900, the defendant received plaintiff as a passenger on one of its trains, and agreed to carry him from Carlisle, Ky., to Pleasant Valley, Ky., both of said places being regular stations on the line of defendant's road, and if the jury believe from all the evidence that the defendant, by its agents and employes, cried out, 'all off for Pleasant Valley,' as said train was slowing up for said station, and that plaintiff then immediately left the car in which he was riding, as soon as the train stopped, and immediately proceeded to go down the steps leading from said car to the place where passengers usually alight at said point, but that before plaintiff had reasonable time to get off said steps the defendant, by its agents and employes, carelessly and negligently caused said train to start forward with a jerk, and that said forward movement of the train threw plaintiff forward and off of said steps to the ground, whereby he was injured, they ought to find for the plaintiff in damages in such a sum as will reasonably compensate him for his physical and mental suffering, if any, and loss of time, if any, and all such further injury, if any, temporary or permanent, which they may believe from all the evidence has accrued, or is reasonably certain to accrue, as the direct result of said injury; and if the jury further believe from all the evidence that said injury was the result of gross carelessness and negligence on the part of the defendant, they may in addition to such compensatory damages

as above indicated, award, in their discretion, punitive damages, not exceeding in all \$5,000, the amount claimed in plaintiff's petition."

The complaint is against that part of the instruction defining the measure of damages. The first point made against the instruction is that it submitted to the jury the right to assess damages for loss of time suffered by appellee. The petition contains this allegation only on this subject: "That in addition to his (plaintiff's) suffering he has been unable since he received said injury to do ordinary farm work, and that he has been permanently injured and disabled by reason of the injuries and wrong aforesaid, and has been damaged in the sum of \$3,000."

This allegation would seem more especially to refer to the extent and nature of plaintiff's injury than to the fact that by reason of it he had lost time. But it also conveys the idea that by reason of the injury plaintiff had been unable to do farm work, and because of that fact he had lost time of a peculiar and special value. It is not stated in the pleadings that he was a farmer, or had ever been so employed, nor is the damage resulting from his being impaired in his power to follow this special vocation set out.

It is the well-settled rule, and a just one, that a claim for special damages, such as for loss of time, where it is of special value, medical bills, etc., must be specially pleaded before either proof can be heard or a recovery allowed therefor. (*Jesse v. Shuck*, 11 Ky. Law Rep., 463; *L. & N. R. R. Co. v. Reynolds*, 24 Ky. Law Rep., 1402.)

Appellant had a right to have the matters relied upon so pleaded that it could determine whether it would admit or deny the averments relating thereto. If the petition had been taken pro confesso by reason of the failure of appellant to plead, appellee could, as special damages, have recovered at most but a nominal sum. The instruction, however, is, in our opinion, susceptible of graver criticism than the one just made, in that it authorizes the jury to compensate appellee "for all such further injury, temporary or permanent, which they may believe from all the evidence has accrued, or is reasonably certain to accrue, as the direct result of said injury." What other injury? What standard or measure is here given to the jury? No limitation is placed upon their imagination or conjecture. At best it has been found extremely difficult, if not impossible, to accurately measure damages in such cases under the most carefully guarded legal limitations. The jury should be limited in assessing damages for personal injuries, not resulting in death, independent of punitive damages, to compensation which in its legal signification consists in remuneration for loss of time, necessary expenditures, for mental and physical suffering resulting from the injury, and for permanent disability, if such be the result, and where proper averments relative thereto are made, and the court should so inform the jury, instead of leaving to them to determine the legal import of the true damages sustained by the plaintiff. (*Parker v. Jenkins*, 3 Bush, 591.) The permanent disability referred to is a permanent reduction of appellee's power to earn money resulting from an injury caused by the negligent act of appellant in question. (*Muldraugh's Hill, C. & C. T. P. Co. v. Maupin*, 79 Ky., 106; *L. & N. R. R. Co. v. Case*, 9 Bush, 736.)

It was shown in this case that appellee was a man past middle age, and  
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there was some evidence that for some years he had been of infirm health, and that he had frequently complained that he was unable to do more than a half day's or half a man's work. It was not proper, therefore, for the jury to have considered the injury sued for, assuming him to have been a robust person, sound in health, but they should have been told that in estimating the amount of damages they should take into consideration the age and situation of the plaintiff, and his earning capacity, in fixing the damage sustained by the want of the limb injured. (*Greer v. L. & N. R. R. Co.*, 94 Ky., 177.)

The phrase, "and all such further injury, if any, temporary or permanent, which they may believe from all the evidence has accrued, or is reasonably certain to accrue, as the direct result of such injury," should have been omitted.

Appellant asked, and the court refused to give, the following instruction: "The court instructs the jury that the plaintiff is not entitled to recover any sum for damage resulting to him from any unskillful or improper treatment of any injury he may have received in the accident complained of as occurring at Pleasant Valley."

This instruction is predicated upon this line of evidence introduced by appellant at the trial; the condition of the injured limb at the time of the trial showed that it was lengthened about two inches more than normal. This was because the thigh bones had left the acetabulum. It was the theory presented by appellee that this condition of the hip joint was caused by the severe wrench and contusion received when he was thrown from appellant's train, by which the ligaments about that joint were ruptured and torn, allowing the femur to slip down. There was evidence, however, for appellant that appellee did not call a competent and skillful physician when injured; that he neglected the advice and directions his physician gave him and refused to obey them; that by his own negligence in persisting in walking about upon the injured limb, and in failing to have it treated by a competent and skillful surgeon at the time, he has so aggravated his injury as to produce the permanent ill effect of which he complains, and that but for this species of his negligence the injury could have been and would have healed entirely, and within a few weeks, or, at most, a few months.

A very satisfactory treatment of this subject may be found in Thompson's Commentaries on the Law of Negligence, section 202. It is there said, and sustained by the authorities cited: "Undoubtedly the person injured is bound to use ordinary care in treating the injury, and can not recover from the author of the injury enhanced damages growing out of his own want of ordinary care in procuring medical or surgical aid to treat it. In other words, if he neglects to use such means to effect a recovery as an ordinarily prudent person would use, under like circumstances, he can not recover damages for any aggravation of his injury, growing out of such neglect. \* \* \* But his neglect in this regard bears only upon the extent, and not upon his right of recovery for the injuries. \* \* \* It is his duty to use ordinary care, under the circumstances, in employing surgeons, nurses, etc.; but, having done so, the law does not make him an insurer that they will commit no mistakes in treating him. \* \* \* If he employs a reputable physician and surgeon, and follows his directions as to the treatment

of the injury, until such physician or surgeon discharges himself from the case, the patient can not be charged with negligence in causing an aggravation of the injury, because the result of it was more severe than was anticipated. \* \* \* Negligent injuries have been some times aggravated by delay in calling in the services of a physician or surgeon. In such a case it seems that it would generally be a question for the jury whether such delay was the result of negligence or of want of ordinary care under all the circumstances of the case." (L. & N. R. R. Co. v. Kingman, 18 Ky. Law Rep., 39; Central Passenger Co. v. Rose, 15 Ky. Law Rep., 211; Seord v. St. P., M. & M. R. R. Co., 18 Fed. Rep., 221.)

The court is of opinion that the instruction asked for and quoted above is not broad enough to prevent all the features of this question as they should have been, and furthermore we are of opinion that under the issues in this case an instruction upon the law on this subject was not authorized. In this jurisdiction contributory negligence must be pleaded. In this case it is pleaded in this language: "The defendant for further answer says that the plaintiff, by his own carelessness and negligence, caused the injury or injuries of which he complains in his petition, and but for such contributory negligence on the part of the plaintiff said injury or injuries complained of by him in his petition herein would not have occurred to, or have been sustained by, him."

This, however, has reference to the act by which the injury was inflicted. If the defendant contemplated putting in issue the plaintiff's contributory negligence subsequent to the occurrence for which he sued, which neglect went to aggravate his damages, the facts constituting it should have been alleged so as to have allowed an issue to be joined thereon, and the production of the proof to meet it. Under the state of pleadings the court is of opinion that the instruction was properly refused. Upon the return of the case, however, the plaintiff should be allowed to amend his petition, if he elects to do so, concerning the loss of time asserted in his proof, and the defendant should be allowed to amend its answer, if it elects to do so, concerning the special matter of contributory negligence discussed.

Judgment reversed and cause remanded for proceedings not inconsistent herewith.

# REPUBLIC IRON AND STEEL WORKS v. GREGG.

(Filed February 12, 1908—Not to be reported.)

Master and servant—Negligence—Evidence—Appellee was an employe in appellee's employ in its mill, and had been so employed about twenty-five years, and for five years had operated what is known as the alligator shears. At the time the injuries sued for were sustained appellee was engaged in cutting gas pipe with the shears. On the afternoon previous appellee had complained to the millwright that his shears were dull and loose, and he promised to repair same. On the morning following he renewed his complaint to the millwright, who again promised to repair same, but before he did so a piece of pipe was thrown up, catching his hand between the iron and the shears, inflicting severe injuries to his hand. A suit for damages resulted in a verdict and judgment for \$860 for appellee, from which this appeal is prosecuted. On the trial appellant offered to prove that the same



shears were operated for several weeks afterwards without resulting in any injury. On the other hand, appellee offered to prove that subsequent to this injury the shears were screwed up, which prevented any injury afterwards occurring. The court properly rejected the testimony offered by each party, as it was incompetent. The court properly instructed the jury as to the duty of appellant to provide machinery that was reasonably safe for his servants, and directed the jury that appellee was not deprived of his right to recover damages by continuing the operation of said machinery for a reasonable time after the millwright had promised to repair same. The verdict is not against the weight of the evidence, and is not excessive.

Myers & Howard and Ed. W. Strong for appellant.

B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

Appellee, George W. Gregg, who is sixty-seven years old, was a laborer in appellant's employ in its mill. He had been employed in the mill twenty-five years, and for five years had operated what is known as the alligator shears, which are in principle like a pair of scissors, the knives being about two feet long; the lower arm is stationary; the upper one is worked by means of a crank set in motion by machinery. Until about five days before the accident he had been employed in cutting sheet iron, but for the last five days had cut gas pipe, one inch in diameter. His duty was to cut the pipe into pieces about eight inches long preparatory to its going into the furnace. On the evening before he was injured, according to his testimony, he complained to the millwright that his shears were out of order, the knives being dull and loose. The millwright promised to fix them, but failed to do so. The next morning he made the same complaint and the millwright again promised to fix them, but before he had done so, about 10 o'clock that morning, when he was holding a piece of pipe about eighteen or twenty inches long, in the effort to cut it with the shears, the pipe was thrown upward against the upper jaw of the shears, catching his left hand between the two, and inflicting an injury which substantially destroyed the use of that hand. The jury to whom the case was submitted found a verdict for the plaintiff in the sum of \$850, which is not excessive under the evidence.

The chief complaint relates to the exclusion of evidence by the court. The defendant insisted that the shears were not out of order, and the proof offered by it as to the condition of the shears at the time of the injury was all admitted by the court. In addition to this it offered to show that after the injury, for a period of from four to six weeks, the same shears were operated by three other employes in the same condition as when appellee was hurt, and that no accident or injury resulted therefrom. This evidence was excluded by the court. The plaintiff in rebuttal offered to show that after he was hurt, and before any one else worked with the shears, the assistant of the millwright tightened up the bolts and put them in order. This evidence was also excluded. After reading the entire bill of exceptions we do not see that there was any substantial error in these rulings of the court. On the contrary, we are rather inclined to think that the testimony

of the witnesses was substantially gotten before the jury, unless it was competent to show that no accident or injury resulted from the operation of the shears after appellee was hurt. Proof of this sort would only furnish grounds for an argument, and the weight of it would depend on the probability of the conditions being the same. There might be several reasons why no accident occurred after appellee was injured, and yet his cause of action for his injury may have been well-founded in fact. A party can not make evidence for himself. The mere absence of any injury for six weeks after appellee was hurt might have been due to special steps taken in anticipation of a suit, or to precautions suggested by his injury. The court allowed great latitude to the defendant in getting before the jury all its witnesses knew as to the actual condition of the shears at the time of the injury, and, on the whole, we think that the defendant's case was fairly gotten before the jury.

The millwright denied that he had promised to repair the shears, or that they were out of order, but the verdict of the jury is not palpably against the evidence on either of these questions. So short a time had elapsed after the making of the promise to repair, if it was made, that it can not be said that an unreasonable time had elapsed for the execution of the promise, and we do not see that there was any error in the instructions of the court on this subject. It is also complained that the instructions of the court do not submit to the jury whether the shears were in a reasonably safe and proper condition for use by appellee if he was exercising ordinary care; but the phraseology of instruction 1, given by the court, is substantially taken from instruction "A," asked by the defendant. Besides, by the instruction of the court the jury, in order to find for the plaintiff, were required to believe "that the plaintiff at the time of the injury, and in doing his work at said shears, was exercising such care as is ordinarily exercised by ordinarily careful and prudent persons under the same or similar circumstances in the same or similar business;" and also that "the shears mentioned in the proof, and at which plaintiff was injured, were in a defective condition, or in a condition unfit for work, and that the injury to plaintiff was caused solely by the said defective or unfit condition of said shears." The proof for the defendant was directed to showing that there was nothing wrong with the shears, and that the millwright had not promised to repair them. If the shears were in the condition as shown by plaintiff, the operation of them would necessarily be dangerous, for when the knives were loose and would not cut, they would naturally draw the thing between them which was intended to be cut, just as a loose pair of scissors will do when dull. The instructions of the court fairly submitted to the jury the real issue in the case. The question of contributory negligence, under the proof, was for the jury, and this, too, by appropriate instructions was clearly submitted to them. On the whole case, we see no substantial error in the trial.

Judgment affirmed.

## THOMAS, &amp;c. v. CONRAD.

(Filed February 12, 1908—Not to be reported.)

Landlord and tenant—Liability of landlord to repair—Correcting mistake in contract—Appellee purchased a building at a cost of \$40,000, and leased it to appellants for a period of ten years. Appellee agreed to add improvements to the building to cost \$15,200, and appellants agreed to pay as rental therefor annually a sum equal to 7 per cent. per annum on the total cost of the building and improvements, besides taxes and street improvements. Pursuant to the contract the appellants took possession of the property and for a period of five years discharged all the obligations of the lease. At the end of that period the roof, which had been placed upon the building as a part of the improvements, became so worthless by reason of natural wear and tear and natural decay that the building was worthless for a tobacco warehouse, for which it was used. Appellants requested appellee to put a new roof on, and he refused to do so. Appellants put on a new roof and withheld enough of the rent to pay for same, and this appeal involves their right under the lease to compel the landlord to pay for the new roof. One of the provisions in the lease is that the tenant will keep the property in as good condition as same is in when the improvements are completed, natural wear and tear excepted. Another provision is that at the termination of the lease the property is to be returned to the landlord in as good order as when received, natural wear and tear excepted. Held—That as there is no obligation in the lease requiring the landlord to make repairs, appellants can not require him to make same or pay for any that they may make. But as appellants aver that the provision requiring the landlord to make repairs was omitted from the lease by mistake, they are entitled to have the mistake corrected if such mistake was made, so as to conform to the agreement of parties.

Humphrey, Burnett & Humphrey for appellants.

Wm. Krieger and B. K. Marshall for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Paynter.

The appellants, W. J. Thomas, &c., leased from the appellee, Conrad, a certain building, situated at the corner of Tenth and Main streets, in the city of Louisville, for a period of ten years. The following facts appear: Conrad purchased the property for \$40,000, and agreed with the lessees to remodel the building in a way particularly specified at a cost of \$15,200, the work to be done under the supervision of the lessees. The lessees were to keep the property insured during the progress of the improvements and thereafter during the term of the lease. As a rental for the property the lessees agreed to pay the lessor annually a sum equal to 7 per cent. per annum on the cost of the property and improvements, which rental was to be paid quarterly, and, in addition thereto, they were to pay all city, State and county taxes, all street improvements and apportionment warrants assessed against the property by the city.

Pursuant to the contract the lessees took possession of the property, and for a period of five years they, or their assignee, discharged all of the obligations imposed by the lease. At the end of that period the roof, which had been placed upon the building as a part of the improvements, became so

worthless by natural wear and tear and natural decay that it no longer served the purposes of a roof, and could not be repaired. The only thing that could be done to enable the parties to occupy the warehouse (the building was to be used as a tobacco warehouse) for the storage of tobacco and the general purposes for which it was used was to place a new roof upon it. The lessees requested the lessor to put it on, but he refused to do so; thereupon the lessees did so, and withheld sufficient rent to reimburse them the expense. This action was instituted to recover the rent and the appellants sought to plead the cost of the roof as an offset against it. The foregoing facts were averred in the answer, to which the court sustained a demurrer.

The question here for consideration is as to the right of the lessees to place the new roof upon the building at the cost of the lessor. It is insisted that as the lessor did not agree to repair the building during the period of the lease, or to restore such parts as might be destroyed by natural wear and tear and decay, he was under no obligation to do so, and the lessees could not do so and compel him to pay the expense.

There are two provisions of the lease bearing upon this question, which read as follows: "And the second parties further agree and bind themselves, their heirs, executors and assigns, to make all repairs on the said property during the pendency of the said lease and to keep the said property in good and substantial repair during the continuance of said lease as the same is in when the improvements are completed by the said first party, natural wear and tear excepted."

Fourth paragraph: "At the termination of this lease, as herein provided, the second parties will surrender peaceable possession of said premises in as good order as when received by them in its completed condition, the improvement herein stipulated for having been made by the first party as aforesaid, natural wear and tear and natural decay and injury or destruction by fire or other cause, not the fault of the second parties, excepted."

At common law the covenant of the tenant to pay rent obligated him to do so, even though the premises were destroyed by inevitable casualty. (*Redding v. Hall*, 1 Bibb, 539; *Bohannon v. Lewis*, 3 T. B. Mon., 380; *Helburn v. Mefford*, 7 Bush, 174.)

If a tenant without any qualification agrees to repair and return the premises at the expiration of the term in substantially as good condition as when received, his violation of his covenant to do so will make him liable. (*Brashear v. Chandler*, 6 T. B. Mon., 150; *Proctor v. Keith*, 12 Mon., 254.)

In *Brashear v. Chandler* the tenant agreed that he would deliver the farm to the landlord in "good tenantable repair in every respect." The court held that he was compelled to do so, although the premises were not in good repair when received.

In *Proctor v. Keith* the tenant agreed "not to suffer any of the fencing to rot down and was to keep it in good repair, natural wear excepted." The fencing was washed away by a freshet, and the court held that the tenant's covenant imposed upon him the duty of rebuilding the fence.

At that time section 2297, Kentucky Statutes, was not in force. It reads as follows: "Unless the contrary be expressly provided for in the writing, no agreement of a lessee that he will repair, or leave the premises in repair, shall have the effect of binding him to erect similar buildings, if without

his fault or neglect the same may be destroyed by fire or other casualty; nor shall a tenant, unless he otherwise contracts, be liable for the rent for the remainder of his term of any building leased by him, and destroyed during the term by fire or other casualty without his fault or neglect."

Had the above statute been in force the court would not have compelled the tenant to restore the fence. (*Sun Insurance Office v. Varble*, 102 Ky., 758.)

In stating the foregoing conclusion we have practically agreed with counsel for appellee and for appellant. The lessees covenanted to keep the property in good and substantial repair during the continuance of the lease as same was when the improvements were completed, "natural wear and tear excepted." They agreed to surrender the premises in as good order as when received by them, "natural wear and tear and natural decay and injury or destruction by fire or other cause," not their fault, excepted. These stipulations certainly impose no obligation upon the lessees to make repairs upon the building rendered necessary by natural wear and tear and natural decay or injury or destruction by fire or other cause. Against such liability there is an express stipulation. The parties contemplated that it should be occupied for ten years as a tobacco warehouse, and that the rent should be paid during that period unless the appellees were exonerated by their contract or by the section of statutes quoted, or because of the failure of the lessor to keep an obligation imposed upon him by the terms of the contract.

If the building had been damaged or destroyed by fire or other cause, not the fault of the lessees, and the landlord refused to restore it, certainly the tenants could not be compelled to retain the building or premises and pay the rent. They were both exempted from this liability by reason of the statute and their covenants against it. It will be observed that there is no promise contained in the lease that, in the event the property is destroyed by fire or other cause, or that, if it should become untenable by reason of the natural wear, tear and decay, the landlord will repair or rebuild as the case might be. The lessees entered into the contract without providing against such a contingency. At common law, unless there was an express obligation to that effect, the landlord was not required to make repairs upon property during the term of the lease. He was entitled to collect his rent, even if the property was destroyed by fire or other casualty, although no obligation rested upon him to restore the property. The statute which we have quoted does not impose an obligation upon the landlord to repair or rebuild, but its purpose was to modify the rigor of the common law and to relieve the tenant from the liability to rebuild under covenant that he would keep the premises in repair, and to relieve him from the payment of rent during the remainder of the term if the leased building was destroyed by fire or other casualty without his fault or neglect. So the common law prevails, except as modified by the statute.

The authorities do not support the claim of counsel for appellants, that there is an implied obligation arising from the contract upon the landlord to pay the expense of the roof; they are against such claim. In *Proctor v. Keith* it appeared that there was no covenant in the lease which required the landlord to make the repairs. The tenant was injured by the lessor's failure to restore a fence which had been washed away by a freshet. He

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claimed that the landlord had verbally promised to do so. The lease, however, did not contain such a stipulation. The court was called upon to consider the question of the alleged promise, and said: "The agreement did not contain any stipulation upon the part of the lessor to make repairs of any kind; nor does it contain any provision exempting the tenant from the payment of rent, in consequence of the deterioration of the premises on account of unavoidable accident. No obligation was imposed upon the lessor either by law or by the terms of the original agreement of the parties, and there was no consideration for his promise, unless the lessee had a right to yield up and abandon the leased premises either because of the loss of the fences or by the terms of the agreement itself."

As the law did not impose the duty upon the lessor to restore the fence, the court looked for a covenant in the lease which would do so, but failed to find it, hence held that the verbal promise was without consideration. If under the terms of the lease under consideration the lessor could be made to put the new roof on the building, he, for the same reason, could have been compelled to replace the building had it been destroyed by fire or other casualty.

The supposed implied obligation would have been as efficacious in the one case as in the other. If lessees desire to protect themselves against such contingencies as has arisen in this case, they must see that it is provided for in the contract. The averments of the answer which tenders the issue discussed were demurrable. But in addition to them it is averred that if the contract can not be construed as imposing an obligation upon the lessor to make repairs, such provision was omitted by mistake of the draftsmen, as there was an agreement to the effect that the lessor was to make the repairs in question, and asked to have the contract reformed. These averments, if true, entitle the lessees to have the contract reformed in accordance with the agreement of the parties.

Judgment is reversed for proceedings consistent with this opinion.

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WHITEHEAD, JR. v. BROTHERS LODGE NO. 132, I. O. O. F.

SAME v. ELLIS.

(Filed February 12, 1903—Not to be reported.)

Interest—Jurisdiction—Appeals—These actions are here on appeal the second time, and involve the questions whether this court has jurisdiction of a judgment involving only the right to interest on the principal sum and whether appellants are entitled to interest on the amount due them on a contract for erecting a building. Held—That this court has jurisdiction of an action to test the right of a party to interest on a claim. Neither the reason nor spirit of section 950, Kentucky Statutes, would carry its provisions to the extent of preventing a party from having the judgment of this court on the question of the right to have interest allowed on his claim, there being a wide difference between the right to claim interest and the mere sum which may or may not happen to be due. Appellant is entitled to interest on the amount due him under his contract for building a house from the date the work was accepted by the architect.

R. A. Miller, Chapeze Wathen and Birkhead & Clements for appellant.

Sweeney, Ellis & Sweeney and H. M. Haskins for appellees.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Barker.

This case is here on appeal for the second time. The question involved is whether or not the lower court erred in refusing to allow appellant interest on the sums due him on the 1st day of May, 1896.

We think the case of the City of Louisville v. Henderson, 11 Ky. Law Rep., 796, is conclusive of the questions involved on this appeal. The money due appellant at the time the building was accepted by the architect was due on contract, and the appellee having had the benefit and use of the building, which was the subject of the contract from that time, and having refused to pay appellant what was due him on said day, are, in law and equity, bound to pay him interest as compensation for being deprived of the use of his money pending this litigation. This question was so decided in the case cited, and it is a correct exposition of the law on the subject. It is also conclusive of the jurisdictional question raised by appellees. An examination of the case will show that the appellant, city of Louisville, only appealed from so much of the judgment as allowed interest on the claim of appellee Henderson. The case had been many years pending in court, and the interest alone amounted to the sum of \$25,000; there was involved on the last appeal only the question of the right to charge appellant interest from the day appellee Henderson had finished his contract. This question had been decided adversely to the city in the court below, whereupon it paid the principal, the sum of \$28,646.01, and appealed from so much of the judgment as allowed interest on that sum from January 1, 1875, the interest, as said before, amounting to some \$25,000. The Court of Appeals took jurisdiction of the appeal and affirmed the judgment of the court below.

Section 950 of the Kentucky Statutes, which regulates jurisdictional questions of appeals to the Court of Appeals, is as follows: "No appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property if the value in controversy be less than \$200, exclusive of interest and costs; nor to reverse a judgment granting a divorce or punishing contempt; nor from any order or judgment of the county court except in actions for the division of land and allotment of dower; nor from any order or judgment of quarterly, city, police, fiscal or justice's court; nor from a bond having the force of a judgment. In all other cases the Court of Appeals shall have appellate jurisdiction over the final orders and judgments of all courts."

The object of fixing a minimum sum as constituting the jurisdictional line in appeals to the Court of Appeals, in cases for the recovery of money or personal property, was to relieve this court from the burden of deciding controversies over small and trifling sums of money and personal property, and neither the reason nor the spirit of the statute in question would carry the provisions to the extent of preventing a party from having the judgment of this court on the question of the right to have interest allowed on his claim, there being, in our opinion, a wide difference between the right to interest and the mere sum which may, or may not, happen to be due. This was clearly recognized in the case of the city of Louisville v. Henderson,

supra, else the court could not have taken jurisdiction of the appeal in that case, because, as said before, only the right to charge interest on the principal sued for was involved.

The case cited, when it returned from the Court of Appeals the second time, was in precisely the same condition as was the case at bar when it returned to the lower court. This court had, in both cases, named the sums for which the plaintiffs should be given judgment on their contracts, without having, in so many words, mentioned interest. In the case cited, the chancellor allowed interest; in the case at bar he refused it; in both cases the appeals were from the orders relating alone to interest.

We think the opinion in the case cited is sound, and must control the case. The amount in controversy, for the purpose of testing the right to interest as a legal principle on this appeal, is the amount due appellant under his contract in each case. Suppose, for instance, the holder of municipal bonds of the face value of \$1,000,000 should, in an action to enforce their payment after maturity be allowed by the lower court a judgment for their face value without interest, thus erroneously depriving the plaintiff of, say, \$50,000 of accrued interest; would not that be an anomalous construction of the statute, which would hold that the plaintiff was remediless as to so enormous an injury? A statement of the proposition seems to answer it.

We do not concur in the assertion of counsel for appellees, that the court below carried into effect the opinion of this court on the former appeal. An examination of the opinion will show that the court stated appellant's claim against the Brothers Lodge No. 132, 23 Ky. Law Rep., 81, as follows: "The plaintiff, Whitehead, also instituted an action in the Daviess Circuit Court against the Brothers Lodge, I. O. O. F., No. 132, seeking to recover judgment against it for \$3,455.10, with interest from May 1, 1896, being balance due upon the contract for the building heretofore referred to, and also instituted suit against W. T. Ellis, claiming judgment for \$1,175, with interest from March 1, 1896, being balance due upon contract with Ellis as aforesaid."

After having thus recognized the claim of appellant as bearing interest from a day certain, the court, on page 33 of the opinion, allowed certain parts of appellee's counterclaim against appellant, to wit, the appellee, Brothers Lodge, I. O. O. F., No. 132, was allowed \$1,000 in damages for failure of appellant to complete the building by the 1st day of January, 1896, and the appellee, Ellis, was allowed \$400 for damages for the same reason. The right of appellees to be credited by any judgments which they had paid in favor of Drach, Thomas & Bohne was also allowed, and perhaps some other small sums not necessary to be here enumerated; and then the court concludes its opinion as follows: "The judgments appealed from in the two cases of appellant against the Brothers Lodge, I. O. O. F., No. 132, and the judgment in the case of appellant against W. T. Ellis, are reversed and the cause remanded, with directions to enter a judgment in favor of appellant for the sums due him as balance upon his contract, after deducting the credits indicated herein.

Clearly, taking the opinion as a whole, it recognizes the right of appellant to interest on the claim due him, and it is certainly the law that he is entitled to such interest. This view of the opinion disposes of the question of



res adjudicate. We think the judgment tendered by appellant upon the last hearing in the court below contained a correct exposition of the law as enunciated in the opinion of this court on the former trial herein.

Wherefore, the judgment is reversed, with directions for proceedings consistent with this opinion.

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JORDAN, &c. v. FENNACY, &c..

(Filed February 18, 1908—Not to be reported.)

Title—Possession—This appeal involves the question of title to the boundary of land. Held—That appellant acquired no title by purchase as his vendor had previously conveyed her interest to others. The proof fails to show that appellant has acquired a title by possession alone.

J. R. Ward for appellants.

E. B. Wilhoit for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Settle.

The land in controversy is claimed by appellees under the Izrigg 1,000-acre patent and this court, in *Smith v. Fennacy*, 20 Ky. Law Rep., 1007, affirmed a judgment of the Carter Circuit Court which adjudged to appellees the legal title to the lands embraced in the Grayson patent of 7,000 acres, and the Izrigg patent of 1,000 acres. The appellant, Jordan, seems to have been a party to that action.

It appears that one Floyd previous to 1840 entered upon lot 11 of the Grayson survey and marked out a boundary of about 900 acres, extending into lot No. 10 of the Grayson survey, and lapping over the Izrigg survey, embracing a strip running entirely across lot No. 11. Floyd had, however, shortly theretofore settled on 50 acres of lot No. 10, which had been given him by Carter, the then owner of all these lands. The additional boundary seems to have been marked secretly by him, at any rate his claim thereto, which appears to have been purely possessory, was never successfully asserted by him or his children, and was never recognized by the holders of the legal title. After Floyd's death one of his daughters, Athellale, married Jake Perkins. She seems to have had, before this marriage, a daughter known as Sarah Floyd, who first married one Keith, from whom she was divorced. She then became the wife of the appellant, Jordan, who claims to have purchased of her the land in controversy before their marriage.

It is reasonably apparent from the record that Jordan derived no title by this alleged purchase, for it appears that Sarah Floyd, or Sarah Keith, as sometimes called in the record, had in the case of *R. B. Carter, &c. v. Charles Pearce, &c.*, decided in the Carter Circuit Court some twenty-five years ago, and before the alleged purchase of Jordan, compromised with the Carters, and by deed conveyed to them her entire interest in the Floyd boundary in consideration of which the Carters conveyed her the title to the 50 acres upon which her ancestor, old man Floyd, had settled.

The only remaining question is as to the sufficiency of appellee's possession. A great amount of proof was taken upon this point, and much of it is

conflicting. The chancellor, whose judgment is appealed from, came to the conclusion that appellant's possession is not of such a character as to overthrow appellee's legal title, and as our examination of the record has failed to disclose any error in that conclusion, the judgment is affirmed.

## LOUISVILLE, HENDERSON &amp; ST. LOUIS RAILWAY CO. v. McCUNE.

(Filed February 18, 1908—Not to be reported.)

Railroads—Negligence—Instructions—Appellee was a motorman on an electric car and his car was struck by a freight train at the crossing on Frederica street, in Owensboro, and knocked off the track, and appellant was thrown a considerable distance and suffered severe, painful and permanent injuries. An ankle and wrist were permanently injured. Appellee recovered a judgment for \$3,000 on the ground that said injuries were caused by the negligence of appellant's servants in backing said train at a high rate of speed, without giving warning of its approach. A reversal is asked on account of alleged prejudicial errors in instructions given. It is urged that the court improperly gave an instruction, which permitted the jury to give damages for expense incurred for medical or surgical treatment. Held—That this instruction was harmless, as appellee did not make any claim in his petition for special damages, nor did he prove any expense incurred for medicine or such treatment. Appellant claims that the permanency and seriousness of his injury was caused by getting out and walking too soon. Held—That this contention is not maintainable. There was no issue made in the pleadings on this matter, and, besides, the court confined the jury to the damages he sustained by reason of his being thrown from the car as the direct and proximate result of the injuries he received as the result thereof.

Helm, Bruce & Helm and Chapeze Wathen for appellant.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Nunn.

The appellant asks a reversal of this case for several reasons. The facts, as shown in the record, are, in substance, that appellant's railroad crosses the street railway at right angles on Frederica street in the city of Owensboro, Ky., a street, and at a point that is used extensively by the public, and where street cars cross appellant's tracks about every ten minutes.

The appellant's servants in charge of a freight train, composed of engine, tender and from eight to twelve cars with caboose, without any warning and without any one being on the caboose or cars, backed this train from the east at the rate of eight to twelve miles per hour and struck a street car, on which appellee was the motorman, and knocked the car off of its track and threw appellee a considerable distance and injured his hip, back, wrist and ankle. The jury gave him a verdict for \$3,000.

The appellant's witnesses fix the rate of speed at which the train was running at not more than four miles per hour, and that the bell was rung continuously, and two of the witnesses place one of the servants on the caboose, and say that he tried to attract appellee's attention to his danger. The appellant excepted to all of the instructions given by the court, which, taken

all together, were more favorable to it than it was entitled to. The main contention of appellant is that instruction No. 2 authorized the jury, in fixing the amount of damages, to consider the expense incurred for medical or surgical treatment. The appellee did not claim anything in his petition for special damages, nor did appellee prove any sum incurred for medicine or such treatment.

The language used in instruction No. 2, referred to, was evidently inadvertently used, and under the evidence in this case the error was harmless, and if the jury believed the appellee's evidence, and the evidence of his witnesses, appellant's servants in operating said train did not use "the highest" or any degree of care for the protection of persons using, or about to use, the crossing at Frederica street. The evidence at the trial, which was about a year after the injury, showed that the injured wrist was still enlarged and his injured ankle was in bad condition, and by four physicians that it was permanently injured; that one of the smaller bones was enlarged, the ligaments that held the foot in position on one side were torn loose from the bone and caused his foot to turn and he walked on the side of his foot, and that his power to earn money was lessened, at least one-half, and would so continue.

Appellant claims that the permanency and seriousness of his injury was caused by his getting out and walking too soon, i. e., about four or five weeks. There was no issue made in the pleadings on this matter, and, besides, the court confined the jury to the damages he sustained by reason of his being thrown from the car, as the direct and proximate result of the injuries he received as the result thereof. The jury by the instructions given were not allowed to give appellee anything for injuries caused or produced by his own improper or imprudent acts, if any, which enhanced his injuries. Instruction No. 6 was harmless, and not subject to the criticism made by the appellant, but it was not necessary for the court to give it, for the law on that point, as applicable to both appellant and appellee, was given in instruction No. 7.

Perceiving no error prejudicial to appellant the judgment is affirmed.

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HOME INSURANCE CO. v. WOOD.

(Filed February 13, 1908—Not to be reported.)

Insurance—Waiver of payment of premium—Instructions—In this action to recover the amount of loss on a policy of fire insurance issued by appellant, it was pleaded in defense that appellant was not liable for the loss on account of the failure of appellee to pay the premium when due, as agreed. In reply appellee pleads a waiver by the agent of the prompt payment and a waiver of the forfeiture of the policy. Held—That appellee's proof failed to show a waiver of prompt payment, and the court should have given a peremptory instruction to find for defendant. Appellee can not avail himself of the defense of sickness as preventing prompt payment of the premium. It is a well-settled rule of law that where the law itself creates a duty the nonperformance of it will be excused by an unavoidable accident previous to its performance. But this principle has no application to a case where a person has created a charge or obligation upon himself by an express con-

tract. In the latter case he will not be permitted to excuse himself therefrom by pleading an act of God rendering performance impossible.

Sims & Grider and Guy H. Herdman for appellant.

McQuown & Bradburn for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant issued to appellee a policy insuring his barn and contents for five years from the 7th of December, 1895, which contained the following stipulation: "It is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any installment of the installment note, given for premium upon this policy, remains past due and unpaid, or while any single payments of the premium remains past due and unpaid."

In consideration of the policy the appellee paid to the agent of the appellant \$7 in cash, and executed the following obligation: "For value received in policy, dated the 9th day of December, 1895, issued by the Home Ins. Co. of New York, I promise to pay said company, or order, by mail, if requested, at the office of its Western Farm Department in Chicago, Ill., \$28, in installments as follows: \$7 upon the 1st of December, 1896; \$7 on the 1st of December, 1897; \$7 on the 1st of December, 1898; \$7 on the 1st of December, 1899, without interest. It is hereby agreed that in case any one of the installments herein named shall not be paid at maturity, \* \* \* this company shall not be liable for loss during such default, and the said policy shall lapse until payment is made to this company at the Western Farm Department at Chicago."

The installment, due on the 1st day of December, 1899, was not paid at maturity, and the insured barn with its contents were burned up on the 2d day of December, 1899, whilst the installment premium remained unpaid. The company having declined to pay, appellee brought this suit to coerce payment. Appellant plead and relied on the foregoing provisions of the policy and note to avoid liability. Appellee in his reply seeks to escape the forfeiture provided for in the policy and note, for default in the payment, upon two grounds:

1st. Because this provision, he alleges, was waived by the defendant through its agent, Dearing, before the last installment of the premium became due.

2d. He alleges that about the last of November, 1899, he was taken violently ill, and was unable to attend to any of his business matters; and that whilst in this condition his barn and other property insured by the defendant was burned up. The defendant, in its rejoinder, denies the alleged promise or agreement made with Dearing, and alleges that on the 15th day of November they mailed to appellee the following notice:

"Chicago, November 15, 1899.

"John T. Wood:

"Your fifth installment of premium for insurance in the Home Ins. Co. of New York, \$7, falls due on the 1st day of next month. Please remit immediately the above-named sums by draft on Chicago or New York; or by

postoffice order, or express money office order, payable to the Home Ins. Co. of New York. \* \* \* \*

"We inclose herewith an addressed envelope, in which please return this sheet with the amount designated.

"Respectfully yours,

"H. H. WALKER, Secretary.

"P. S.—Do not fail to fill and sign the following blank attached below, and return this whole sheet with remittance in the return envelope. Write your name plainly, also the name of the postoffice at which you now receive your mail, so that we may change our records if your name or address is not recorded correctly."

Plaintiff testified upon the trial that three or four months before the installment became due he had an interview with John Dearing, the agent of the company, who called upon him to pay an overdue premium upon a policy of insurance upon his dwelling house, which he paid, and that at this time he asked Dearing if he had the note for the last premium on his barn, which fell due on the first day of the following December; that Dearing answered no; that he then said to Dearing: "If you will get that note and send it to the bank, I will pay. I had rather pay it now;" that in response, Dearing said that it was all right; that he would bring it down some time when he came on other business. Plaintiff admitted, upon cross-examination, that Dearing told, at that time, that it was not the rule of the company to send the note, and the way for him to do was to send the money, and the company would forward the notes; that in response to this he said it was not his rule, and was not customary throughout the county; that when his note was paid he wanted it, and would require it, but that he never sent it to the bank. Dearing denied the whole of this conversation.

This conversation is not as definite and specific as it might be, but, even if we concede that it amounted to a waiver of the express stipulation of the note that the installment was to be paid direct to the company at their home office in Chicago, it was based upon a mere voluntary agreement without consideration, which the company had the power to withdraw upon notice. And we are of the opinion that the notice of November 15, 1899, which appellee admits he received, amounted to a revocation of the alleged waiver made by Dearing.

Nor can appellee avail himself of the defense of sickness, relied on in the second paragraph of his reply. It is a well-settled rule of law that where the law itself creates a duty, the nonperformance of it will be excused by an unavoidable accident previous to its performance. But this principle has no application to a case where a person has created a charge or obligation upon himself by an express contract. In the latter case he will not be permitted to excuse himself therefrom by pleading an act of God, rendering performance impossible. (A. & E. Ency. of Law, 2d edition, volume 1, page 588, and authorities there cited.) This doctrine has also been repeatedly announced by this court. (Beatty & Skinner v. Scrivner, 19 Ky., 189; Bohanan v. Lewis, 19 Ky., 380; Sinclair v. Carrol, 29 Ky., 537; Hilburn v. Mofford, 70 Ky., 174.)

We are, therefore, of the opinion that the court erred in failing to direct the jury to return a verdict for the defendant upon their motion at the close of plaintiff's testimony.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

## KENTUCKY COURT OF APPEALS.

MOAYON, &c. v. MOAYON.

(Filed February 12, 1903.)

1. Husband and wife—Specific performance of contracts—Appellant and appellee are husband and wife. They have two children who are infants, and the Fidelity Trust and Safety Vault Co. is the guardian of these children. Prior to December 4, 1900, they had separated on a ground which, as is alleged, entitled the wife to a divorce a vinculo. The wife had retained counsel, who had prepared for filing a petition for divorce from the husband. On that day, at the instance of the husband, a written contract of settlement of their differences was entered into. The contract recites the fact that the parties have been living separate and apart for some months, and they have agreed mutually to forego their differences and to be reconciled and live with each other as husband and wife after the full execution of this agreement. It further recites that the parties have agreed that a settlement is to be made upon the children in order to insure a sufficient estate for them and for their maintenance, education and support and future welfare, and in consideration of love and affection and the further consideration of \$1 cash in hand paid. Then follows the agreement on the part of the husband to transfer and convey to the trust company for the benefit of said children one-third of all his property, real and personal, and providing that in the case of the death of either child its share should vest in the wife. The wife resumed her relations as wife, but the husband refused to comply with the terms of the contract by making a transfer to the trust company, and this suit was brought to enforce specific performance of same. Divers objections are urged against the enforcement of said contract.

2. Consideration of contract—It is urged that it is not founded upon a valuable consideration, and that it is disfavored upon principles of public policy. Held—That the facts and circumstances constitute a valuable consideration for the contract. The amount agreed to be paid for the benefit of the children was no more than the law would have given her as alimony, and was fair and reasonable. It is the policy of the law, because it has been found best for social happiness and progress, that the state of marriage be encouraged. Certainly if an agreement between husband and wife, settling

the obligations of the husband to provide for the wife in contemplation of their living permanently apart, will be specifically enforced as being based upon a sufficient legal consideration, and as being not contrary to the policy of the law, a fortiori must be a contract between them under like conditions founded on the consideration of the restoration or preservation of the marital relation. The contract was based upon sufficient consideration, and is not opposed to a sound public policy. The contract is definite, certain, fair and equitable. It is urged that the contract can not be enforced because lacking in mutuality of obligation and remedy on the part of the wife. Held—That there were several mutual obligations. The mutual agreement to forego differences that was executed; the mutual agreement to be reconciled, which was executed, and the remaining consideration to be performed of living together as husband and wife. This feature of the contract was executed by resumption by the parties of the marital relation and duties.

3. Sufficiency of description of land in contract—Statute of frauds—The description of the property to be transferred to the trustee as "one-third of all the real and personal estate" of the husband is sufficiently definite to be enforced. "All" means "all." "All of my land" is a description by necessary implication and common understanding, referring to such land as I may own, evidenced by the public records where land titles are required to be recorded, or to my actual and continuous possession for such time as under the law constitutes a title. This identification is complete, and admits of no possibility of mistake in this case. Applying to it the familiar usage of the courts in such matters, parol testimony may be allowed to designate the particular properties described and identified by the writing and in the contemplation of the parties in making the contract.

4. Parties to actions—A court of equity has authority to grant the wife relief as against her husband where her property rights are involved, besides, section 34, Civil Code of Practice, expressly authorizes the wife to maintain an action of this nature.

Barker & Woods, Kohn, Baird & Spindle and Hunter Wood & Son for appellants.

Landes & Allensworth, John C. Duffy, John Feland, Jr., John Phelps and Hazelrigg & Chenault for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, Birdie Moayon, and appellee, Max Moayon, are husband and wife. They have two children who are infants. The Fidelity Trust and Safety Vault Co. is the guardian of these children.

Prior to December 4, 1900, there was a separation of these parties on a ground, as is alleged, which entitled the wife to a divorce a vinculo. It is not material to this decision as to the nature of this cause. The wife had retained counsel who had prepared for filing a petition for divorce from appellee. On the 4th of December, 1900, at the instance of appellee, the parties treated for a settlement of their differences, resulting in a contract, in writing between them, which we copy in full, as follows:

"This agreement, made and entered into this 4th day of December, 1900, by and between Max J. Moayon and his wife, Birdie Moayon, and the Fidelity Trust and Safety Vault Co., trustee for Beatrice and Jessamine, children of the said Max and Birdie Moayon, witnesseth: That whereas, the said Max and Birdie are now, and have been for some months past, living sep-

separate and apart from each other; and whereas, the said parties have this day agreed mutually to forego their differences and to be reconciled and live with each other as husband and wife after the full execution of this agreement; now, and in view of the fact that the parties have agreed that a settlement is to be made upon the said children by the said Max Moayon, in order to insure a sufficient estate for them and for their maintenance, education and support and future welfare; now, in consideration of the love and affection which the said Max Moayon bears the said children, Beatrice and Jessamine, and in consideration of \$1 cash in hand paid, the receipt of which is hereby acknowledged, and in consideration of the acceptance of the trust by said Fidelity Trust and Safety Vault Co., under this agreement, the said Max Moayon hereby agrees to convey, transfer and deliver, in fee simple, to the Fidelity Trust and Safety Vault Co., as trustee, for the use and benefit of the said Beatrice and Jessamine Moayon, his children, one-third of all of his estate, real, personal, or mixed, of whatever kind or nature, belonging to him in his own right, which he acquired under the will of Hannah Moayon, his mother, as well as all the other estate otherwise acquired or now owned by him, the said personal property to be delivered according to the rules of law, and the real estate to be conveyed by deed properly acknowledged and recorded as soon as the deeds can be prepared. The absolute estate is to be conveyed to said trustee for the use and benefit of the said children, and in the event of the death of either of said children the estate of such child shall go and belong to said Birdie Moayon, for her own sole and separate use forever. Said trustee shall have the authority to collect all income from said estate so conveyed, and pay the same over to the said Birdie Moayon for the use and benefit of the said children's care and education. She shall not be required to render any account of the moneys thus received by her, but her receipt shall be an absolute acquittance of the trustee. Said trustee shall be authorized to convey, sell, exchange or dispose of any part of the estate so conveyed, and transfer a fee-simple title whenever the said trustee deems it proper to do so, and conveyance by the said trustee shall convey the fee-simple title, and the said trustee shall hold the proceeds received from any such conveyance for the same use, purposes, and to the same extent and in the same manner as the original estate is held under this agreement. It is agreed between the parties that within ten days a full inventory of all the estate of the said Moayon shall be delivered to the said Birdie Moayon and said Fidelity Trust and Safety Vault Co., and the deeds executed in accordance with this agreement, and the transfers of personalty made in accordance with the terms of this agreement and to carry into full effect the same

"Witness the hands of the parties this 4th day of December, 1900, at Louisville, Ky.

"MAX J. MOAYON,

"BIRDIE MEYERS MOAYON.

"The Fidelity Trust and Safety Vault Co. joins in the foregoing arrangement for the purpose of signifying its acceptance of the trust to be created by the deed of conveyance contemplated by its terms.

"FIDELITY TRUST AND SAFETY VAULT CO.,

"By JOHN W. BARR, Vice-President."

The foregoing facts are gathered from appellants' petition filed in this



case, seeking a specific performance of the above contract, it being also alleged that in pursuance thereto appellant Birdie had forgiven the wrongs of appellee and had returned to his home and resumed her relations as a dutiful wife, and from the date of this contract, and in performance of her part thereof, had continued to live with appellee as his wife, and was yet doing so. It was also averred that appellee had wholly failed to comply with his part of the agreement, the one above copied, and that he refused to do so. A full description of his property, alleged to be that intended by the parties to be, and that was, embraced in the terms of the written contract was given in the petition. It shows a number of pieces of real estate in Christian county, this State, and personal property of the value of about \$30,000. Appellee interposed a demurrer to the petition, which was sustained, and the petition dismissed.

In support of the judgment it is argued that the contract is unenforceable, for the following reasons:

1st. That it is not founded upon a valuable consideration, and that it is disfavored upon principles of sound public policy.

2d. That it is indefinite and uncertain, and inequitable and unreasonable.

3d. That it is lacking in mutuality of obligation and remedy on the part of the wife.

4th. That the description of the property to be conveyed is not sufficiently certain, nor is it sufficiently identified to satisfy the statute of frauds.

5th. That the wife can not contract with her husband concerning her property rights, nor can she sue him therefor, other than in an action for divorce and alimony.

As a determination for appellee of any one of the questions just outlined must result in an affirmance of the judgment, we will take them up and discuss and dispose of them in the order stated:

1st. It is conceded by the demurrer that Mrs. Moayon had legal grounds for her separation and divorce; that she and her husband were then living apart, because of those grounds, and that she had retained counsel, to prepare, and he had prepared, a suit for her seeking a divorce from her husband. She, at her husband's solicitation, forgave his wrong; resumed a relation which he by his conduct had forfeited, and had no legal right to longer claim, and saved to him the costs of the threatened litigation. Also, under the facts admitted, she was certainly entitled to recover from him substantial alimony, including maintenance for herself and children pending the action, and including a sum sufficient to enable her to employ counsel and defray the costs of her suit against him. As between other persons, where one has a cause of action against the other, and is about to begin a suit on it, its abandonment and satisfaction will constitute a consideration to support a contract based upon that fact. (Clark v. McFarlan, 5 Dana, 48; Brown v. Buford, 3 Ben Mon., 508; 6 Am. & Eng. Ency. of Law, 2d edition, 947, and cases.) Nor is it even necessary that the party sought to be charged shall have been benefited by the abandonment of the suit. If the other party has thereby been put to an irretrievable disadvantage, that fact will equally constitute what is termed a valuable consideration. (Ford v. Crenshaw, 1 Litt., 70; Gaines v. Scott, 3 Ky. Law Rep., 418.)

Becoming reconciled to the husband, with full knowledge of his action.

able offense, will be a bar, as a condonement, to the suit of the wife for divorce based upon the original facts. Independent of the question whether the fact of the reconciliation was not of as much value to the wife as to the husband, and that a mere claim or right to a divorce is of no legal value, yet her right to a settlement upon herself and children, as alimony and maintenance, was a right possessing money value. When she abandoned and obliterated her cause for divorce in this case it likewise nullified her right to sue for and recover alimony.

It is argued, though, that it is the duty of the wife, no less than of the husband, to maintain in good faith the marital relation; that a promise of one to pay money to the other to continue the married relation is at best but an agreement to pay for the performance of a duty already undertaken for a sufficient consideration (to wit, the mutual undertaking to live together in the married state), and that, therefore, there is nothing upon which to rest the new promise.

Were it the fact that there was no cause for the separation, this argument of appellee would be good. The other side of this proposition, that is, an agreement between husband and wife by which the former undertook to pay the latter a stipend in consideration of their living apart, has been before this court frequently. In all those cases it was shown that the marital relations had become unendurable to the parties, whether because of statutory grounds of divorce or not was not always shown. The contract of the husband to pay the wife a stipulated sum, or to convey to her certain property, was upheld on the theory that it was the legal and moral duty of the husband to support the wife; and that these contracts were but another form of, and were in lieu of, the original undertaking, and were consequently valid. (*Gaines v. Poor*, 3 Met., 303; *Flood v. Flood*, 5 Bush, 170; *Loud v. Loud*, 4 Bush, 455; *Evans v. Evans*, 93 Ky., 510.)

Nor was it held in those cases to be necessary that the suit for divorce should be pending in order to support the agreement. It was sufficient if there was an actual, or impending separation and suit for divorce. (*Gaines v. Poor*, *supra*.)

It is the policy of the law, because it has been found best for social happiness and progress, that the state of marriage be encouraged. Certainly if an agreement between husband and wife, settling the obligations of the husband to provide for the wife, in contemplation of their living permanently apart, will be specifically enforced, as being based upon a sufficient legal consideration, and as being not contrary to the policy of the law, a fortiori must be a contract between them under like conditions founded on the consideration of the restoration or preservation of the marital relation. (*Bishop on Marriage, Divorce and Separation*, section 1279.)

As said in *Adams v. Adams*, 91 New York, 381: "While the law favors the settlement of controversies between all other persons, it would be a curious policy which would forbid husband and wife to compromise their differences, or preclude either from foregoing a wrong committed by the other." To same effect is the case of *Phillips v. Meyer*, 92 Ill., 70.

In *Barbour v. Barbour*, 49 N. J., 499, the wife had abandoned her husband because of certain violations by him of the marital duties. She brought suit for divorce and alimony. He sought a reconciliation. Among other

inducements offered by the husband was the agreement to convey her certain real estate owned by him if she would be reconciled to him. Relying upon his assurance and promises she did become reconciled, and again took up her former relations with him as wife. He then refused to comply with his agreement to convey her the property as he had agreed. The court, at her suit for specific performance, granted the relief prayed for. In the course of the opinion it was said: "The agreement is an agreement respecting the conveyance of land. The consideration was a valuable one. No consideration can be named of higher importance or of more solemn significance. It is difficult to measure it. Dollars and cents afford no adequate conception of the true nature of the consideration moving upon the one side to the execution of this agreement. This agreement is thus brought within every case that recognizes the doctrine of part performance in the slightest degree. Upon the part of the wife, it is not only partially, but entirely performed. She not only agreed to become reconciled to him, but in the sincerest manner, by her conduct, manifested her determination so to continue."

In addition to the foregoing, we think the principle is also sustained by the following authorities: *Smith v. Smith*, 35 Hun, 378; *Shepherd v. Shepherd*, 7 Johns., chapter 57; *Casto v. Fry*, 33 W. Va., 449.

We are consequently of opinion that the contract was based upon sufficient consideration, and is not opposed to a sound public policy.

2d. That the contract is definite, certain, fair and equitable, we have no doubt. The wife agrees to abandon, and it is alleged has abandoned, her suit for divorce, and has forgiven its cause. She agrees to resume the wifely relation, and has done so in pursuance to the agreement. The husband undertook, besides his promise of a fulfillment of the conjugal duties, to convey to a named trustee one-third of all his property for the maintenance and education of their two children, it in event of their death to go to the wife. It also was provided for the management of the trust. The only serious criticism of the paper as to its indefiniteness or lack of equity, besides the matter of description and mutuality, which will be discussed further on, is the suggestion that it is unfair and inequitable to appellee to enforce a contract that may let into joint ownership with him in his property, and in his mercantile establishment, other persons probably not desirable, and whose interference would jeopardize, if not destroy, the value of his business. As to the real property, it not infrequently happens that it is owned jointly by persons of incompatible tastes. Yet we have never before heard it urged as a defense against the specific performance of one's contract to sell an undivided interest in his land that his vendee might sell the interest to some undesirable person, entailing probably a disastrous suit to sell the whole property because of its indivisibility. Those are questions that might properly influence one in determining whether he will sell an undivided interest in his property. But after he has contracted to do so, for an adequate consideration, we perceive no reason why equity should relieve him from a specific execution of his contract on such a ground. Upon the face of the contract it does not appear to us to be unfair. It settles upon the wife's children certainly no more than the allegations of her petition show would probably have been set apart to her as alimony had she prosecuted her suit.

That she saw proper to have this sum settled on her children, instead of upon herself, is not a ground for objection by appellee.

3d. It is very earnestly argued that the contract should not be enforced because of lack of mutuality in obligation and in remedy. It is asserted by appellee that before a contract will be specifically enforced in equity it must not only be reasonable and practicable, and supported by an adequate consideration, and be certain and definite in regard to the property to be conveyed, but it must be mutually binding upon the parties, and the remedy for its enforcement must also be mutual to the parties. It is the latter condition that we now address ourselves to. We concede the correctness of appellee's proposition. Yet it may be satisfied with less than an ideal fulfillment of its full text. For example, it is generally held that, under the statutes of frauds and perjuries, where the contract is not in writing, if one party relying on the agreement and induced thereby has executed his part of the contract, the other party may be compelled to perform, or to respond in damages if specific performance is withheld. Not to do so would be to make the statute, enacted to prevent frauds, an instrument for effectuating a fraud.

To examine minutely that part of the agreement bearing on this question, we again quote from it: "Whereas the said Max and Birdie Moayon are now, and have been for some months past, living separate and apart from each other; and whereas, the said parties have this day mutually agreed to forego their differences and to be reconciled and live with each other as husband and wife after the full execution of this agreement; now, in view of the fact that the parties have agreed that a settlement is to be made upon the said children by the said Max Moayon, in order to insure a sufficient estate for them and for their maintenance, education and support and future welfare; now, in consideration of the love and affection which the said Max Moayon bears the said children, Beatrice and Jessamine, and in consideration of one dollar cash in hand paid, etc."

We have not rested this contract on the consideration of the "love and affection" of the father to his children (though it seems that might alone have been sufficient in this State) any more than upon the one dollar recited as having been paid. In the case of an executed contract, reciting several matters as constituting the consideration, if any one of them is sufficient, probably that would satisfy the inquiry. But in an executory contract, the execution of which is resisted by one of the parties, the inquiry should embrace all the matters recited as the consideration, because we can not say that the complaining party would have entered into the contract in the absence of any of the matters recited as the moving consideration for his action. The consideration of this contract may be thus stated:

- (a) The mutual agreement to forego differences.
- (b) The mutual agreement to be reconciled.
- (c) The mutual agreement to live with each other as husband and wife.
- (d) Love and affection of the husband for his children.
- (e) One dollar.

The last two are not questioned. Appellant, Mrs. Moayon did forego the cause of their difference—that part of the contract is unquestionably executed; she did become reconciled to appellee—that is executed. The only re-

maining part of the contract is (c) "the mutual agreement to live with each other as husband and wife, after the full execution of this agreement." The parties saw proper to anticipate the time of execution of this clause of the contract, and resumed their living together before the full execution of the agreement. This was necessarily by mutual consent, and neither party can take advantage by complaint of that act. The case is rested, however, on this point upon the argument by appellee that the contract contemplated not merely going back to their former relation, but permanently continuing in it; that the wife's undertaking on this score can not be fulfilled short of the death of one of the parties, for so long as they both live she might leave him. It is then argued that so long as she owes him any part of this undertaking, i. e., to live with him as his wife, it is a duty that could not be enforced against her by the court; that no civil court ever has attempted to compel two people to so live together, no matter which was in fault, therefore, it is claimed there is lacking that mutuality of remedy necessary to the enforcement in equity of this contract. Marriage contracts and marriage articles have been upheld and enforced by the courts from earliest times. They involve an agreement between a man and woman to assume the marital relation, to live together as husband and wife, in consideration of which each relinquishes his or her claim to the other's property, or one agrees to convey or deliver to the other certain property or money. If they, in pursuance of the agreement, did marry and live together as husband and wife, the contract has been considered always as executed, so far as that part of the undertaking was concerned. It has been held that neither misconduct of a party after marriage (*Moore v. Moore*, 1 Atk., 272; *Sidney v. Sidney*, 3 P. Wins., 269; *Seagrave v. Seagrave*, 18 Ves., Jr., 439; *Fisher v. Koontz*, 110 Iowa, 498), nor the subsequent divorce of the parties, in the absence of some term in the contract providing against such contingency (or of some statutory regulation of the subject), do not affect the validity of the marriage settlement. (*Evans v. Carrington*, 2 De G. F. & J., 481; *Barclay v. Waring*, 58 Ga., 86; *Babcock v. Smith*, 24 Pick., Mass., 61; *Child v. Pearl*, 43 Vt., 224.) Bonds for the payment of money have been enforced upon the executed consideration of marriage. (*Smith v. Patterson*, Cheves' Eq., 29; *Ancker v. Levy*, 8 Strobb. Eq., S. Car., 197; *Logan v. Winholt*, 1 Cl. & F., 611.) The promise of a woman to marry a man was held a sufficient and valuable consideration to support his deed to her, where it appeared that she had been prevented from executing the promise without her fault, but by his death. (*Smith v. Allen*, 5 Allen, 454, S. C.; 81 Am. Dec., 758.) The marriage contract, that is, the agreement to marry, is complete and executed when the parties to it have entered into the married relation in the manner required by statute. Undoubtedly every valid marriage contemplates that the parties shall live together as husband and wife "till death them do part." In a case like the present one, the agreement to live together as husband and wife could include nothing more on this point than the original vows of matrimony did. To say that marriage was not an execution of that part of a marriage settlement between a man and woman, competent to marry, as would require the performance of the other undertakings in the settlement, would be to practically destroy that which for time out of mind has been regarded as a subject of such contracts, for it

would necessarily postpone the execution of the remaining part of such contracts till the death of one of the parties, thereby substantially destroying their value in many instances to the party benefited and intended to be protected by them.

We must hold, in reason and under the authorities, that this feature of the contract under consideration was executed by the resumption of the parties of the marital relation and duties. What relief appellee would be entitled to, as to a restoration of the property, or some part thereof, if Mrs. Moayon should subsequently abandon him without cause, is a question we do not determine.

4th. Does the contract sufficiently describe the property to be conveyed?

The description in the contract is: "One-third of all his (appellee's) estate, real, personal, or mixed, of whatever kind or nature, belonging to him in his own right which he acquired under the will of Hannah Moayon, his mother, as well as all the other estate otherwise acquired or now owned by him."

Can the intention of the parties, and the property to be affected by the writing, be gathered from this description? If so, the statute is complied with. It is the purpose of the description of the property, concerning which a contract is made, to identify it. As said in *Warvelle on Vendors*, volume 1, section 96: "While an unequivocal description, giving location, area and boundaries, is a literal and perfect observation of the rule, a less particular statement will usually suffice, provided it contains within itself the proper means of identification, as by reference to extrinsic facts or other instruments by means of which the land can be ascertained with sufficient certainty."

The ideal, perfect description, is preferred. But we can not compel its adoption. It is our business to treat with such contracts as the parties have made, enforcing them when lawful and practicable. It is not necessary then that the writing should do more than indicate clearly what property is to be affected by it, if its description or identification can be gotten from the contract or from any extrinsic fact or writing referred to in the contract. A portion of the property may be identified by the will of Hannah Moayon, specifically referred to in the contract. It is necessarily of record to be a will, and that record will satisfy so much of the contract as treats of so much of appellee's property as derives its title from that source. The remainder of the description is: "All the other estate otherwise acquired or owned by me."

In *Warvelle on Vendors*, section 135, it is said that a description as "my house and lot" imports a particular house and lot, rendered certain by the description that it is the one that belongs to "me."

The following descriptions have been held sufficient: "My lot on the plat in the town of S., on the plat of said town, on the river bank" (*Colenck v. Hooper*, 3 Ind., 816); the "Snow farm" (*Hollis v. Burgess*, 37 Kansas, 487); "H.'s place at S." (*Hodges v. Korving*, 58 Conn., 12); the "Knapp Home Property" (*Goodman v. Curtis*, 18 Mich., 268). An agreement to convey land described as "occupied" by the vendor or a third person (*Angel v. Simpson*, 85 Ala., 53; *Tarle v. Carmels Land and Coal Co.*, 99 Cal., 397; *Doctor v. Hellberg*, 65 Wis., 415.) In all such cases parol evidence was ad-

mitted not to identify, but to designate the subject-matter already identified in the minds of the parties, in the language of the contract when read in the light of the facts.

In this State, in *Overstreet v. Rice*, 4 Rush, 3, the expression "we have swapped farms," naming the terms, but without further description of either farm, was held sufficient after the parties had themselves identified the lands intended to be affected by taking possession of them.

In *Ellis v. Deadman's Heirs*, 4 Bibb, 466, the writing was: "4th January, 1808. Received of Jesse Ellis, \$—, in part pay for a lot he bought of me in the town of Versailles, it being the cash part of the purchase of said lot. Nathan Deadman." This court said: "Had the receipt specified the terms of the agreement, there would have been no doubt of the propriety of decreeing the specific execution." It is as essential that the terms be specified as the description of the property. "Ten acres adjoining him on the north" in a bond for title to land of the vendor adjoining the vendee, was held sufficient in *Hanly v. Blackford*, 1 Dana, 2.

In *Henderson v. Perkins*, 94 Ky., 211, the description was "my home place and store house." It was held sufficient on the authority of *Ellis v. Deadman*, *supra*, and *Hanly v. Blackford*, *supra*.

In the case of *Varnum v. State*, 78 Ala., 28, the description was: "My entire crop of every description, raised by me or caused to be raised by me, annually, till this debt is paid." While that was not concerning real estate, it was such a contract (one not to be performed within a year) as was by the statute of frauds required to be in writing. Concerning that description that court said: "It is objected to the admission in evidence of this mortgage that it was void for uncertainty in the description of the crops intended to be included in it. Whatever force there may be in this objection to the instrument on its face, this alleged uncertainty was capable of being removed, when read in the light of the circumstances surrounding the contracting parties at the time of its execution, by extraneous parol identification."

Parol evidence can not be introduced to vary, enlarge or restrict the written terms of the contract. But frequently it is the case that application of apparently vague descriptions must be by parol testimony, which puts before the court the facts and circumstances surrounding the parties when the contract was made, or is to be executed, that its terms may be interpreted by the light from such surroundings. From this rule springs the maxim, "that is certain which can be made certain."

In this case it has been said "all" means all. "All of my land" is a description by necessary implication and common understanding referring to such lands as I may own, evidenced by the public records where land titles are required to be recorded, or to my actual and continuous possession for such time as under the law constitutes a title. This identification is complete, and admits of no possibility of mistake in this case. Applying to it the familiar usage of the courts in such matters, parol testimony may be allowed to designate the particular properties described and identified by the writing, and in the contemplation of the parties in making the contract.

5th. It is true that by the common law contracts between husband and wife were void. Yet equity recognized numerous instances in which the

parties had peculiar property rights which they were allowed to personally control, and to make contracts concerning. It would be an anomaly, and a reproach to the law, to say that it recognizes a legal property right in one, to whom all the doors of every court were closed. Therefore, it was early held (Story's Eq. Jur., 1872) that although contracts between husband and wife are void at law, they are not always so in equity. This court has repeatedly affirmed the same doctrine. In *Evans v. Evans*, 98 Ky., 510, it was said: "Generally, if a contract between husband and wife merely be just and reasonable, and would be good at law when made by the husband with a trustee for the wife, it will be upheld in equity." This case was followed in *Bohannon v. Travis*, 94 Ky., 59.

In *Ward v. Crotty*, 4 Met., 59, it was affirmed that the husband's contract with the wife would be specifically enforced against him in equity, without the intervention of a trustee. This has been adhered to in *Maraman v. Maraman*, 4 Met., 89, and *Campbell v. Galbreath*, 12 Bush, 459.

It is further re-enforced by legislative enactment looking to the same end, viz., section 34 of the Civil Code, as follows: "In actions between husband and wife; in actions concerning her separate property; and in actions concerning her general property, and in actions for personal suffering of or injury to her person and character, in which he refuses to unite, she may sue or be sued alone."

The wife may maintain her action.

It follows that the judgment must be reversed and the cause is remanded for further proceedings not inconsistent herewith.

Whole court sitting.

#### MERCER COUNTY V. CITY OF HARRODSBURG.

(Filed February 18, 1908.)

Contracts—Failure of consideration—Nuisance—In 1888 appellant made a contract with appellee, by which it surrendered seven feet of ground on the north and south sides of its public square, and appellant agreed to build a good fence on the new line and a good brick pavement on the land surrendered, in consideration of which appellee granted to appellant the right and privilege to erect hitching racks on the old line, and to perpetually maintain them. Appellant fully complied with its part of the contract and enjoyed the privilege of the hitchrack until 1900, when appellee forcibly tore down the hitchrack and enjoined appellant from erecting them again. Appellee removed same because they had become a nuisance, and it had been so declared by order of the council. Appellant brought this suit to recover \$3,500, the value of the ground, and \$700, the cost of the improvements it had made. Held—That appellant can not recover. This contract was binding on both parties when it was made, and each party continued to receive the benefits of the consideration from the date thereof until 1900. The hitching rack was not per se a nuisance, but it became so by reason of the increase of population in its increased use. At the time this contract was entered into, in 1883, and appellant accepted the hitching posts as the consideration for the strips of land, it so accepted same with the knowledge that it might, on account of the growth of the county and city, and the great and continued use of same, become a nuisance, and, therefore, be compelled to surrender same for the public good and health.



W. C. Bell and Gaither & Vanarsdall for appellant.

Robt. Harding for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Nunn.

On October 8, 1883, the appellant and appellee made a contract, by the terms of which the appellant surrendered to appellee seven feet of ground on the north side of its public square in Harrodsburg and a like amount on the south side, both strips extending the width of the square from east to west, and appellant agreed to build a fence on the new line and a good brick pavement on the land surrendered, for which land and the improvements made the appellee granted to the appellant the right and privilege to erect hitching racks on the old line and to perpetually maintain them.<sup>6</sup> Appellant's petition sets up this contract, and that in keeping with it the county surrendered the lands, which were of the value of \$2,500, and made the improvements, at a cost of \$700, to recover which this action was brought; after which it erected the hitching racks and maintained them as contemplated by the contract until May 19, 1900, when appellee forcibly tore down the racks, removed them and then denied the right and privilege of appellant to erect and maintain the racks. The petition fails to state that the racks were torn down without right, but says that they were prohibited from re-erecting the racks "by injunction proceedings in this honorable court." And further, that the city, by an ordinance duly passed, and entered on its records, had prevented all persons from hitching horses on the courthouse square under a penalty of \$5 for each violation. To the plaintiff's petition appellee filed a demurrer, which the lower court sustained, and this cause is here on appeal from that judgment.

From the petition it seems clear that this contract was valid and binding upon the parties when made, and each party continued to receive the benefits of the consideration from the date thereof until the year 1900, a period of seventeen years. This court also gathers from the petition that in 1900 the use of the racks became a nuisance, and that they were necessarily removed. A hitching rack is not per se a nuisance, and this court has so held in the case of Harrison County v. Wall, 11 Ky. Law Rep., 223. And also in the case between the same parties to this action (33 Ky. Law Rep., 1744.) In the last case referred to the court said: "While the hitching posts and chains were not a nuisance in themselves, they became a nuisance from the hitching of horses to them. They were placed there for horses to be hitched to them, and the removal of the posts and chains was the only way to abate the nuisance." \* \* \* And again the court said: "The city was not estopped by the contract made in the year 1883. As population increases things become nuisances which occasioned little inconvenience when the population was not so dense or the traffic so great. The contract of 1883 did not contemplate the creation of a nuisance; the town trustees could not have legalized a nuisance if they had contemplated it."

At the time this contract was entered into in 1883, and appellant accepted the hitching posts as the consideration for the strips of land, it so accepted same with the knowledge that it might, on account of the growth of the city and the county, and the great and continued use of the same, become a

nuisance, and, therefore, be compelled to surrender same for the public good and health. And it appears from the petition that this occurred in 1900. Appellant received a good and valuable consideration and had the benefit of it for seventeen years, but owned and used it all the time subject to the public welfare, and the appellee did not, by any act or omission, cause it to become a nuisance, but it was caused by the natural and to be expected growth of the city and the county, and the great use to which it was put by reason thereof. *Ashbrook v. Commonwealth*, 11 Bush, 148, these principles are enunciated: "The pursuit of a noxious trade is lawful so long as it does not interfere with the rights of the public, but when it does so interfere with these superior rights it becomes illegal, and no length of time can sanctify it as its exercise is a daily renewal of the offense. Whilst many private rights will be protected from public invasion, because not necessary to the public good, yet most of the individual rights are held subordinate to the public welfare."

The appellant entered into this contract with the knowledge that the hitching rack might become a nuisance; the contract was fairly made and appellant took upon itself the risk of its becoming and being declared a nuisance, and whatever may be the apparent hardship of losing the use and benefit of its consideration, it was brought about by its own voluntary undertaking, and it is, therefore, entitled to no relief. To this effect is *Griswold v. Taylor's Adm'r*, 1 Metcalf, 281.

For these reasons the judgment of the lower court is affirmed.

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SANDY RIVER CANNEL COAL CO. v. WHITE HOUSE CANNEL COAL CO.

(Filed February 18, 1908—Not to be reported.)

Action to quiet title—Reservation of mineral rights and passway in conveyances—Appellee instituted this action to quiet its title to a tract of land and minerals rights and a road to the river against appellant, who is claiming same. The lands and mineral rights in controversy are included in a patent granted to S. Appellee claims title to the land, mineral rights and road by conveyances from S., his grantees and children. It is admitted that the surface of land in which the appellee claims the mineral rights and road belongs to appellant. S. conveyed to B. a tract of land, expressly reserving the mineral rights and a roadway over the land to the river. B. accepted the deed from S., reserving to the grantor all mines and minerals on the land as well as a road to the river, with full knowledge on the part of B. of said reservation. But appellant claims title to the mines and minerals under a patent to B. B. testifies that he never got a patent to the land, and the record shows that he never claimed the property in controversy, besides, in his deposition he disclaims ownership thereof. B. will not be permitted to disavow his vendor's title, and appellant claiming under him, is in no better position to do so than he. The court properly quieted appellee's title and referred the case to the commissioner to take an account as to the value of coal taken by appellant from appellee.

W. S. Harkins and John P. Wells for appellant.

Hager & Stewart for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge Settle.

Appellant and appellee own adjoining lands and valuable mineral rights in Johnson county, and both are engaged in the business of mining coal.

This action was instituted by appellee in the circuit court of Johnson county to quiet its title to certain mines, mineral rights and a roadway to Big Sandy river. The petition, and amendments thereto, charge in substance that appellee owns and is in actual possession of certain lands therein described, the mines and minerals under a certain other boundary, the surface of which is owned by appellant, and that it (appellee) also owns a roadway leading therefrom to the river. It is further averred by appellee that appellant is interfering with its possession of, and is claiming to own, its lands, minerals and roadway mentioned, giving it out in public speeches that this property is owned by it (appellant), and that appellee is unable to make a valid deed thereto. It is also averred that appellant is engaged in mining on its land, and removing coal therefrom, by means of an entry made upon appellant's own land, and is threatening to further mine and remove appellee's coal. An injunction was obtained by appellee to restrain appellant from further acts of trespass to its property.

The answer traverses the allegations of the petition as amended, and sets up a claim of title in appellant to the lands, mines, minerals and roadway in controversy. Upon the issues thus formed proof was taken on both sides, and the trial resulted in a judgment in favor of appellee, which was declared to be the owner of the land and road in controversy. Appellant was perpetually enjoined from the further mining of coal thereon, and the cause was referred to the master commissioner to take proof, and report the quantity and value of coal mined or removed from appellee's land by appellant. Appellant complains of that judgment, hence this appeal.

The land in dispute is situated in the valley of White House creek, and on the White House side of the dividing ridge that separates White House creek from Lick creek. These two creeks flow into the Levisa fork of the Big Sandy river, and on the east side thereof some eight or ten miles below the town of Paintsville. One John Stafford, who died in 1865, formerly owned a large boundary of land on each side of the river, including the land in controversy. Stafford had several children, one of whom, Callista, married first a man by the name of Wilson, who soon died, after which she married a man by the name of Ash. Stafford, by deed of March 16, 1861, conveyed to his daughter, Callista Wilson, or Ash, a large tract of land, nearly all of which was on the Lick creek side of the dividing ridge between Lick and White House creeks.

Appellee owns nearly all of the Callista Wilson land, but a part thereof belongs to appellant. The easterly line of the Callista Wilson tract is shown on the map in the record as the red line running from a point near the bottom of the map to a point marked "maple," on Big Sandy river, just below the mouth of Lick creek. The land included in the deed lies on the west side of this line. As the minerals in controversy lie upon the east side of this line its correct location is one of the points at issue in this case. If appellant's contention is sustained, the line would run from the point indicated near the bottom of the map to a point on the bank of Big Sandy river

34 poles below the mouth of Lick creek. We think, however, that this line was correctly fixed by the lower court, and as laid down on the map is, after allowing the proper variation, north  $6\frac{1}{4}$  east, running to a point just below the mouth of Lick creek as indicated on the map. The line in question passes through the mines as shown upon the map, and all the coal that was removed by appellant from the land on the right or east of this line as indicated was taken from the land adjudged to appellee by the lower court.

On March 26, 1865, Stafford, by deed, conveyed to Gabe Brown, his former slave, whom he had theretofore voluntarily emancipated, a tract of land, the boundary of which began at the mouth of White House creek; thence running up the river to the upper end of the cliff, from which it passes to the top of the dividing ridge between White House and Lick creeks, and following the top of the ridge around a certain hollow; thence down the point on the upper side of the hollow to White House creek, a short distance below Gibson branch shown upon the map; thence down White House creek to the beginning. But by the terms of the deed the grantor reserved to himself the mines, minerals and road to the river, in controversy in this case.

It appears that the description as given of the boundary of Gabe Brown's deed makes the line following the top of the ridge between the creeks lap in some places over upon the land previously conveyed by Stafford to his daughter, Callista Wilson, but Brown does not, by that means, become entitled to any part of her land that may fall within his line, as hers is the older deed and title. It is conceded by appellee that appellant is the owner of the surface of the lands in controversy. So the only question to be considered is as to the ownership of the mines and minerals contained therein.

Stafford seems to have secured many patents for lands, and the one for fifty acres, bearing date July 23, 1833, copied into the record covers all the mines and minerals in controversy herein. It is, we think, well established by the evidence that Stafford was at the time of the conveyance from him to Brown, in 1865, the owner in fee of the land on which the mines and minerals in controversy are situated, and there is no doubt whatever of his having reserved the mines, minerals and road in the deed executed to Brown.

We are of opinion, too, that the mines, minerals and roadway passed by the subsequent deeds of conveyance from Stafford, his vendees successively, and children to appellee, and, besides, the construction placed upon the deeds by the parties shows that such was the intention of all the grantors, beginning with Stafford himself. If it be true, as contended by appellant, that Stafford in the deed to King never parted with his title to the mines and minerals, appellee nevertheless derived title thereto from the heirs at law of Stafford, who conveyed to it their title, either directly or through intermediate parties. We are unable to see how Gabe Brown acquired by the patent from the Commonwealth covering the land he got of Stafford any better title than he had already received thereto by the deed from Stafford, and as the deed reserved to Stafford all mines and minerals on the land, as well as the road to the river, it was accepted by Brown with knowledge of that reservation. We are likewise unable to see how the patent procured by him can destroy, or otherwise remove, the reservation. Appellant claims title to the mines and minerals in controversy under the Gabe Brown patent, and

yet Brown testifies in his deposition that he never got a patent to the land, but in this he is certainly mistaken, and he also says that he got the patent to annoy King, appellee's vendor, and the immediate vendee of Stafford.

It is not disclosed by the record that Brown ever claimed the property in controversy. In fact in his deposition he disclaims ownership thereof. Brown will not be permitted to disavow his vendor's title. Appellant claiming under Brown, is in no better position to do so than he. We are also of opinion that the several deeds under which appellee claims title to the mines, minerals and road in dispute contain a sufficient description of the interest and estate they purport to convey, and taken, altogether, they present a reasonably well-connected chain of title from Stafford to appellee.

Upon the facts presented by the record the chancellor was authorized to render the judgment appealed from, and the same is, therefore, affirmed.

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E. H. TAYLOR, JR. & SONS v. LOUISVILLE PUBLIC WAREHOUSE CO.

(Filed February 17, 1903—Not to be reported.)

Contracts—Damages—Instructions—Appellant brought this action to recover of appellee \$8,000 damages for a breach of contract. Appellant alleges in its petition that in the spring of 1895 it had in its warehouse 738 barrels of whisky which was worth 50 cents per gallon; that it made a contract, by its vice-president, that it would ship said whisky to Louisville and deposit it in appellee's warehouse on a storage charge of 5 cents per barrel per month, and that appellee agreed to loan appellant \$10 on each barrel, and would renew, or cause to be renewed, the loan from time to time as long as the whisky remained in appellee's warehouse, appellant to pay the regular bank rates of interest and discounts and 5 cents per barrel per month storage to appellee; that under this contract appellant shipped said whisky to appellee's warehouse and obtained the loan of \$10 per barrel, and appellee issued its warehouse receipts and attached said receipts as collateral to the notes and the notes were due and payable four months after date. Before the expiration of said four months part of the whisky was sold and the proceeds credited on the notes. There then remained 448 barrels unsold. The notes were renewed, and when the renewed loan matured appellee violated and broke its contract by refusing to renew and carry said loan. Appellant notified appellee of the sale, and demanded that it comply with its contract and renew said loan, and that appellant was unable to carry the same, and that at the sale 200 barrels of the whisky sold at 18 cents per gallon and 248 barrels sold at 19 cents per gallon, the whisky at the time being reasonably worth 50 cents per gallon, and that appellant thereby suffered a loss of \$8,412. Appellee in its answer put in issue every allegation of the petition except those stating that appellant was unable to carry said loan, and that appellee knew of appellant's inability to do so, and that it did not contract to bind itself to loan said money, or cause it to be loaned, to appellant for a longer period of time than four months, as specified in said notes. The first trial resulted in a verdict in favor of appellant for \$3,100, and the court set this aside and granted a new trial, which resulted in a judgment for defendant. Appellant on this appeal asks that the last judgment be reversed, and that the lower court be directed to enter judgment on the first verdict. Held—That the lower court erred in telling the jury that the appellee had the right—

to terminate the contract after the expiration of a reasonable time, and that a reasonable time had elapsed in contemplation of law between the making of said contract and the forced sale of the whisky. This question should have been left to the jury. The instructions given on the first trial, except the first part of No. 8 as indicated in the opinion, were correct. This court will not disturb the action of the lower court in setting aside the first verdict. The lower court could better determine whether the parties had a fair and impartial trial, and as the defense is supported by strong evidence, this court will not direct that a judgment be entered on the first verdict.

Hargis & Duncan for appellants.

Helm, Bruce & Helm for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Nunn.

This was an action brought in the Jefferson Circuit Court by appellants against appellee for damages on an alleged breach of contract whereby they claim to have suffered to the extent of more than \$8,000.

The appellant alleges in substance, in its petition, that in the spring of the year 1895 it had in its bonded warehouse in Woodford county, Kentucky, 736 barrels of whisky, containing fifty gallons to the barrel, of the "Old Taylor" brand, which was worth 50 cents per gallon; that on the 27th day of May, 1895, J. S. Taylor, vice-president of appellant, it being a corporation, made and entered into a contract with one Coldewey, who was then the president of appellee, a corporation, that appellant would ship to Louisville, Ky., and deposit in appellee's warehouse said 736 barrels of "Old Taylor" whisky on a storage charge of 5 cents per barrel per month, and that appellee, in consideration therefor, agreed with appellant to loan, or cause to be loaned, to it \$10 per barrel on said whisky, and would renew, or cause to be renewed, the loan from time to time as long as the whisky remained in the appellee's warehouse, the appellant to pay the regular bank rates of interest and discounts, and 5 cents per barrel per month storage to appellee; that under this contract appellant shipped said whisky to appellee's warehouse in Louisville, Ky., and obtained the loan of \$10 per barrel, and appellee issued its warehouse receipts for the whisky and attached said receipts as collateral to the notes given by appellant for said loan; that after getting possession of the whisky appellee claimed that, in order to keep its contract and renew and carry this loan, it was necessary for appellants to execute its note for \$9 per barrel to the Citizens National Bank of Louisville and a note for \$1 per barrel to appellee, these notes due in four months. Before these notes became due appellant sold a portion of said whisky, and the proceeds were credited on said notes. There was left of said whisky, at the expiration of said four months, 448 barrels on the same terms and conditions as the first loan.

That on the 30th day of January, 1896, when the renewed loans matured, the appellee violated and broke its contract by refusing to renew and carry said loan, notwithstanding it had contracted to carry the loan, and the fact that appellant was unable to carry the same, and that appellee knew that appellant was unable to carry and renew the loan, and that appellant notified appellee of the contemplated sale of the whisky by the Citizens National

Bank, and requested appellee to protect appellant's whisky from sale and sacrifice by performing its contract to renew the loan, and that appellee failed to perform its contract and allowed the whisky to be sold at a sacrifice; that 200 barrels of the whisky sold at forced sale at the price of 18 cents per gallon and 248 barrels at the price of 19 cents per gallon, the whisky at the time being reasonably worth 50 cents per gallon, to the appellant's loss of \$8,412.

The appellee's answer put in issue every allegation of the petition, except those stating that appellant was unable to carry said loan, and that appellee knew of appellant's inability to do so, and that it did not contract to bind itself to loan, or cause to be loaned, to appellant, nor contract that the loan would be renewed or continued for a longer period of time than that named in the notes, viz., four months; that its effort in securing and continuing the loan made by the Citizens National Bank were simply for the accommodation of its customers. And by counterclaim set up two notes which it held against appellant, amounting to the sum of \$584, which counterclaim the appellant, by reply, admitted, but controverted the affirmative allegations of appellee's answer.

Upon these issues a trial was had which resulted in a verdict for appellant for the sum of \$3,100. Upon motion of appellee, with reasons filed, the court set aside that verdict and judgment and granted appellee a new trial, and afterwards another trial was had which resulted in a verdict and judgment in favor of appellee for the full amount of its counterclaim. Appellant filed grounds and asked that this verdict and judgment be set aside, which motion the court overruled. Appellant is here on appeal, asking that the last judgment be reversed, and that the lower court be ordered to enter judgment on the first verdict.

The instructions given by the court to the jury on the second trial were erroneous and prejudicial to the appellant. The court, under the facts and circumstances in issue in this case, should not have told the jury that the appellee had the right to terminate the contract after the expiration of a reasonable time, and that a reasonable time had elapsed in contemplation of law between the making of said contract, as alleged in the petition, and the forced sale of the whisky. Under the evidence in this case, as appears from the record, this question should have been left to the jury. Counsel for appellee on this point refer this court to the case of Blackwell, &c. v. Fosters, &c., 1 Metcalfe, 88, as sustaining said instruction of the court. We do not so understand the decision. In that case the appellant in October, 1851, sold to appellee 500 hogs, to be delivered between the 10th of October and 1st of November, 1852, more than a year after the making of said contract. And in the contract this language was used: "And the said parties bind themselves to give security for their respective performance of this contract, if at any time required." The parties lived about seven miles from each other. The testimony in the case showed, and it was admitted by the appellees, that before January 1, 1853, that the appellants had given notice that they required security for the performance of said contract. The appellees failed to give the security, and on the 6th day of March, 1853, the appellants gave to appellees written notice that their said contract was annulled in consequence of their failure to give the security as required, and this

court said the facts being admitted that four months' time to comply with the stipulation of their written contract was, as a matter of law, reasonable time. And in the same case the court said: "It is a well-settled rule of law that wherever one party is required to do an act upon the demand of another, performance, or an offer to perform, must be within a reasonable time after demand, that is, so much time as is necessary to do conveniently what the contract requires to be done."

That case is unlike this case for the reason that, according to appellants' contention, it transferred this whisky, at considerable expense, from its warehouse in Woodford county, Kentucky, to appellee's public warehouse in the city of Louisville, and there deposited it, under a contract with appellee to hold it for the consideration of 5 cents per barrel per month, and to loan, or secure to be loaned, and renew the loans thereon at \$10 per barrel, so long as the whisky remained in appellee's warehouse, appellee violating its said contract, and failing and refusing to renew the loan, thereby forcing the sale of the said whisky at a sacrifice, and knowing at the time appellant was unable to protect itself and save itself from loss. Under these alleged facts the question of reasonable time, under all the circumstances, should have been submitted to the jury.

There are other errors in the instructions given on the second trial, but we do not think it necessary to refer to them, as the instructions given on the first trial were correct, except instruction No. 8.

If the appellee had contracted to loan and renew the loan so long as the whisky remained in its warehouse, and knew that appellant was unable otherwise to obtain or renew the loan, we can not understand the application of the first part of instruction No. 8, "that if the appellee gave the appellant a reasonable notice that the loan would not be renewed or continued, then they should find only in such sum as they may believe from the evidence represents the amount the plaintiff would have been compelled to pay to carry the said loan without the defendant's assistance under the said contract."

We are not inclined to disturb the action of the court in the setting aside the verdict of the jury on the first trial. That court presided and witnessed the conduct of the trial from its inception to the end, and could better determine whether or not the parties had a fair and impartial trial. And while in some cases this court has directed the entry of the first judgment, when it was erroneously set aside, yet in a case where the defense is supported by strong evidence and, in the opinion of the trial judge, presents a good defense, we are not inclined to apply the rule contended for. And, besides, it was error for the court to permit the advertisement for the sale of appellant's whisky to be sent to the jury after the cause had been submitted to them, and the court may have observed other small errors in the progress of the trial which caused him to exercise his discretion in the setting aside the verdict.

For these reasons the case is reversed and the cause remanded, with directions to grant appellant a new trial and for further proceedings consistent with this opinion.



## HALL, &amp;c. v. METCALFE.

(Filed February 17, 1903.)

**Decedents' estates—Personal representatives—Unnecessary allowance of attorney's fees—**H. died intestate, leaving a widow and son surviving him, owning no personal estate and only a small farm on which was a mortgage lien to appellee. P. was appointed as administrator. Appellee instituted this action to enforce his mortgage lien, making the administrator, the widow and son defendants. The petition alleges that appellee and S. were the only creditors of the estate, but failed to allege that the decedent left no personal estate, or not enough thereof to pay his debts, nor does it state the amount or nature of the claim held by S. against the estate. The prayer of the petition asks a sale of the mortgaged real estate to pay appellee's debt and a reference to the commissioner for a settlement of the estate, and that appellee be allowed his costs and attorney's fees. Prior to the trial the land was sold at private sale and the debts paid, but the case was prepared and the judgment entered, directing the sale and allowed appellee's attorney a fee of \$40, and a fee of \$15 to the attorney for the administrator. Held—That the judgment was altogether erroneous. There was no necessity for the appointment of an administrator, as there was no personal estate left to be administered. The action was not one to settle an estate. The original petition contained no statement of fact that would have authorized a reference of the case to the commissioner for the purpose of ascertaining the estate's indebtedness, or to make a settlement thereof. The manner in which this action has been instituted and conducted is well calculated to excite suspicion that the recovery of attorney's fees, and their payment out of the estate of the decedent, is the end mainly sought to be maintained. It is not the policy of the law nor the aim of this court to permit estates, small or great, to be consumed by unnecessary costs. No attorney's fees should have been allowed by the lower court, either to appellee's attorney or the attorney of the administrator. Appellee was only entitled to his costs from the institution of the suit until the payment of his debt, to include a taxed attorney's fee of \$5. The appellants should be allowed their costs.

Walker C. Hall for appellants.

L. L. Manson and B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Settle.

Charles L. Hall died in Kenton county, Kentucky, intestate. The appellant, Julia A. Hall, is his widow, and the appellant, Edward Hall, his son and only heir at law.

On November 21, 1900, one R. J. Perry was appointed and qualified as the administrator of his estate; on November 24, 1900, this action was instituted by appellee in the Kenton Circuit Court to enforce a mortgage lien that had been given him on a small tract of land by the decedent and his wife to secure a note of \$300, in which action R. J. Perry, as administrator of the estate of the decedent, the latter's widow and son, and Samuel Stephens were made defendants. The petition alleges that appellee, T. T. Metcalfe, and Samuel Stephens were the only creditors of the estate, but failed to allege that the decedent left no personal estate, or not enough thereof to pay his debts, nor does it state the amount or nature of the claim held by Samuel Stephens against the estate. The prayer of the petition asks a sale

of the mortgaged real estate to pay appellee's debt, and a reference of the cause to the master commissioner for settlement of the estate, and that appellee be allowed his costs, including attorney's fees.

The administrator filed answer, in which he states his appointment and qualification as administrator; that so far as he knows Metcalfe and Stephens were the only creditors of C. L. Hall's estate; and further, that the mortgage note of appellee contained usury, as it calls for 8 per cent. interest, when only entitled in law to bear 6, and asks that the note be purged of usury, which would leave \$468.16 due appellee, instead of the larger sum claimed. The answer, like the petition, is silent as to the nature and amount of the Stephens debt, and it also fails to state what personal estate, if any, was left by the decedent, but concurs in the prayer of the petition for a reference and settlement, and asks an allowance to himself and attorney.

It appears from the record that the appellant, Julia A. Hall, had ascertained that her deceased husband owed about \$250 in addition to appellee's debt, and a part of this sum she paid, but being desirous of paying all his debts, she effected a sale of the little farm covered by appellee's mortgage, which was all the estate left by her husband, at \$850, which sum was sufficient to pay the debts in full and leave her and her son \$50 or \$75. The answer of appellants averred that all the debts of the decedent, including that of appellee, had been fully paid by them, and they exhibited with their answer a schedule containing the names of the creditors, and the sums paid them respectively, which showed the aggregate indebtedness to be \$832.52 paid out of the proceeds realized from the sale of the farm, leaving to appellants \$32.48.

Appellee filed reply, traversing the averments of appellants' answer, and appellants thereupon took the depositions of several witnesses, which were duly filed with the clerk of the Kenton Circuit Court before the submission of the case as appears from an order of court. It is contended by counsel for appellee that the depositions were taken without notice, or upon insufficient notice, and, therefore, they should not be considered by this court. If they were taken without notice, exceptions should have been filed to them in the lower court, and before the submission of the case, but as the record fails to show that they were excepted to in that court, it is too late to object to them now and in this court. The depositions furnish indisputable evidence to the effect that as far back as December 21, 1900, which was less than a month after the institution of appellee's action, one J. C. Cotton, who afterwards became the purchaser of the farm from appellants, learning of the mortgage debt of appellee, went to see him and advised him of his purpose to purchase the farm, and appellee told him that he did not wish to buy the farm, but would buy it for him (Cotton), and the latter then placed in his hands \$600 as a guaranty that he would take the farm if appellee would buy it for him at commissioner's sale, and for the \$600 then left with him appellee executed to Cotton his due bill.

It is further shown by the proof that Cotton then learned that appellants were endeavoring to sell the farm through Foster, a real estate agent, and he bargained for the place through Foster at the price of \$850, and paid to appellant, Julia A. Hall, and certain of the creditors, all of the purchase price over and above the \$600 in appellee's hands, and upon receiving of

appellants a deed conveying him the farm Cotton again saw appellee, who settled with him by paying back to him \$42 out of the \$600, which had been left with him by Cotton, and after paying the \$42 to Cotton, he claimed that the sum retained by him only equalled the principle and interest of his mortgage debt, and a medical bill of \$15, which appellant, Julia A. Hall, owed him.

Thus we find that appellee not only received the amount of his mortgage debt, but in addition that he appropriated to the liquidation of a medical bill which he had against the widow the pittance going to her out of the money left in his hands after satisfying his mortgage debt. Notwithstanding the payment of his debt, appellee refused to release the mortgage lien which he held upon the farm purchased by Cotton of appellants. It appears that appellee's attorney, upon being informed of the sale of the land to Cotton, presented himself while the parties were making out a list of the debts to be paid out of the proceeds of the sale, and demanded the payment of a fee of \$75 for services rendered by him in this action in the lower court, a fee of \$50 for the attorney of the administrator, and a bill of \$19.35 costs, the payment of which fees and costs appellants refused.

Appellee was also present when these fees were demanded, and he then stated, in the presence of his attorney and without contradiction from him, that the latter had agreed with him on a fee of \$20 for his services in the case. The administrator, upon being asked by the attorney of Cotton about the fee demanded by his attorney, denied that he had employed him, yet in an affidavit afterwards filed by him in the case he demanded the allowance of a fee to that attorney.

The lower court, in the judgment rendered upon the submission of the case, allowed appellee's attorney a fee of \$40, a fee of \$15 to the attorney for the administrator, and ordered a sale of the land described in the mortgage of appellee to pay the debt sued on, and the costs of the action. This court is now asked to reverse that judgment. We do not hesitate to say that the judgment in question is altogether erroneous. There was no necessity for the appointment of an administrator of the estate of the decedent, C. L. Hall, as there was no personal estate left by him. No proof of the appellee's debt was necessary other than the statutory affidavit thereto attached, which seems to have been properly made by the holder of the note, and no demand for its payment before suit would have been necessary had there been no administrator. The action to enforce the mortgage lien of appellee could have been maintained by simply making the widow and heir at law parties. Other creditors, if known, should also have been made parties.

A reference to the commissioner in such a case would have presented their claims fully to the court, and given such relief as they were entitled to. The manner in which this action has been instituted and conducted is well calculated to excite suspicion that the recovery of attorney's fees, and their payment out of the estate of the decedent, is the end mainly sought to be attained. It is not the policy of the law, nor the aim of this court, to permit estates, small or great, to be consumed by unnecessary costs. The action was not one to settle an estate. The original petition contained no statement of fact that would have authorized a reference of the case to a commissioner for the purpose of ascertaining the estate's indebtedness, or

to make a settlement thereof. In fact the amended petition, which contained the only averment in the pleadings, to the effect that the decedent left no personal estate, was not filed until after appellee and all other creditors had been paid what was due them from the estate.

We are of opinion that no attorney fees should have been allowed by the lower court, either to appellee's attorney, or the attorney of the administrator. We are also of the opinion that the lower court erred in decreeing the enforcement of appellee's mortgage lien, and a sale of the land in satisfaction of the mortgage debt, for, according to the evidence, his debt was paid some months before the rendition of the judgment. But inasmuch as the debt was not paid until after suit was instituted, appellee is entitled to his costs incurred in the proceeding to enforce his lien down to the time of the payment of his debt, say February 1, 1901. The costs to which he will be entitled should include a taxed attorney's fee of \$5 as is usual in actions in equity. In all other respects the appellants should be allowed their costs.

For the reasons indicated the judgment of the lower court is reversed and cause remanded for further proceedings consistent with the opinion herein.

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COMMONWEALTH v. BAVARIAN BREWING CO.

(Filed February 17, 1903.)

Appeals—Mandamus—Suspension of judgment by motion for new trial—Appellee and other brewing companies were indicted for a violation of section 8915, Kentucky Statutes, prohibiting combinations for the purpose of regulating, controlling or fixing the price of any merchandise, manufactured article or property of any kind. On the trial had on the 8th day of October, 1902, a verdict was rendered for defendant under a peremptory instruction of the court. On the following day the Commonwealth's attorney filed grounds and entered a motion for a new trial. This motion was continued from time to time until December 26, 1902, when it was overruled, to which the Commonwealth's attorney excepted and asked the court to grant an appeal. The court did not dispose of the motion for an appeal until January 21, 1903. On the 28th day of January, 1903, the attorney general appeared in this court and filed a certified transcript of the orders of the court below, and moved the court to issue a mandamus against the circuit judge, requiring him to grant an appeal from the judgment overruling the motion. To which the judge filed a response that in his judgment the Commonwealth was not entitled to file a motion for a new trial in the case; and further, that the court had no power to grant an appeal as the motion for an appeal was not made until more than sixty days had expired after the rendition of the judgment. Held:—That the Commonwealth had the right to make a motion for a new trial. The motion for a new trial had the effect to suspend the judgment until it was finally overruled, or, in other words, that the judgment only became final when the motion for a new trial was finally overruled, and that under section 348 of the Criminal Code it was the duty of the defendant to have granted the appeal prayed, and he is directed to conform his rulings to these requirements.

C. J. Pratt and D. A. Glenn for appellant.

George Washington and Joe L. Ellison for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

The Bavarian and other brewing companies were indicted by the grand jury of Kenton county for a violation of section 3915 of the Kentucky Statutes, which is a section of the act of May 20, 1890, prohibiting combination by corporations, partnerships, individuals, or persons, or associations of persons, for the purpose of regulating, controlling or fixing the price of any merchandise, manufactured article, or property of any kind. Section 3917 prescribed a fine of not less than \$500 nor more than \$5,000 for the violation of the preceding section. A trial of the defendants under the indictment on the 8th of October, 1902, resulted in a verdict for the defendant which was rendered under a peremptory instruction from the court. On the following day the Commonwealth's attorney for that district filed grounds, and entered a motion for new trial. At the sitting of the court on October 20, 1902, the motion was continued by consent. On October 20, 1902, the motion was again continued for two weeks, but the record does not show at whose instance. On November 4 the motion was again continued for two weeks. On November 24, 1902, the motion for a new trial was set for oral argument on December 8, 1902. On December 8, 1902, the defendants moved the court to strike the motion and grounds for a new trial from the file, and the argument on the motion for a new trial was continued until December 15. On December 23 both motions were submitted, and on December 26 the trial court overruled the motion of the Commonwealth for a new trial, to which the plaintiff excepted, and asked the court to grant them an appeal to the Court of Appeals. Defendants objected to this time, and the court took time. On December 30 the Commonwealth's attorney moved the court to dispose of his motion for an appeal, which was first made on December 8, 1902, and this motion was finally submitted on January 12, 1903. At a sitting of the court on January 21, 1903, the motion of the Commonwealth for an appeal to the Court of Appeals was overruled, and the appeal refused, to which the Commonwealth excepted. On the 28th of January, 1903, the Commonwealth of Kentucky, by U. J. Pratt, attorney general, appeared in this court and filed a certified transcript of the orders of the court below, and asked that a writ of mandamus should issue against the Hon. James P. Tarvin, judge of the Kenton Circuit Court, requiring him to grant an appeal from the judgment of the Kenton Circuit Court, overruling the motion. To which the Hon. James P. Tarvin, as judge of the Kenton Circuit Court, filed a response, in which he says in substance that he had reached the conclusion that the Commonwealth was not entitled to file a motion for a new trial in the case; and that he, as judge of the Kenton Circuit Court, had no jurisdiction to pass on same; and that more than sixty days having elapsed since the rendition of the judgment on October 8, 1902, before the Commonwealth moved for an appeal, that its motion came too late, and was consequently overruled.

By section 347 of the Criminal Code the Court of Appeals is given appellate jurisdiction of penal actions and prosecutions for misdemeanors, if the judgment be for the defendant in cases in which a fine exceeding \$50 might have been inflicted. Section 348 provides: "The appeal must be prayed during the term at which the judgment is rendered, and shall be granted upon

the condition that the record be lodged in the clerk's office of the Court of Appeals within sixty days after the judgment.

"Section 850. When the Commonwealth's attorney prays an appeal, the clerk shall forthwith make and certify a complete transcript of the record, and transmit the same to the attorney general, or deliver it to the Commonwealth's attorney for that purpose. And if the attorney general on inspecting the same believes it proper to take the appeal, he shall do so by filing the transcript in the clerk's office of the Court of Appeals in sixty days after judgment."

There has been no change in these provisions of the Code since it took effect on the 1st of July, 1854. In the *Commonwealth v. Adams*, 55 Ky., 270, which was decided in 1855, this court construed these sections of the Code, and held, first, that appeals from judgment of circuit courts in misdemeanor cases must be taken at the term at which the judgment was rendered, and the record filed in the clerk's office of the Court of Appeals within sixty days after judgment. In *Commonwealth v. McCready*, 59 Ky., 377, the ruling in the *Adams* case was adhered to. But it appears that in that case, after judgment was rendered and the motion for a new trial had been overruled, time was given by consent of parties until the first day of the next term to file a bill of exceptions. And it was held to be still incumbent upon the appellee to file the record within sixty days after the judgment.

In the case of the *Louisville Chemical Works v. Commonwealth*, 71 Ky. 179, it was held that a motion for a new trial suspended the judgment, and that no appeal could be prosecuted until after the motion for a new trial had been disposed of. The court, through Judge Pryor, said: "No appeal can be taken by either party, plaintiff or defendant, to this court from the judgment of an inferior court in a case like this without first making a motion for a new trial in the court where the error complained of occurred. Upon the hearing of the motion, if overruled, the party complaining files his bill of evidence, and is then in a condition to bring his case to this court, and not before. If either party should bring the case here upon the judgment alone, with the motion for a new trial pending in the lower court, or without having made such motion, the dismissal of the appeal would be the inevitable result. If appellants had appealed from the judgment in this case at the time it was entered, viz, at the November term, and filed their record in this court, with the motion for a new trial pending in the lower court, and continued over until December term, we are at a loss to perceive how this court could take jurisdiction and try the appeal.

"There is no judgment in fact upon the verdict of a jury until the motion for a new trial, if made in proper time, is disposed of. This motion suspends the judgment, and it has no more effect than the verdict of the jury until the application for a new trial is overruled. Any other construction of the law would deprive the parties of the right to an appeal in all cases where the court, for prudential reasons, or otherwise, saw proper to continue the motion from one term to another, a right that the court can exercise, and over which neither the counsel nor his client have any control."

It seems to follow from these provisions of the Code, and from the construction given them in the case quoted, that a motion for new trial was necessary to enable this court to correct errors growing out of the evidence

or instructions given to the jury in the court below. This court has uniformly held that a motion for a new trial suspends the judgment in a civil case, and may be continued and passed on at a subsequent term. (Louisville Rock Lime Co. v. Curr, 78 Ky., 12; Harper v. Harper, 10 Bush, 447; Turner v. Johnson, 18 Ky. Law Rep., 203; Trip, & Co. v. Aldrich, 23 Ky. Law Rep., 2432.)

We are, therefore, of the opinion that the motion for a new trial had the effect to suspend the judgment until it was finally overruled; or, in other words, that the judgment only became final when the motion for a new trial was finally overruled; and that under section 348 of the Criminal Code it was the duty of the defendant to have granted the appeal prayed, and he is directed to conform his rulings in this matter to the views herein expressed, and order will go as prayed.

#### MIDDLESBOROUGH R. R. CO. v. STALLARD'S ADM'R.

(Filed February 17, 1903—Not to be reported.)

Railroads—Damages—Negligence—S. was one of a gang of section hands working on appellant's road, and at the close of the day's work they were returning home on two hand cars, S. being on the first car and the two cars were not more than two hundred feet apart. When coasting on a down grade, going at a rate of about fifteen miles, the first car struck a mule and stopped, all the hands on it getting off on the sides of the track except S., who got off behind, when the second car ran on him and killed him. This action for damages resulted in a verdict for \$3 000. On appeal, Held—That the verdict is not improper. The testimony shows that the front car was in plain view of the rear car when the accident occurred, and it is evident that if the rear car could have been stopped in time to have avoided striking decedent, it was gross negligence not to have done so. If, on the other hand, it could not have been stopped after the collision of the first car with the mule, it was gross negligence to have operated them on so steep a grade so close together, and especially not to have retained control of the brakes. In either event, the appellant can not escape liability.

J. W. Alcorn, B. D. Warfield and C. W. Metcalf for appellant.

Beckner & Jouett for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, J. L. Reader, administrator of W. E. Stallard, recovered a judgment against the appellant, the Middlesborough R. R. Co., for \$2,000 for the death of his intestate, which it is alleged was caused by the negligence of the defendant in permitting a hand car to be run against him while in the service of the appellant. Appellant asks a reversal on the ground, first, that no negligence was proven against the defendant, and that the verdict was the result of passion and prejudice; second, that but for the decedent's contributory negligence the accident would not have happened; third, that the court erred in the instruction given to the jury. The testimony shows that the decedent, W. E. Stallard, was working for the appellant as one of a gang of bridge builders on its road at a point not far from

the city of Middlesborough; that at the close of the day's work the whole gang were loaded upon two hand cars; that plaintiff's intestate, with five other persons, were on the front car, and that about fifteen others were loaded on the second car; that there was a steep grade from the point where they had been at work, and from which the hand car started to Middlesborough, which made it unnecessary for the occupants of the car to work the handles, and they were turned loose and the car permitted to coast, as one of the witnesses expresses it. The distance between the cars varied according to the testimony of the witness is from two to three hundred feet. A mule, which suddenly ran onto the track in front of the first car, was struck and knocked down, and the car ran up on its body. The men on this car jumped off, some of them from the sides of the car, but the decedent, Stallard, and one Prior Wilson jumped from the rear end of the car, and Stallard was struck by the second car, which, Wilson testifies, was not more than two hundred feet behind the first car at the time the mule was struck, and was running down grade at the rate of about ten miles an hour; that he heard some one call "lookout," and he stepped off the track just in time to avoid being struck by the second car. But Stallard failed to do so, and was knocked down and killed. The testimony of the other witnesses as to how the accident occurred does not materially differ from the version of Wilson. W. S. Bean, the foreman in charge of the front car, says that the rear car was running about two hundred and fifty feet behind his car when the mule was struck, and could have been stopped if the brakes had been promptly applied in a distance of about one hundred and fifty feet. W. T. Mills, who was section foreman, and who had charge of the rear car, testified that he was between two and three hundred feet behind the first car when he saw the men jump off the front car; that he was running down grade with loose brakes; that he did not see the mule before it was struck by the front car, and supposed the men were getting off at their homes; that no one had hold of the handles, and he gave no order to apply the brakes until too late to avoid the collision. The witness Logsdon, the general manager of the appellant company, testifies that the grade of the track where the accident occurred is about sixty feet to the mile; and that a coasting car would run fifteen or twenty miles an hour at that point. Three hundred feet is the furthest distance at which any of the witnesses place the rear car at the time the first one struck the mule, and as it was running at the rate of ten miles an hour, it would have only taken twenty seconds for it to have overtaken the first one.

All the witnesses testified that the front car was in plain view of the rear car when the accident occurred, and it is evident that if the rear car could have been stopped in time to have avoided striking decedent, it was gross negligence not to have done so. If, on the other hand, it could not have been stopped after the collision of the first car with the mule, it was gross negligence to have operated them on so steep a grade, so close together, and especially not to have retained control of the brakes. Taking either horn of the dilemma, it seems to us that defendant can not escape the charge of negligence.

There is nothing in the testimony which justifies the claim of appellant that Stallard was guilty of such contributory negligence as but for which



he would not have been struck by the rear car. The right of a person to damages for a personal injury is not effected by his having contributed to it unless he was in fault in so doing.

"The rule is well settled that where an employe is suddenly and unexpectedly placed in a position of imminent danger, caused by the failure of duty on the part of others, that he will not be held guilty of contributory negligence, because he did not adopt the best means of escape or made an error in judgment as to the best course to pursue." (Gayley's Personal Injuries, section 1151; South Covington and Cincinnati Ry. Co. v. Ware, 84 Ky., 269; Thompson on Negligence, volume 2, 1092; Stokes v. Saltonstall, 13 Peters, 191; Price on American Railroad Law, page 495.)

Serious complaint is made of the instruction. We think it may be conceded that they are not drawn with technical accuracy, but, taking them as a whole, they are more favorable to appellant than the facts seem to warrant, and certainly taking the verdict as a criterion, were not prejudicial.

Judgment affirmed.

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#### HARRIS v. TUTTLE.

(Filed February 17, 1908.)

Partnership—Mortgages—A. and B. entered into a partnership in an electric light and power company, and A. borrowed his share of the capital, \$7,500, from appellant, his mother, and B. borrowed his share of the capital, \$7,500, from his father-in-law, the appellee, and each executed a mortgage on his undivided interest in said partnership to secure the loans. Subsequent to making of these mortgages, but prior to recording said mortgages, the partners, for the purpose of securing the payment of a prior partnership debt of \$4,000, executed to T. a mortgage on the partnership property, but this was not recorded until after the individual mortgages had been recorded. In a contest between the holders of these mortgages, Held—That the holder of the mortgage on the partnership property is entitled to the priority. By the execution of the prior mortgages A. and B. only put in lien to the mortgagees their interest in the property after the partnership debts were paid, each partner reserving his equitable lien upon all the property for the payment of partnership debts. The proof shows that the \$4,000 would not have been loaned the partners except upon their statement that there was no mortgage lien on the property.

John W. Ray and Sturgeon & James for appellant.

W. L. Porter and V. H. Baird for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Nunn.

The substance of the facts of this case appear to be that J. T. Harris, who is a son of appellant, H. S. Harris, and S. L. Bowen, who is a son-in-law of appellee, E. A. Tuttle, formed a co-partnership under the style of the Glasgow Electric Light and Power Co. They were equal partners, each borrowed the capital with which he began, Harris from his mother, appellant and Bowen from his father-in-law, Tuttle, appellee. The sum loaned in each instance was \$7,500. It was agreed all along that each was to give a mortgage on the undivided one-half of the property to secure the loan made.

On the 27th of May, 1898, the final amount to make the \$7,500 was loaned to Harris by his mother, and on that day he executed to her his note for the full sum, and also executed a mortgage to her on his one-half of the property to secure the note, as he had agreed to do. On the same day Bowen executed a note and mortgage to appellee Tuttle for the like sum of \$7,500 to secure the loan from him, as he had agreed to do. These mortgages were not acknowledged and lodged for record until June 17, 1898. On May 31, 1898, just four days after the execution of the notes and mortgages, but before they were acknowledged and lodged for record, Harris and Bowen executed a note and mortgage to Trigg & Co., to secure a prior indebtedness, in the sum of \$4,000. This mortgage to Trigg & Co. was filed and recorded November 8, 1898. This note and mortgage for \$4,000 was sold and transferred by Trigg & Co. to appellee, E. A. Tuttle, and he brought suit upon it on the 21st day of January, 1899, against Harris and Bowen, as partners, and Annie M. Bowen and H. S. Harris, &c.

Appellee alleged in his petition that his lien for the \$4,000 mortgage debt was a prior lien over the mortgage debt of himself and that of appellant, H. S. Harris, for the \$7,500 each. The appellant filed answer, denying this allegation and alleging that her mortgage was a superior lien to that of appellee for the \$4,000 debt, or any one else except the mechanic's lien of E. B. Davis. The special commissioner in the case reported and the lower court adjudged that all of the firm's debts were superior liens, and should be paid before the individual debts of the two partners, and on this judgment Tuttle received on his \$4,000 debt and its interest the sum of \$3,529.50, and the appellant, H. S. Harris, excepted to this judgment. It is now here on appeal.

Appellant claims that by the mortgage of her son to herself, and H. L. Bowen to his father-in-law, Tuttle, of their undivided half each of the partnership property that they by that act waived all their rights to partnership liens, and that the general creditors of the partnership have no lien upon the partnership property; that their lien is derivative only, and that they can only assert such lien when the partners themselves can do so. Admitting this to be true, the mortgages were each executed individually, Bowen to Tuttle and Harris to his mother, conveying each of their undivided half interest in said partnership property. And construing these mortgages, they only put in lien to the mortgagees their interest in the property after the partnership debts were paid, each partner reserving his equitable lien upon all the property for the payment of partnership debts. Bowen swears that this was the understanding with Harris at the time these individual mortgages were executed. Harris contradicts him in his testimony. Trigg and Dickinson, of the firm of Trigg & Co., corroborate Bowen; they say that they made the loan of \$4,000 to Bowen and Harris directly with Harris, and that they would not have loaned the money to them except upon the statement of Harris that there was no mortgage lien of any kind upon the property.

For these reasons the judgment of the lower court is affirmed.

FARMERS AND SHIPPERS TOBACCO WAREHOUSE CO. v.  
GIBBONS.

(Filed February 18, 1908—Not to be reported.)

Res judicata—Instruction—This is the second appeal in this action, and the issue tried after the return of the case to the lower court involved the question of damages to which plaintiff was entitled for illegal levy of an attachment on a crop of tobacco. On this issue the court on the first trial gave substantially the same instruction as was given on the second trial, and which is now objected to on this appeal. Held—That as the court did not condemn this instruction on the former appeal, the court will treat it as approved. The doctrine of res judicata prohibits a review of the action of the court on the same question on the former appeal.

W. H. Wadsworth and J. R. Minor for appellant.

M. L. Harbison for appellee.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Paynter.

This is the second appeal. On the former one the court delivered an opinion, which is in 21 Ky. Law Rep., 1348. The court eliminated one of the causes of action, and stated the remaining one in language as follows, to wit: "But the injury for which appellee has cause of action is that the attachment against W. A. Gibbons was, by the direction of the appellant, levied upon his property, and the averments of the petition are sufficient to support a cause of action for such wrongful levy and seizure, and for damages to the property levied upon, that directly flowed therefrom."

It is insisted that, although the plaintiff may have directed the property to be levied upon, the attachment was not executed in the manner provided by law, therefore, no injury could result to the appellee for which the appellant is liable.

On the trial the court allowed the appellee to recover damages for depreciation of not only the tobacco taken into actual possession by the sheriff, but for the depreciation of all of the tobacco restrained or withheld from him by persons who did so by reason of the service upon them of the purported copies of the writ. On the former trial the court did likewise, and in submitting that question to the jury gave instruction No. 1, which reads as follows: "The jury are instructed that they shall find for the plaintiff such damages as he sustained by reason of the seizure or detention of the tobacco and money mentioned in proof under the attachment, or purported copies thereof, issued in the former cause. The measure of damages for the detention or seizure of the money mentioned in the proof is interest on the sum garnished at the rate of 6 per cent. per annum from the date of the seizure and service of the writ of attachment and garnishment, or purported copy thereof, to the date of its discharge. The measure of damages for the seizure or detention of the tobacco mentioned in proof is the difference in value, if there was any depreciation, in value, of the tobacco, of which the plaintiff was the sole owner, and one-half of the difference in value of the tobacco of which plaintiff was the owner of a one-half interest on the date of the seizure and service of the purported copies of the writ of attachment and garnishment, the date of the discharge or release of the tobacco; also all

expenses incurred by plaintiff for storage, insurance on tobacco during the period it was so restrained, and also the necessary rehandling of said tobacco, if such was necessary, and such expense."

It will be observed that this instruction submitted to the jury on the first trial the very questions which the appellant contends should not have been submitted to the jury on the last trial, for on it the court gave substantially the same instruction as No. 1 quoted above.

The court decided that the only cause of action remaining was the one submitted to the jury by that instruction; it did not condemn this instruction on the former appeal, and we must treat it as having approved it as properly submitting the issue to the jury. The doctrine of *res judicata* prohibits us from reviewing the action of the court on the question on the former appeal of this case. (*Davis v. McCarkle*, 14 Bush, 746.)

The facts authorized the submission of the case to the jury, and the verdict is not, if at all, so palpably against the weight of evidence as to warrant us in reversing on that ground.

Judgment is affirmed.

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CITY OF LOUISVILLE v. BREWER'S ADM'R.

(Filed February 18, 1908—Not to be reported.)

Municipal government—Negligence—Obstruction of streets—Pleading—Evidence—In 1895 territory was added to the city of Louisville. Previous to this annexation what is now known as Rawlings street was a county road, used by the public as such, and had been so used for a considerable time. Before it was annexed to the city a cinder path had been built along the edge of the road for the use of pedestrians, and three or four posts had been erected along the outside of this cinder path to prevent wagons from being driven on it or over it. The post which caused the injury complained of stood nearly in the middle of the path. On a dark night in October, 1897, B., who was an old man, was walking along this path with his son and grandson, when he fell on this post, which was about two and one-half feet high, the top of which was sharp, and received such severe injuries that he died therefrom. This action was brought by his administrator to recover damages from the city, and a verdict and judgment for \$1,000 was rendered from which this appeal is prosecuted. It is insisted that the court erred in excluding evidence offered by defendant to show that Rawlings street had never been accepted as a public street of the city, and in misinstructing the jury on this point. It is insisted that to authorize a recovery in this proceeding that it was necessary for appellee to establish the fact that Rawlings street had been formally accepted as a public street of the city of Louisville by its council, or that they had taken control of it and improved it in some way, and appellant offered to prove by two engineers of the city that the council had done neither. An objection was sustained by the trial court to this testimony, and this is relied on as one of the main grounds for a reversal. Held—That the court did not err in excluding this testimony. There can be no doubt that when the city of Louisville procured the annexation of the territory traversed by the county road, known as Rawlings lane, that it became a street of the city, and it became chargeable with all the duties with reference thereto that they owe to any of the public streets and alleys of the city; that a formal recognition of this fact by a resolution of its board of council was wholly unnecessary. It is insisted that the peti-

tion, as amended, is not good because it fails to allege that appellant knew of the erection of the posts in the walk, or by the exercise of ordinary care or diligence could have known thereof, and also because there is no averment that deceased did not know of the obstruction complained of prior to the injury. It is conclusively shown that this post had been standing in the middle of the walk more than three years previous to the injury after the annexation of the property through which the road run. This fact alone is sufficient to charge the appellant with notice of the obstruction. Having means of knowledge and negligently remaining ignorant, is equivalent to knowledge. The allegations referred to are matters of defense, but if the petition was defective it was good after trial and judgment. Besides, in this case, no such objection to the petition was raised in the lower court in any way, and the instructions distinctly submitted this question to the jury, and the defect, if any, was cured by the verdict.

H. L. Stone for appellant.

B. H. Young, M. W. Ripy and Edwin C. Waile for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Chief Justice Burnam.

This action was brought by the appellee, James W. Brewer, as the administrator of Wm. H. Brewer, deceased, against the appellant, the city of Louisville, and Clara Klienhenz for damages for the death of his intestate. The particular acts of negligence relied on for recovery, set out in the amended petition, are that the defendant, by its agent or servants, with negligence, and without regard to the rights of the public to the free and unobstructed use of Rawlings street, erected, or permitted to be erected, or put up in front of the premises owned by Klienhenz, certain wooden posts, so near to the yard fence in front of her premises as to obstruct the pathway, and so as to make a dangerous obstacle to the public and those passing along and using the street; and that it was negligently maintained and allowed to remain in its position by the appellant, its agents and servants; and that by reason thereof appellee's intestate sustained the injuries which resulted in his death. The defendant in its answer denied all the material allegation of the petition, and especially that Rawlings street was at the time set out in plaintiff's petition, or at any time, a street, highway or thoroughfare of the city, or that it had ever been dedicated for the use of the public as a street, or was under the charge or control of the defendant at the time of the accident complained of, or that it was their duty to have kept it free from obstruction, or that the post which caused the injury was either erected or permitted to remain at the point indicated to the danger of the public using the said street. And in the second paragraph of the answer they plead contributory negligence on the part of appellee's intestate, which helped to bring about his injury, and but for which it would not have happened. The reply of plaintiff denied all the material allegations and the answer. The cause was tried out before a jury, and resulted in a verdict in favor of the appellee for \$1,000, on which the court entered a judgment against the city, the petition having been previously dismissed as to the other defendant. And the defendant appeals and asks a reversal, first, on the ground that appellee's petition as amended does not state a cause of action, and is insufficient to support a verdict and judgment; and, second,

that the court erred in excluding evidence offered by the defendant to show that Rawlings street had never been accepted as a public street of the city, and in misinstructed the jury on this point.

We will first consider the last ground relied on, and to do so it is necessary that we should give a brief history of the facts disclosed by the record as to the existence of Rawlings street. In September, 1895, a considerable boundary of territory which theretofore constituted a part of Jefferson county was annexed to the city of Louisville. Previous to this annexation what is known now as Rawlings street was a county road, used by the public as such, and has been so used for a considerable time. A number of houses had been built upon the property adjacent, which fronted the road; and before it was annexed to the city a cinder path had been built along the edge of the road for the use of pedestrians, and three or four posts, one of which caused the accident to decedent, had been erected along the outside edge of the cinder path for the purpose of preventing wagons and other vehicles from being driven on or over it. The path was about four or five feet wide, and the post which occasioned the injury stood nearly in the middle thereof, about one and a half feet further in than the others. It was about two and a half feet high and about six or eight inches square, and its top had been gnawed or split to a sharp point. After this portion of the county road was taken into the city limits by the annexation of the territory it was continued in use as a public thoroughfare and the property fronting thereon assessed for taxation by the city of Louisville, and appears with its dimensions upon all the official maps of the city published subsequent to the annexation, beginning with the year 1896.

On the night of October 30, 1897, W. H. Brewer, his son, S. B. Brewer, and his grandson, Ernest Quire, were walking along Rawlings street, and William Brewer, quite an old man, stumbled over the post, which stood in the center of the path, striking the top of the post with the left side of his abdomen, near the groin, and in consequence thereof the wall of the abdomen was broken, and the bowels came out. He died the next day as a result of the injury.

It is insisted for appellant that to authorize a recovery in this proceeding that it was necessary for appellee to establish the fact that Rawlings street had been formally accepted as a public street of the city of Louisville by its council, or that they had taken control of it and improved it in some way, and the appellant offered to prove by Messrs. Claybrooke and Breed, engineers in the employ of the city, that the council had done neither. An objection was sustained by the trial court to this testimony, and this is relied on as one of the main grounds for a reversal. Elliott on Roads and Streets, section 414, says: "Where land is dedicated or appropriated for a suburban road, the implication must be that it shall be used as the convenience and welfare of the public may demand, although that demand may be augmented by an increase in population or by towns and cities springing up in the territory traversed by the road. Under the ancient maxim, 'once a highway, always a highway,' the road continues to exist for all lawful purposes to which a highway of its class may be devoted, unless it is abandoned or vacated in due course of law. This subject is, however, generally

covered by statute, and recourse must of course be had to the statute to determine what right a town or city has over roads laid out as public or suburban ways, but it may be said that where a town or city grows up within a territory traversed by rural public roads, they pass under the jurisdiction of the municipal corporation, unless some different provision is made by statute."

In section 416, the same author says: "Our opinion is that as soon as a town or city is incorporated the public ways, that is, ways belonging to the public and not owned by private corporations, come within the jurisdiction and control of the new public corporation unless the statute expressly or impliedly continues the authority of the county or township officers. It is apparent that the ways must of necessity change character and the servitude be much extended. This extension carries with it wider duties and greater liabilities, thus requiring an essentially different control and care."

In section 154 the author says: "It may now be considered the prevailing opinion that an acceptance may be implied from a general and long-continued use by the public as of right. The later decisions upon this subject will, when analyzed, be found to be well bedded in principle."

In *Mackin v. Wilson*, 30 Ky. Law Rep., 203, it was decided that where a turnpike road is taken into a city by an extension of the city boundary it becomes a street of the city. And although it had already been improved as a public highway at the time it was taken into the city, any subsequent improvement would be original construction. And in the recent case of the *South Covington and Cincinnati Street R. R. Co. v. N. L. & A. Turnpike Co.*, 28 Ky. Law Rep., 68, the court said: "Where an amended charter is accepted which adds municipal territory previously laid out and platted, there is an implied acceptance of the streets and alleys designated on the plat. The extension of the city limits in 1872 and the original construction of Preston street in 1890 are sufficient evidence of the dedication of this street by the city."

And numerous authorities are cited in support of this contention. *Dillon on Municipal Corporations*, section 1009, says: "Where a corporation has treated a piece of land, within the limits of the municipality as a public street, taking charge of it, as such, it is chargeable with the same duties as though it was legally laid out; and it is liable for damages by reason of neglect to keep the same in safe condition for travel. It is under such circumstances estopped to claim that it is not a legal highway; and it is affected with the consequence of the knowledge and acts of its officers and agents."

It seems to us that there can be no doubt that when the city of Louisville procured the annexation of the territory traversed by the county road, known as Rawlings lane, that it became a street of the city, and they became chargeable with all the duties with reference thereto that they owe to any of the public streets and alleys of the municipality. That a formal recognition of this fact by a resolution of its board of council was wholly unnecessary. We, therefore, conclude that the trial court did not err in the exclusion of the testimony on this point.

Appellant insisted that the petition, as amended, is not good, because it fails to allege that appellant knew of the erection of the posts in the pave-

ment, or by the exercise of ordinary care or diligence could have known thereof; and also because there is no averment that appellee's intestate did not know of the obstruction complained of prior to the injury. This court has frequently declared that a municipal corporation can not be charged with negligence by the act of a third person unless sufficient time has elapsed after the authorities had notice of the defect to repair it, or they ought, by reasonable diligence, to have acquired notice of such defects. (*City of Covington v. Asman*, 24 Ky. Law Rep., 419; *City of Covington v. Manwaring*, 24 Ky. Law Rep., 428; *City of Wickliff v. Moring, By. &c.*, 24 Ky. Law Rep., 419.)

"But it is not necessary, however, that it should have actual notice; constructive notice is sufficient. Wherever the defect has existed for such a length of time and under such circumstances that the city or its officers, in the exercise of proper care and diligence, ought to have obtained knowledge of the defect, notice thereof will be presumed. And it is generally for the jury to determine as a question of fact whether the city had notice or not, although it may become a question for the court where the facts are undisputed, and but one reasonable inference can be drawn from them. In a recent case it was held that the existence of an obstruction, consisting of a plank crossing a sidewalk for an hour and forty-five minutes, was not sufficient to charge the city with notice, and the judgment upon the verdict against the city was reversed because the evidence failed to sustain the verdict upon that point. But where a dangerous obstruction had existed for three weeks, it was held sufficient time to charge the city with notice. And in a number of cases notice has been presumed where the obstruction existed for several months. The length of time during which a defect or obstruction is required to exist in order to charge the city with notice must, however, depend largely on the nature of the defect and the circumstances of the particular case." (*Elliot on Streets and Roads*, section 626, and authorities there cited.)

It is conclusively shown in this case that the post over which the intestate stumbled had been standing in the middle of the cinder path more than three years previous to the injury, after the annexation of the property through which the road ran. This fact alone, we think, is sufficient to charge the appellant with notice of the obstruction. Having means of knowledge, and negligently remaining ignorant is equivalent to knowledge. In the *City of Covington v. Diel*, 22 Ky. Law Rep., 955, it was contended for the appellant, as in this case, that the petition should have affirmatively alleged that the defect in the sidewalk was known to exist by the appellant a sufficient length of time to have enabled it to have repaired it before the injury was received. In response to this contention the court said this was a matter of defense, but if the petition was defective, it was good after trial and judgment. Besides, in this case no such objection to the petition was raised in the lower court in any way, and the instructions distinctly submitted this question to the jury, and the defect, if any, was cured by the verdict. In the *City of Maysville v. Guilfoile*, 28 Ky. Law Rep., 48, the proof showed that the appellant knew of the defect in the street, but momentarily forgot its existence, and the contention was there made that this was such contributory negligence as to preclude recovery. The court said; "It can not



be fairly stated as a matter of law that appellee was guilty of contributory negligence by forgetting for the time the existence of the defect. So far as we are informed it has never been so held in this State."

And it was held in that case that the question of contributory negligence should go to the jury. And the facts in this case bring it within the rule announced in that case. The accident occurred at night, the streets were not lighted, the deceased while walking along the cinder path stumbled over an obstruction which was so dangerous as to cause his death. These questions were fully submitted in apt instructions to the jury, and upon the whole case we see no error prejudicial to the substantial rights of the defendant, and the judgment must, therefore, be affirmed.

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CUMBERLAND TELEPHONE & TELEGRAPH CO. v. LOUISVILLE  
HOME TELEPHONE CO.

SAME v. SAME.

(Filed February 18, 1908.)

Telephone companies—Exclusive privileges—Injunctions—Foreign corporations—In 1886 the city council of Louisville granted to the Ohio Valley Telephone Co. the privilege of constructing and operating telephone lines along the streets and public ways of the city, which it did until 1900, when it sold out its interests to appellant, but it was expressly stated in the ordinance granting this privilege that it was not the exclusive right. In 1900 the council of the city provided for the sale of the franchise or privilege to construct and maintain a telephone system in said city. A sale was made, and appellee, a corporation, created under the laws of Delaware, became the owner of the franchise. Appellee began the construction of its lines of telephone along Frankfort avenue on the same side of the street as appellant had previously constructed its poles and wires, but the poles set by appellee were ten feet higher than those used by appellant so as not to interfere with the operation of appellant's wires. Afterwards appellant removed its poles and substituted longer poles, leaving only five feet space between the two sets of wires, which would materially obstruct the operation of appellee's lines. In some places appellant proceeded to erect poles so as to be of the same height as appellee's, and thus prevent the operation of appellee's lines. Appellee instituted these two actions, seeking to enjoin appellant from erecting its poles so as to interfere with the operation of appellee's telephone system. The chancellor granted the relief prayed for, from which this appeal is prosecuted. It is insisted that as appellee is a corporation formed under the laws of Delaware, whose laws do not conform to the laws of this State, that it has no authority to maintain a system of telephones in this State. It is conceded that a foreign corporation is recognized in other States only as a matter of comity, but owing to the intimate association of the people of the several States, corporations formed in one State have been universally recognized in other States, except in cases clearly forbidden by the policy of those States. This is not an application by the State questioning appellee's power to act as a corporation. The objection is made by appellant when sued by appellee for an invasion of its rights. Appellee has not only been incorporated in the State of Delaware, but it has been recognized by the authorities of the city of Louisville as a corporation, and has been granted by it an important and valuable franchise. It is at least a de-

facto corporation, and the rule seems to be that when an association of persons is exercising corporate franchises under color of legal organization the existence of the corporation can not be inquired into collaterally, but only in a direct proceeding by the government. It appears from the record that appellee has spent something like a half million of dollars in the construction of its telephone system under the grant referred to. It has been the policy of the State to invite foreign capital here to aid us in the development of the resources of the State. This corporation has come here under that policy, and in the absence of some express legislation, we are not at liberty to shut the door of the court against it when suing for the protection of valuable rights granted to it by the municipality pursuant to the laws of the State. As appellant had no exclusive privilege with which appellee has interfered, it can not complain.

Fairleigh, Straus & Eagles and Humphrey, Burnett & Humphrey for appellant.

Helm, Bruce & Helm for appellee.

Appeals from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hobson.

On August 17, 1886, by an ordinance of the city of Louisville, pursuant to an act of the legislature approved April 3, 1886, the Ohio Valley Telephone Co. was authorized to construct, operate and maintain a telephone system on the streets of the city; but the ordinance contained this provision: "Nothing in this ordinance shall be so construed as to give the said telephone company, its successors or assigns, any exclusive right to erect poles or to lay underground conduits, pipes, cables, conductors or wires in the streets, avenues, alleys or sidewalks of the city of Louisville."

The company accepted the provisions of the ordinance and constructed its telephone system, which it maintained until the year 1900, when it was consolidated with the appellant, the Cumberland Telephone and Telegraph Co., and since that time the consolidated company has continued to maintain and operate this telephone system. On November 5, 1900, the general council of the city of Louisville passed an ordinance providing for the sale at public auction of the franchise or privilege to construct, maintain and operate a telephone system in the city, the purchaser to have the right to transfer or assign the franchise, provided the transfer was not made to any competing telephone system. It was also provided in the ordinance that the telephone system should be constructed in the public ways of the city, under the supervision of the board of public works, and that the franchise should not be construed as being in any way exclusive or as preventing the council from providing for the sale of similar franchises to other persons. E. M. Coleman purchased the franchise when sold at public auction under the ordinance for the sum of \$10,000, and assigned his purchase to appellee, the Louisville Home Telephone Co., a corporation formed on March 20, 1901, under the laws of Delaware. It thereupon complied with the terms of the ordinance by the execution of bonds to the city as required thereby, and began operations for the construction of its telephone system under permits from the board of public works. One of its lines through the eastern part of the city ran along Frankfort avenue, and as the Cumberland Telephone and Telegraph Co. had also a line along Frankfort avenue, notice was given

it of the application, and a time fixed when both companies could be heard. They were heard by the board, and the board then in person visited the grounds, and after looking over the actual situation, granted the permit, as asked for by the appellee, which allowed it to erect its line on the same side of the street as the line of appellant, but on higher poles and up above it. Appellee thereupon commenced building its line, and distributed its poles along the street for a considerable distance. These poles were fifty feet long. They set the poles for several squares and were going on smoothly until one morning when the workmen returned they found that since the last evening appellant had set just in front of them, along the street where appellee's poles were lying on the ground waiting to be erected, its poles forty-five feet long. As five feet space was not sufficient for the operation of a telephone system, appellee hauled away its fifty foot poles and set in place of them poles fifty-five feet high, so that it would have ten feet of space above the top of appellant's forty-five foot poles, and so continued to construct its line. After this appellant took down its forty-five foot poles and substituted for them fifty foot poles, thus leaving appellee, as before, only five feet of space. At another point on the line, where appellant was maintaining thirty-five foot poles, appellee erected fifty foot poles, so as to leave fifteen feet of space above them. After it had done this appellant erected in the same line poles fifty feet long, notched exactly the same way as appellant's, so as to render it impossible for appellee to operate its line, as two telephone systems can not be operated on the same horizontal plane. At another point along the avenue appellant's poles were set out along the roadway, the street at this point not having been improved or sidewalks constructed. Appellee set its poles fifty feet long on the line of the sidewalk; appellant then set new poles fifty-five feet long in the same line. Appellee thereupon instituted these two actions to restrain appellant from interfering with it, and to require it to cut off its poles, or make its line in the plane ten feet below it. The chancellor adjudged the relief sought, and the defendant appeals.

It is shown in the record that appellee, the Louisville Home Telephone Co., was formed in Delaware by incorporators, one of whom lived in Ohio and the others in Kentucky. The articles of incorporation do not conform to the Kentucky laws, and it is urged that the incorporators evaded the laws of Kentucky to get privileges not granted here and to avoid burdens placed by our law, and that having gone to Delaware for this purpose, the corporation formed by them should not, on principles of comity, be recognized by the courts of Kentucky, or allowed to sue here. The corporation may do business in Delaware or in any other State, and while its incorporators seem to have contemplated that their main business would be done in Louisville, they are not by their articles confined to this State, and in fact they contemplated doing business in other States, as shown by the evidence. The purpose they had in going to Delaware to get their articles of incorporation does not clearly appear, except as it may be inferred from the fact that the laws of Delaware are not so rigorous as the laws of Kentucky.

It is conceded that a foreign corporation is recognized in other States only as a matter of comity; but owing to the intimate association of the people of the several States, corporations formed in one State have been universally

recognized in other States, except in cases clearly forbidden by the policy of those States. Thus it has been held that a corporation formed in one State, which is not allowed to do business there by the terms of its articles of incorporation, will not be recognized elsewhere. (*Land Grant Railway v. Board of Commissioners*, 6 Kan., 245.) And where the statutes of a State did not allow a corporation to carry on a mercantile business, citizens of that State, who had themselves incorporated in another State, and then did business as a corporation in the State of their domicile, were held liable as partners. (*Empire Mills v. Alston Grocery Co.*, 12 L. R. A., 366.) So where the charter of incorporation was not valid in the State in which it was made. (*Montgomery v. Fogg*, 148 Mass., 249.) Other cases may be found in what are denominated "tramp corporations" having become insolvent, their stockholders have been held liable in the State of their domicile as partners. (6 *Thompson on Corporations*, sections 7895, 7896, and cases cited; *Cleton v. Emery*, 49 Mo. Ap., 345; *Hill v. Beach*, 12 N. J. Eq., 31.) On the other hand, the Court of Appeals of New York refused to follow this rule in a case where citizens of New York had obtained a West Virginia charter of incorporation, which contained no privileges not granted by the laws of New York (*Deinarest v. Flack*, 13 L. R. A., 854), but no question of this sort arises here. This is not an application by the State questioning appellee's power to act as a corporation. The objection is made by appellant when sued by appellee for an invasion of its rights. Appellee has not only been incorporated in the State of Delaware, but it has been recognized by the authorities of the city of Louisville as a corporation, and has been granted by it an important and valuable franchise. It is at least a de facto corporation, and the rule seems to be that when an association of persons is exercising corporate franchises under color of legal organization, the existence of the corporation can not be inquired into collaterally, but only in a direct proceeding by the government. The reason of the rule is that it would produce endless confusion and destroy the corporation if the legality of its existence could be drawn in question in every suit to which it was a party, for then no judgment could be rendered which would finally settle the question. Where property has been granted to such a corporation, and it brings a suit to recover its property, the defendant can not be allowed to inquire into the regularity of the organization in that suit upon the broad principle of common justice and public policy. (*Agricultural Association v. Insurance Co.*, 70 Ala., 130; *East Norway Church v. Froislie*, 37 Minn., 447; *First Baptist Church v. Branham*, 90 Cal., 23; *Eaton v. Aspinwall*, 19 N. Y., 119; *Buffalo, &c., R. R. Co. v. Carey*, 26 N. Y., 25; *Exporting Co. v. Locke*, 50 Ala., 332; *Gill's Adm'r v. Mining Co.*, 7 Bush, 639.) The stock of corporations is now sold every day in the market, and may in a short time entirely change hands so that none of the original incorporators have any longer an interest in the corporation, and to allow a trespasser, who had destroyed its property, to defeat an action against him by the corporation on the ground that it was not originally properly incorporated, when the State has not complained and the municipality has recognized and contracted with the corporation, would be a perversion of justice.

It appears from the record that appellee has spent something like a half million of dollars in the construction of its telephone system under the

grant referred to. It has been the policy of the State to invite foreign capital here to aid us in the development of the resources of the State. This corporation has come here under that policy, and in the absence of some express legislation, we are not at liberty to shut the doors of the court against it when suing for the protection of valuable rights granted to it by the municipality pursuant to the laws of the State. We rest our judgment here and intimate no opinion on any other question discussed in the argument.

On the merits of the case we have little difficulty. Appellant's franchise was not exclusive; its prior occupation of a particular space entitled it to the continued enjoyment of that space without substantial impairment by appellee, but this enjoyment is subject to such incidents as result from the exercise of the rights of appellee under its franchise, for it is necessarily implied in the grant to appellee that it is subject to such limitations as will enable another to enjoy a like franchise. Otherwise, the right of the first company obtaining a grant would amount to a monopoly. This was not intended. The grant to appellant is like other privileges in the public ways: it must be exercised in such a way as not unduly to interfere with the rights of others. The substance of its rights can not be appropriated by another, but there is no reason why two telephone companies can not operate on the same side of the street, and from the proof in this case it is not only common, but much better than to have them on different sides, when there are electric light lines on the street, or other wires carrying heavy currents of electricity. The city authorities may rightfully determine in what manner the streets may be used, and to what extent and when structures may be erected in them, and within reasonable limits to fix the space to be occupied by rival telephone lines. Of course there must be no substantial impairment of appellant's property rights, but mere inconvenience must be endured by it, just as by all others, in the enjoyment of the public utilities of the city. After a careful reading of the record we are unable to see that any substantial injustice was done appellant by the chancellor's judgment. On the contrary, it seems to us to have been in accord with the real equity of the case.

Judgment affirmed.

Whole court sitting.

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STAPP v. MASON, &c.

(Filed February 18, 1903.)

Gaming—Construction of statutes—The wife of S. instituted this action under section 1869, Kentucky Statutes, alleging that M. and C., in connection with her husband, opened and conducted a gambling house and got a takeout of all the games played; that S. played in these games and lost a considerable sum of money which was the property of the wife, which he held as her agent, and sought to recover same of his partners, on the ground that they had enticed him into playing there by setting up the gaming place. The question presented on this appeal simply is, is a man who jointly with others, sets up a gaming place, and plays there himself, within the protection of the statute as against his partners in the enterprise, on the ground that they thereby invited, persuaded or otherwise induced him to visit the

place; Held—That it was no doubt contemplated by all of the partners that each of them would contribute what he could to the success of the common enterprise. The more gaming was done the greater was the takeout, and S. was as much interested in this takeout as anybody else. In playing there he, therefore, was furthering his own business, which was a felony. It was never intended by the legislature to give him right of action against his partners, or them against him, for losses in the business or to require the court to settle up for them their felonious enterprise; and if he is not given a right of action then his creditor can not sue, for only the creditor of a person who can sue is given the right of action.

Thos. E. Ward for appellant.

A. O. Stanley for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Hobson.

As shown by the evidence in the case, and in substance found by the verdict of the jury, C. A. Stapp, the husband of appellant, Nannie W. Stapp, in connection with T. P. Nason and C. F. Cody, opened a gambling house in the city of Henderson, which they ran for some time, getting a takeout on all the games played there. C. A. Stapp played in these games and lost a considerable amount of money, which was the property of his wife, Nannie Stapp, and which he held as her agent. She thereupon filed this suit to recover of her husband's partners the money thus lost by him at the gaming place set up by him and his partners, on the ground that they had enticed him into playing there by setting up the gaming place. The suit seems to have been brought under section 1969, Kentucky Statutes, which is as follows: "Whoever shall invite, persuade or otherwise induce another to visit any place where any gaming mentioned or included in section 1960 of this chapter is carried on, shall be fined from \$50 to \$500, and, moreover, be responsible to such other and his creditors for whatever he may lose in gaming at such place."

It is charged in the petition that the husband by betting and losing the money of his wife became indebted to her in that amount, and that she thereby became entitled to sue for and recover it. It is earnestly maintained that, although the husband himself could not maintain the action against his partner, the wife, who was innocent of any wrong, and is his creditor, may maintain it. But back of this is the question whether the husband is one of the persons provided for by the section, for if he is not covered by the section, then his creditors stand in no better light than he, for they are the creditors of a person not provided for by the section, and only the creditors of such persons as are given a right of action by the section can maintain an action under it. This is not an action under section 1968, providing for a recovery of the money lost from the winner, for the facts required by that section are not alleged. The question then simply is, is a man who jointly with others, sets up a gaming place, and plays there himself, within the protection of the statute as against his partners in the enterprise, on the ground that they thereby invited, persuaded or otherwise induced him to visit the place? The question is not new. In *Brown v. Thompson*, 77 Ky., 538, the question was presented whether one who was interested in setting up a faro bank, and who lost money to those who bet against the bank, could recover

it. It was held he could not recover. The court said: "It is a familiar rule that a case within the letter, but not with the spirit of a remedial statute, is not embraced by it. The courts will look beyond the letter to the legislative purpose and intent, and will not, by a blind adherence to the letter, permit a law to become the shelter of those it was intended to punish, nor to be used to encourage practices it was made to suppress."

It was accordingly held that as the statute was enacted for the protection of the community against gamblers, and not for their protection, one who had set up the faro bank was not within the protection of the statute. This case was followed and approved in *Elias v. Gill*, 92 Ky., 569, where the question was whether one who engaged in the business of selling pools on horse races was within the protection of the statute. The court, after referring to the previous case, said: "And looking to the evil of gaming, suppression of which was the object of the statute, it is obvious that persons who engage in gaming, by means of selling pools on horse races, are no more within the protection of that statute than those who set up or keep faro banks, for in each case gaming is carried on and made a business."

These cases seem to us conclusive of the question before us. It was no doubt contemplated by all of the partners that each of them would contribute what he could to the success of the common enterprise. The more gaming was done the more the takeout, and C. A. Stapp was as much interested in this takeout as anybody. In playing there he, therefore, was furthering his own business, which was a felony. (Kentucky Statutes, 1960.) It was never intended by the legislature to give him a right of action against his partners, or them against him for losses in the business, or to require the court to settle up for them their felonious enterprise. And if he is not given a right of action, then his creditor can not sue, for only the creditor of a person who can sue is given the right of action.

Judgment affirmed.

Whole court sitting.

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CRAIG, &c. v. CONOVER.

(Filed February 18, 1903—Not to be reported.)

Conveyances—Husband and wife—Purchase of property by the wife—Execution—Two lots of land were purchased by the husband of appellant at a sale in bankruptcy under an agreement that they were to be conveyed to the wife, which was done through a trustee. The evidence shows that the wife inherited some money and otherwise, and it was deposited in the bank in the name of her husband as her trustee. This money was applied in payment for the lots, and the deed was duly recorded. After this transaction the husband and wife removed to Kansas City, where they still reside. A creditor of the husband obtained a personal judgment against him, and levied an execution on the lots as the property of the husband, which were sold for \$36, although they were worth \$400 or \$500. The purchaser has erected improvements on same. Appellant instituted this action to recover said property. It is insisted that the conveyance to the wife was voluntary and the creditor had the right to treat it as the property of the husband, contending that the husband had converted the money of the wife to his own use and applied it in payment for the property. Held—That while the husband had

the right to convert the chose in action of the wife to his own use, he did not do so, but kept the fund deposited separate from his own, and the purchase of the property was properly made for the wife and no creditor of his had the right to subject same to his debt. The wife did not do anything to induce the belief that it was the property of the husband. It can not be urged that the claim of the wife is stale. The parties who purchased this property were charged with notice that she was the owner of it, and they are presumed to have bought with that knowledge. She has done nothing to mislead them to their prejudice.

R. H. Cunningham for appellant.

Yeaman & Yeaman for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Paynter.

In June, 1878, the two lots in controversy were purchased by F. W. Craig, husband of the appellant, Lizzie L. Craig, at a sale in bankruptcy, with an agreement between husband and wife that they were to be conveyed to the wife. On July 23, 1879, pursuant to that agreement, the lots were conveyed to her through the medium of a trustee.

The uncontradicted testimony of the most convincing character is that the money of the wife was used in payment for the lots. It is unnecessary to go into the details which force this conclusion upon us. At the time this conveyance was made to the wife the husband was worth \$5,000 or \$6,000, and owed about \$600, so there was no reason why he should have conveyed his property to his wife to avoid the payment of his debts. The wife acquired some money by inheritance and otherwise, and it was deposited in the bank in the name of her husband, F. W. Craig, as her trustee. It was never deposited in his name, and no intention was manifested to appropriate the money to his own use or to reduce it to his possession.

At the time of this transaction choses in action of the wife at her marriage were vested in the husband on condition that he reduce them to his possession or dispose of them during coverture. (*McKay v. Mays*, 16 Ky. Law Rep., 862.)

In this case the money was never reduced to the possession of the husband because he treated it as her property, and held it in bank as her trustee.

The conveyance was made to her in the discharge of an obligation to and agreement with her. In the case of *Sanders v. Miller*, 79 Ky., 519, the court said: "While contracts made between husband and wife, as a general rule, are void, still if a husband voluntarily enter into a contract to make, or he does make, a settlement upon the wife in satisfaction of an obligation arising out of the reception of her property under an agreement made before its receipt or reduction to possession, such as a chancellor would, upon her application, make upon her, neither the contract nor settlement would be regarded as fraudulent against creditors." The case of *Miller v. Edwards*, 7 Bush, 394, is to the same effect.

Had a creditor of the grantor made a question about this conveyance at the time it was made we have no doubt that the chancellor would have upheld the transaction and decreed that she was vested with title to the property. These conclusions are supported by the recent case of *Sparks v. Colston*, 22 Ky. Law Rep., 1369.



In the fall following this conveyance to the wife the husband and wife moved to Kansas City, where they have remained until the present time. The same fall one of the creditors of the husband obtained personal judgment against him, and in 1884 had an execution issued and levied upon the lots in question; had them sold and at the sale they brought \$36, although it appears that they were worth \$400 or \$500. The purchaser took possession of them, sold off parts of them, and houses have been erected thereon. The uncontradicted testimony shows that appellants did not know that the lots had been sold under the execution until some time in the year 1900. There is no question here as to the improvements, as that question has been reserved. The question is, what effect had the sale upon the rights of the wife? It is insisted upon behalf of the appellee that it was a voluntary conveyance and fraudulent as to the creditors of the grantor, and, therefore, the sale under execution disregarding the conveyance was valid. If we reached the conclusion that it was a voluntary conveyance, the question suggested would arise, but, as we are of the opinion that the conveyance to the wife was for a valuable consideration, and that she acquired such right in the property as the deed purports to give her, she could not be divested of it by a sale under an execution against her husband.

It is also contended that the recording of a voluntary deed is not constructive notice of the change of title and that a bona fide purchaser is affected only by actual notice of a voluntary conveyance. It may be conceded that the authorities quoted support the contention of counsel, but they have no application here for the reason that the conveyance was for a valuable consideration. If the wife acquired title to the property by the conveyance, then she was just as much entitled to it as if she had inherited it or she would have been had the conveyance been made to her by some one else. She could only part with the title in some way recognized by law. She could have sold it by her husband joining in the conveyance. Under some opinions of this court she might have been guilty of some act which would have estopped her claim to it, but she has done nothing to work such an estoppel on her rights. She was laboring under the disability of coverture, and the statute at least did not begin to run against her until the passage of what is commonly known as the "Married Woman's Act," but we are not deciding whether it commenced to run upon the passage of that act, as the question is not here, for if it did begin to run at that date sufficient time has not elapsed to bar her right of recovery.

It has been suggested that her claim is stale, and for that reason she ought not to be allowed to recover. She was not aware until 1900 that her property had been sold, and that the houses had been built upon it. The parties who purchased this property were charged with notice that she was the owner of it, and they are presumed to have bought with that knowledge. She has done nothing to mislead them to their prejudice. It will not do to say that because some one under some kind of a claim takes possession of real estate and holds it for a number of years, but not for sufficient length of time to enable them to interpose the plea of the statute of limitation against the recovery of it, the owner's claim is stale and should not for that reason be permitted to recover it. This is no case for the application of the doctrine of stale claim.

Judgment is reversed for proceedings consistent with this opinion.

## PERCIFUL, &amp;c. v. COLEMAN.

(Filed February 18, 1908—Not to be reported.)

Boundary—Champerly—Damages—Instructions—C. owned three houses and lots fronting 80 feet each on Chestnut street, running back 163 feet. Said lots were sold at public auction, when appellant and appellee purchased two adjoining lots. The sale was made, describing the lots by front feet, running back the depth as above stated. At the time of the sale there was a fence dividing the lots, but it ran a part of the distance over on the inclosure of appellant. Subsequently appellant insisted on moving the fence over on the true line, to which appellee objected, but appellant had the fence removed onto the true line. Appellee instituted this action and recovered judgment for \$300 damages, from which this appeal is prosecuted. It is insisted that the court erred in instructing the jury on the theory that the conveyance of the lot to appellant, after appellee had taken possession under his deed previously made, was champertous, and appellant was, therefore, liable in damages. Held—That there was no question of champerty in the case. The deeds related back to the time when the property was sold at auction, for they were made to carry out the contract then entered into between the parties. A deed which is made to carry out a previous contract is never champertous as to one who enters after the contract was made. Although appellee took possession after the auction sale, and before the deed to appellant, the purchase of the latter would not be champertous. The court improperly instructed the jury as to their right to impose punitive damages. The court should have told the jury that the question for them to consider was where the dividing line between the lots ran, and that if the defendant had not gotten over this line they should find for him.

Samuel Avritt and J. L. Williams for appellants.

Forcht & Field and Matt O'Doherty for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Hobson.

Mary Gaetano Childs owned three lots in Louisville, lying together on the north side of Chestnut street, between Fourteenth and Fifteenth streets, each being 80 feet wide and 163 feet deep. There was a house on each lot, and the division fence ran from the corner of the house to save the building of the fence clear through. In 1885 she sold these three lots at public auction. Appellee Coleman purchased one and appellant Perciful, through his agent, Erdman, purchased another. In the conveyances the lots are described as 80 feet wide, and beginning at a point so many feet east of Fifteenth street. When appellant's lot is run out from the points indicated in the deed it runs inside of the fence dividing his lot from Coleman's by a foot and a half, or two feet. About the year 1891 Perciful wanted to build a barn on the back of his lot and to make it as wide as the lot, 80 feet. The coal shed of Coleman then projected over on the lot two feet. By agreement a survey was made, which showed that this two feet belonged to Perciful, and the Coleman's shed was cut off at the line and the stable erected. The fence remained where it was, under an agreement, as Perciful says, that when a new fence was needed it was to be reset on the line, but this Coleman denies. Things ran along in this way for some time, and Coleman refusing to agree to move the fence, Perciful getting apprehensive of limitation, employed a

carpenter and had the fence set up near the line, cautioning the man who did the work to stay on his side of the line. For this Coleman sued and recovered judgment for \$300 damages. A part of Perciful's chimney stood on the strip in controversy and the cornice of his house projected over it.

The court instructed the jury that if they believed from the evidence that when Perciful bought his lot Coleman had the strip in controversy enclosed in his lot, and was claiming it as his property adversely to everybody else, then Perciful obtained no title to the strip, and he had no right to move his fence over so as to take it in. But if when Perciful bought Coleman was not claiming the strip in controversy as his own adversely to all the world, then Perciful had the right to move his fence so as to take in the strip, provided in doing so he did no damage to plaintiff's property. This instruction was erroneous. There was no question of champerty in the case, for, although the deed to Perciful was made after the deed to Coleman, they were both made pursuant to the sale made at public auction by the same auctioneer, under the same advertisement and at the same time. We do not understand that there is any controversy as to these facts, but in any event the court should submit this question to the jury by a proper instruction, for on another trial there is a controversy about the facts. The deeds related back to the time when the property was sold at auction, for they were made to carry out the contract then entered into between the parties. A deed which is made to carry out a previous contract is never champertous as to one who enters after the contract was made. So although Coleman took possession after the auction sale and before the deed to Perciful, the purchase of the latter would not be champertous.

As to the measure of damages the court gave this instruction: "If you shall believe from the evidence that in moving the fence over he trespassed upon the plaintiff's property, trampled down his soil or his grass or his herbage, then the law is for the plaintiff, and you should find for him in such sum as will compensate him for the damage done him in that respect; and if the moving over of the fence by the defendant was high handed and in wanton disregard of the plaintiff's rights, then you may, in your discretion, award him such further sum in damages as you may think right and proper under the evidence, and what I have stated as a punishment of defendant for his evident disregard of plaintiff's rights not exceeding the sum of \$1,500, the amount claimed in the petition."

The following words in this instruction should have been omitted: "And what I have stated as a punishment of defendant for his evident disregard of plaintiff's rights." There was no substantial damage shown to the plaintiff, and we are at a loss to understand why so large a verdict was rendered, unless the jury understood from these words that the court directed them to find a verdict as a punishment of defendant for his evident disregard of plaintiff's rights, as stated by the court. These words were at least calculated to make that impression on the jury, who should have been left to determine for themselves under the evidence whether there was such a wanton disregard of plaintiff's rights as justified a verdict for more than the actual damage. Under the evidence the court should have told the jury that the question for them to determine was where the dividing line between the two

lots ran, and that if the defendant had not gotten over this line, they should find for him.

Judgment reversed and cause remanded for a new trial.

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CHESAPEAKE & OHIO RY. CO. V. RIDDLE'S ADM'X.

(Filed February 18, 1908—Not to be reported.)

1. Railroads—Negligence—Removal of case to Federal court—Pleading—Evidence—R., while driving with another in a buggy, was struck by a train operated by appellant over the track of the L. & N. R. R. Co., and killed, and his administrator instituted an action in the United States District Court to recover damages for his death, caused by the negligence of the appellant, its agents and employees. Plaintiff afterwards dismissed its action without prejudice, and instituted this action in the Woodford Circuit Court to recover damages, fixing same at \$2,000. A trial resulted in a verdict and judgment for the amount claimed. Appellant prosecutes this appeal. In the first paragraph of the answer appellant pleaded in bar of the action the prosecution of the case in the Federal court. Held—That the rule that the suit for the same damages had been pending in the Federal court and was dismissed without prejudice constitutes a bar to a subsequent suit in the State court, does not apply where the suit was in the first instance brought in the Federal court by plaintiff. It only applies to actions which have been removed by defendant to the Federal court, and the court properly rejected the plea in bar. The court also properly refused to permit the appellant, during the trial, to amend its answer, and set up the objection that the deceased did not reside in Scott county, where his administratrix qualified. This fact could have been ascertained before the trial, and issue properly made on it.

2. Evidence—The court erred in admitting evidence as to the general reputation of deceased for sobriety. This evidence would not meet or elucidate the question as to whether or not the decedent was sober at the time he was killed, as a man may generally keep sober and yet at some particular time in his life be drunk or under the influence of whisky. The court also erred in admitting testimony to the effect that a witness after the accident had stood near the same crossing and seen other trains pass, but had heard no whistle or bell, and did not see or hear the train until he was within twenty feet of the crossing. The negligence of employees at one time is not evidence to prove that they were negligent at the time of the injury. The instructions of the court defining the respective duties of appellant and deceased when approaching the crossing were not prejudicial to appellant.

Wallace & Harris and John T. Shelby for appellant.

Burton Vance and S. E. Blackburn for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Barker.

On the 24th day of February, 1899, Clabe Riddle, in company with Erasmus Breden, while driving along the Frankfort and Lexington Turnpike Road in a buggy, at a point where the highway intersects with the track of the Louisville & Nashville R. R. Co., near Ducker's Station, in Woodford county, Kentucky, was run into, and instantly killed, by appellant's train

of cars, which was being operated over the Louisville & Nashville R. R. Co.'s track, at said point, under a contract with the said Louisville & Nashville R. R. Co. Whereupon his mother, Mary Riddle, was appointed, by order of the Scott County Court, administratrix of his estate, and as such administratrix instituted an action against appellant in the United States District Court for the District of Kentucky for said injury, claiming damage in the sum of \$10,000. Afterwards, by leave of said United States District Court, she dismissed said action without prejudice, and then instituted this action in the Woodford Circuit Court to recover for said injury the sum of \$2,000. Her petition sets out the facts of the killing of Clabe Riddle, and charges that his death was caused by the negligence of appellant's servants operating said train.

Appellant's answer sets up as a defense, first, the institution by appellee of her action in the United States District Court as a bar to her right to prosecute this action in the State court, claiming, in substance, that by reason of the institution of the action in the United States District Court it had obtained jurisdiction of the case, and the same could not be tried in the State Court for want of jurisdiction; said answer also denies negligence upon the part of its agents and employees, and pleads that the death of appellee's intestate was the result of his contributory negligence. This was put in issue by the reply.

Appellant filed a demurrer to appellee's reply; the demurrer was carried by the court back to the first paragraph of appellant's answer, which sets up the want of jurisdiction in the Woodford Circuit Court, by reason of the fact that the action had first been instituted in the United States District Court for the District of Kentucky, as aforesaid, and said first paragraph was dismissed; and thus the issues were finally made up. Upon the trial of the case a verdict was rendered by the jury in favor of appellee in the sum of \$2,000. Appellant's motion for a new trial having been overruled the case is here on appeal for a review. We think that the lower court did not err in carrying the demurrer back to the first paragraph of appellant's answer, and dismissing said paragraph. The case of *Cox v. The East Tennessee, V. & G. R. R. Co.*, 68 Ga., 446, and *Baltimore & Ohio R. R. Co. v. Fulton's Adm'r*, 59 Ohio, 575, establish the doctrine that where an action is instituted in the State court, and is removed by the defendant to the United States Court, under the act of congress regulating such procedure, that thereafter the plaintiff can not deprive the defendant of his right to a trial in the United States Court, either by dismissing without prejudice or by so acting as to force the court to nonsuit him; but there is a wide distinction between that proposition and the one at bar.

When the defendant exercises his right under the act of congress to remove the action against him to the United States Court he thereby, as said before, acquires a right to have the case tried by that court, and of this right it is not in the power of the plaintiff to deprive him. The defendant, having set in motion the law of removal, acquires vested rights, and confers upon the United States Court a jurisdiction which can not be divested by any act of the defendant. But no such reason exists where the plaintiff goes herself into the United States court with her cause of action; when she so goes, her standing there is precisely the same as it would have been in the State

court, had she first instituted her action therein, and there is no principle of law, or procedure, which requires that her standing, under these circumstances, should be different in the two courts. We think she clearly had the right to dismiss her action in the United States court without prejudice, by permission of the court, and, having done so, she was free to bring it in any other court she chose, which had jurisdiction.

Pending the trial in the Woodford Circuit Court appellant offered to file an amended answer, denying the residence of Clabe Riddle in Scott county, and denying the jurisdiction of the Scott County Court to appoint appellee administratrix of the estate of her son. This motion was based upon certain answers, which were made by appellee on the witness stand, conveying to appellant, for the first time, a doubt as to the residence of Clabe Riddle in Scott county. The motion to file this amended answer was overruled by the court, and we think properly. The trial of the case had begun, and the court very naturally concluded that the question of Clabe Riddle's residence was as open to investigation at the hands of appellant before the trial as any other fact set up in the petition as a basis of appellee's cause of action, and there was no more reason why it should accept as true the allegation that Clabe Riddle lived in Scott county, than for it to accept as true any other allegation in the petition; and if it was true that Clabe Riddle had not lived in Scott county, a little diligence on the part of appellant could have discovered it before the trial; that fact may have been more obscure than some other facts in the case, but it was open to investigation, none the less.

During the trial of the case appellee was permitted to introduce evidence, over the objection of appellant, as to the general habits of her intestate for sobriety. On this point Capt. James Blackburn was allowed to testify that he was a perfectly sober man, and that he had never seen him take a drink in his life. This evidence was introduced in anticipation of evidence subsequently introduced by appellant, that at the time he was killed decedent had about him a strong odor of whisky, and that on the day before he was killed he had, in company with Erasmus Breeden, purchased three pints of whisky. We do not think it was competent for appellee to introduce any evidence tending to show the general reputation of her decedent for sobriety. This evidence would not meet or elucidate the question as to whether or not the decedent was sober at the time he was killed, as a man may generally keep sober, and yet at some particular time in his life be drunk, or under the influence of whisky.

Mr. Robert B. Franklin was allowed to testify for appellee, that long after the accident in question he had crossed the railroad track at the place where Clabe Riddle was killed; that he had listened for a railroad whistle or bell, and heard none, and that he did not perceive, or hear, the train until he was within twenty feet of the crossing; that he could have heard the bell or whistle, if one had been sounded or rung, but that he heard none. This evidence was clearly incompetent, and prejudicial to appellant. In the first place, it would have been incompetent to have shown that the employees on one of appellant's trains had failed to do their duty in regard to giving warning of the approach of the train to the crossing in question at a subsequent time; but it was especially erroneous, because of the fact that there

are two different lines of railroad trains operated over the same right of way, one belonging to appellant, and the other to the Louisville & Nashville R. R. Co.; and there was no evidence that the train which Mr. Franklin saw pass was not that of the Louisville & Nashville R. R. Co., instead of appellant's.

In the case of *Hutcherson v. Louisville & Nashville R. R. Co.*, 21 Ky. Law Rep., 735, this court said: "The fact that those in charge of other trains approaching the crossing had failed to give signals would not be admissible as evidence conducing to show that those in charge of the train that is alleged to have caused plaintiff's injury failed to give the necessary signals of its approach."

In the case of *Eskridge's Ex'ors v. Cincinnati, N. O. & Tex. Pac. Ry. Co.*, 89 Ky., 372, this court said: "But whether a signal was given at the approach of a train to a station or crossing on any particular occasion is a question of fact that can not be affected one way or another by showing the conduct of the subordinate officers or servants in charge of some other train or trains, who may or may not be mindful of their duty."

And in the case of the *Louisville & Nashville R. R. Co. v. Berry*, 88 Ky., 225, this court cited in approval the principle announced in *Gahagan v. R. R. Co.*, 1 Allen, 187, in the following language: "The issue presented was as to the negligence of the company in the use of the highway at the time the plaintiff's intestate received the injury for which recovery was asked. The plaintiffs offered to prove the habit of the company at other times in the use of the highway, to show negligence, and the court held that it had no legitimate bearing on the issue, and was properly excluded."

Appellant complains of the instructions of the lower court, in that they failed to prescribe, with sufficient clearness, the duty of appellee's intestate, as to the care he should exercise before crossing the railroad, and also that a different degree of care is required of appellant from that required of appellee's intestate.

We are not sure that this contention is altogether sound, or that the instructions of the court, upon the whole, are unfavorable to appellant. We think the law upon this subject is laid down with great clearness and accuracy in the case of *L. & N. R. R. Co. v. Cummins*, 23 Ky. Law Rep., 633, and as this case is to go back for trial, we make the following extract for the guidance of the court. Speaking of the instructions in the case cited, this court said: "They are also defective in not informing the jury that the duty of both parties as to care was reciprocal, and in imposing a different degree of care on the appellant from that imposed on the deceased."

"In using the railroad and the street crossing both parties were required to exercise the same degree of care. It was incumbent on appellant to give such notice of the approach of the train to the crossing, to run the train at such speed, keep such lookout and use such care, to avoid injury to persons thereon as might usually be expected of ordinarily prudent persons operating a railroad under like circumstances. It was incumbent on the intestate to use such care as might usually be expected of an ordinarily prudent person situated as he was, to learn of the approach of the train and keep out of its way. If the crossing was especially dangerous, it was incumbent on both parties to exercise increased care commensurate with the danger."

For the reasons herein given the case is reversed for proceedings consistent with this opinion.

## COMBS v. COMBS.

(Filed February 18, 1903—Not to be reported.)

Action to quiet title—Possession—Appellee claims title to land under a patent from the State granted in 1846. Appellant obtained a patent for the same land in 1881, and this action was instituted by appellee to quiet his title. Held—That the patent issued to appellant was void, and he failed to establish title by possession. He had a tenant on the land a short time and occasionally entered on the land and cut timber, but occasional acts of cutting timber and other trespasses are not sufficient to constitute such adverse possession as would ripen into a perfect title as against appellee who held the legal title.

J. J. C. Bach and W. H. Miller for appellant.

W. F. Hall for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Hobson.

Appellee filed this suit to quiet his title to a tract of land in Perry county. The facts of the case are substantially undisputed. The land in controversy is a part of a 500-acre survey, patented by the State to Samuel Napier on the 9th of August, 1846, and conveyed by him on March 6, 1848, to Washington Combs, under whom appellee claims. Appellant obtained a patent for the land from the State in the year 1881, and about that time entered on the land and for a few months had a tenant on it, but since then, until the year 1897, the land was unoccupied, and in that year appellee entered upon the land, finding it vacant, and has since been in possession. The patent issued in 1881 was void, as the land had been previously patented. Appellant lived about ten or twelve miles from the land for a number of years after the tenant left. He occasionally entered on the land and cut timber, but occasional cutting of timber or other trespasses on land are not sufficient to set the statute in motion, and the court properly held that appellant had acquired no title by possession. While the deed from Washington Combs to appellee is not produced, the proof satisfactorily shows that it was executed and is lost, and in view of the lapse of time, the acquiescence of Washington Combs and his heirs at law in appellee's claim of the land and the other circumstances shown by the proof, we can not disturb the chancellor's conclusion of fact that this deed covered the land in controversy. Appellant connects himself in no way with Washington Combs' title, and is a mere trespasser.

Judgment affirmed.



## CITY OF UNIONTOWN v. BERRY, &amp;c.

(Filed February 19, 1903—Not to be reported.)

1. Municipal government—Dedication of property for municipal purposes—Accretion of property—Prior to 1840 B. owned a large body of land on which the town of Francisburg was established. By a plat he subdivided a large portion of same into lots, fronting on Water street on the north, which ran near the bank of the Ohio river, and said plat was duly recorded and property sold abutting that street. The lines of the street were marked with straight lines. Francisburg in 1839, with another small town called Locust Port, was incorporated into Uniontown. Since the division and the dedication of the street to public use a body of land containing about 50 or 60 acres, lying between Water street and the river, has formed by the gradual recession of the river, and the question arises on this appeal as to who this land belongs to. The heirs of the original vendor contend that the dedication of property for a street had the legal effect of reserving to the grantor all the property not required to be used for a street. Held—That the proprietors dedicated to the town of Francisburg for the use of the public not only the strip of ground between the lines designating the streets and alleys, but also that narrow strip of land lying to the north of the line marking the north side of Water street and between the north line and the river; but the court properly added that the owners reserved to themselves the land abutting on the river beyond the length of Water street as laid out on the map, in other words, the extension of Water street would not deprive the owners of the land between such extension and the river.

2. Estoppel—The city is not estopped from claiming said land by reason of the grantors and their heirs and vendees paying city taxes on the property. Before the city could be estopped it must have been competent for it to have sold this strip of land in consideration of taxes paid. It is not claimed that any one had authority to make this sale to appellee. Certainly the assessor had no authority to sell same.

3. Damages—The city was not entitled to recover any damages for retention of land by appellee, as it is not shown that appellant had sustained any damages. It is not sufficient in an action for damages to show that the defendant had made something by his unlawful act, but it must be shown that the plaintiff has lost something. The value of being deprived of the use of the strip of ground by the public was not shown in the record. It was not material what the property was worth as agricultural lands, because appellant could not itself have engaged in agricultural pursuits under its charter, nor could it have leased its public highways for such purpose.

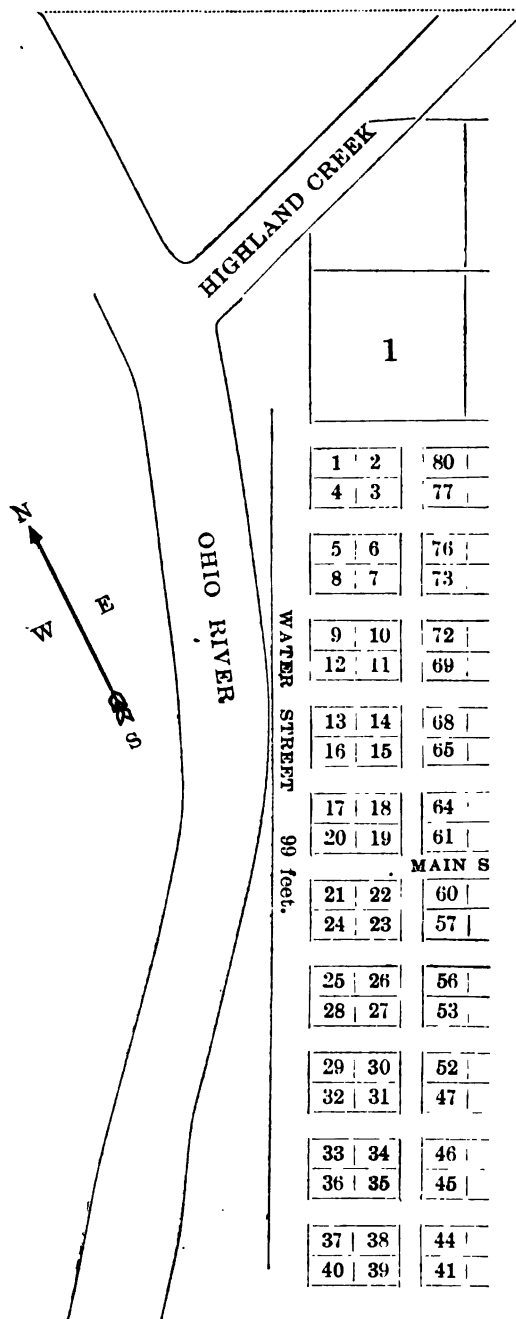
H. X. Morton for appellant.

Allen & Hughes and P. B. Miller for appellees.

Appeal from Union Circuit Court.

Opinion of the court by Judge O'Rear.

Prior to 1819 Berry and Casey were the owners of a grant of land lying on the Ohio river and including the present site of the city of Uniontown, appellant herein. They subdivided a portion of it into town lots, platting according to a map which they caused to be filed in the clerk's office of Union county. A sufficient portion of the plat so filed is inserted here to illustrate the proposition decided:



(NOTE.—In the treatment of this map it will be assumed that the Ohio river lies directly to the north of the town as platted, and that the streets of the town are projected upon due north and south and east and west lines. As a matter of fact, however, it appears that the river runs a south-west course in front of the town.)

In 1819 an act of the general assembly of Kentucky incorporated the town of Francisburg, which was the name given to the town site just mentioned. The lots in the town are designated as "inlots" and "outlots," the inlots containing half an acre each and the outlots about four acres each, except those next to Highland creek, which are of irregular form. Highland creek at that time must be assumed to be fairly represented upon the map above referred to, though it appears now to have so changed its location by the gradual washing away of its banks and changing of its bed as to be some distance further toward the west.

Just below, and to the west of Francisburg another village was established, which was incorporated in 1839 under the name of Locust Port. These two villages or towns were incorporated by the legislature by an act of February 12, 1840, as one municipality under the name of Uniontown. It has continued its corporate existence in fact and under this name until the present time, being classified under the provisions of the Constitution as a city of the fifth class.

At the time of the original laying out of the town of Francisburg the northern line of Water street, as shown on the plat, ran next to the Ohio river, and so close to that river that at some points the edge of the street was at the river bank. The bank of the river, however, was irregular in its conformation, leaving spaces of land between the northern edge of Water street, as shown on the plat, and the bank of the river. During the last forty or fifty years there has been a gradual and constant recession of the river and corresponding accretion to its southern bank, until now there is a tract of some fifty or sixty acres of land lying north of Water street, and between that and low-water mark at the southern bank of the river. This litigation is between the city of Uniontown and certain of the descendants and vendees of Berry and Casey, claiming this strip of land.

The contention of appellees is that the town took only the lands embraced within the lines shown on the plat as streets, and that as Water street is bounded by two lateral lines, one on each its north and south side, a purpose was shown on the part of the dedicators to reserve to themselves all other lands not included in that expressly shown to have been set apart as streets and highways. On the other hand, it is the contention of the city that the dedicators, Casey and Berry, by platting this land into a town site, and offering its lots for sale to the public, and selling them to numerous persons, and procuring the town to be established and incorporated as a municipality, thereby dedicated not only those strips of land shown to be streets, but dedicated all the land lying between the south side of Water street and the Ohio river as public property for the use and enjoyment of the public, and especially of the municipality. A question so nearly identical with the one here involved was presented and decided by this court in the case of *Rowan's Ex'ors v. The Town of Portland, &c.*, 8 Ben Mon., 232, that we do not deem it necessary to enter again upon an examination of the reasons and authorities controlling the decision.

In that case a plat had been filed in nearly every particular similar to the one here involved. It was shown that the proprietor of the town site who dedicated the streets and alleys and public ways to public use, by platting the same and offering them to the public and selling them, had left a narrow

row strip of land between the northern edge of the street fronting on the river and low-water mark of the river, and had drawn the northern line of this street on the plat as a continuous line as in this case. The court said:

"We come to the inquiry whether, upon the face of the map or plan of the town of Portland, the slip or space between Water and Front streets and the river is designated as having been intended and appropriated for public use. \* \* \* That the town extended to the Ohio river, leaving no space between the town and the water is a position which, in our opinion, does not admit of question. There is no line dividing or separating the town from the river. And if there were, it should rather be presumed that the space between such line and the river was thus discriminated for the purpose of showing that it was intended for some use of the town different from that of the ordinary streets and public grounds, than that a town located upon the bank of such a river, and at a point selected for its commercial advantages, should be wholly shut out from free and common access to the river. The unreasonableness of this latter presumption has been more than once declared by this court, and the fact that a town is laid off upon the bank of a navigable river has been held to be sufficient evidence of its extending to the water, unless a contrary intention is manifestly indicated. \* \* \* We are of opinion that the fair and necessary inference from the face of the map is that the entire slip along the whole front of the town (with the exception before referred to) was left open for the public use, and was intended to be and remain a common or public ground, affording free access from all parts of the town to all parts of the river in front of it; and that this access was given, not merely for the use of the water for ordinary domestic purposes, but for the use of the river as a great highway of commerce, and for the enjoyment and security of all the advantages which the location of the town upon such a river, and at a point eligible for the anchoring or mooring of vessels, and for the deposit and landing or shipment of merchandise, was calculated to afford."

The court held in that case that the unbroken line used to designate the northern limit of the street fronting on the river "could not have been intended to indicate the unprofitable and vexatious right in the proprietor, to build a straight wall or fence along the northern side of Water street, which, without inclosing any ground, would merely obstruct the direct access from that part of the street to the river."

We conclude upon the authority of that case, and the numerous decisions of this and other courts referred to therein, that the proprietors dedicated to the town of Francisburg for the use of the public not only the strips of ground between the lines designating the streets and alleys, but also that narrow strip of land lying to the north of the line marking the north side of Water street and between that north line and the river. It will be observed that upon the original plat the north line of Water street extended only to the east edge of the cross street projected and running south between outlet No. 1 and inlots Nos. 1 and 2. The present name of that street is Dewey.

The circuit court adjudged this case in favor of the city as to all of the land lying west of an extension of the east line of Dewey street to the Ohio river; all the land lying east of that extension the court held not to have

been dedicated by the proprietor to any public use. In both these particulars we concur with the judgment of the chancellor. The stopping of the north line of Water street at its eastern limit, as shown upon the map, indicates a purpose on the part of the proprietors, in our opinion, to terminate that street at that point, and to reserve to themselves the land lying east of that point. Another question presented by appellee Berry, from whom a part of the land adjudged the city was taken, is that the city authorities assessed this property to him for taxation, and that he paid taxes thereon to it. It is not clearly shown what taxes were paid, or for what years, but it is apparent that such as were paid was brought about by the act of appellee and the other taxpayers, and that the governing body of the town, its council, was not apprised of the fact that this public property was included in the private tax lists of some of its citizens from whom it was exacting taxes. The attempt to estop the city by an act of this kind must be unavailing for the following reasons: Before one can be estopped it must have been competent for such one to have done the thing claimed to be established through the doctrine of estoppel. It would not have been competent for the city to have sold this strip of land to appellee for the consideration claimed to have been paid in the way of taxes, or for any other consideration, without express legislative authority from the State. What it could not do directly appellant can not be held to have been done by indirection. Furthermore, even if the town could have sold and conveyed this strip of public property in question, it must have been done by some one having authority to do so. It can not be said that the town assessor had such authority, and as he is the only person who is shown to have had any knowledge of the alleged assessment of the property in question, it can not be allowed that his knowledge and unauthorized inadvertence could confer a title which could not have been done by his direct act having such an object in view. (*Alves' Ex'or v. Town of Henderson*, 16 Ben Mon., 168.)

Appellant complains that, although it was given judgment against appellee Berry for a part of the land claimed in the petition, it was not adjudged damages for a substantial sum for his unlawful detention of the property for a number of years. The record discloses that the property was used, and at the time useful only, for agricultural purposes, and that its rental value was about \$2 50 per acre per annum. We are of the opinion, however, that the court properly denied appellant damages in this case from the fact that it was not shown that appellant had sustained any damage. It is not sufficient in an action for damages to show that the defendant has made something by his unlawful act, but it must be shown that the plaintiff has lost something. The value of being deprived of the use of the strip of ground in question by the public was not shown in the record. It was not material what the property was worth as agricultural lands, because appellant could not itself have engaged in agricultural pursuits under its charter, nor could it have leased its public highways for such purpose.

The judgment is affirmed.

## THE MARSDEN CO. v. BULLITT &amp; CO.

(Filed February 19, 1903—Not to be reported.)

1. Common carrier—Damages—Pleading—Appellees in their petition allege that they employed appellant to furnish a barge and transport 3,314 bushels of corn from French Island to Hawesville, and that appellant furnished said barge and the corn loaded into same, and that appellant undertook to transport said barge, and that said barge sunk by the negligence and carelessness of appellant, its officers, agents and employes, and said corn was lost to appellees, except \$72.75 of damaged corn, and appellees sought to recover damages for same. A demurrer to the petition was overruled, and a motion to make more specific the allegations of the petition as to the acts of negligence of appellant was also overruled. On appeal, Held—That the petition was sufficient, and the demurrer thereto; also the motion to make the allegations more specific were properly overruled. But if the court erred in this matter the defendant, by its answer, cured the defect.

2. Evidence—The evidence shows that there was a rent in the barge across the front and back on the sides below the water line which caused the barge to sink. Appellant objects to the testimony of some of appellee's witnesses, describing the repairs and nature of repairs made on the barge after it sunk. Even if this was error, the appellant's witnesses proved the same facts. The manner in which it was proved was not prejudicial to appellant. The amount of the recovery was not excessive, as the proof shows it was less than appellees were entitled to.

Miller & Todd for appellant.

Birkhead & Clements and Chapeze Wathen for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is prosecuted from a judgment of the Daviess Circuit Court, obtained by appellee against appellant, for \$1,262.80.

It was alleged in appellees' petition, in substance, that it had a contract with appellant company whereby it agreed and undertook to furnish to it a barge and transport for it from French Island on the Ohio river, to Hawesville, Ky., 3,314 bushels of corn, for which appellee agreed to pay appellant the sum of 1½ cents per bushel; that appellant did furnish a barge to appellee at said point and the corn was loaded on the barge and afterwards, on the 24th day of March, 1900, the appellant attached the said barge to one of its boats and started to transport the same to Hawesville, and while going up the Ohio river, and long before it reached its destination, said barge sank in the river and the corn was lost; that appellant failed to deliver said corn and appellee recovered no part thereof except to the value of \$72.75 in damaged corn.

The sinking of said barge, the loss and destruction of said corn was caused by the negligence and carelessness of appellant, its officers, agents and employes. Appellant's demurrer to this petition, which was overruled by the court, and then moved the court to require appellee to make its petition more specific, with reference to the charge of negligence and to state what negligent act or omission it would rely on. This motion was overruled by the court. The court was right in this. In the case of Kentucky Central R. R. Co. v. Thomas, 78 Ky., 178, the court used this language: "The alle-

gation is that the accident was occasioned by the negligence of the agents, officers, hands and employes of the defendant. This was sufficient to admit evidence of every fact conducing to prove that the disaster resulted from either the misfeasance or nonfeasance of the company or its agents or servants." (C. & O. R. R. Co. v. Smith, 18 Ky. Law Rep., 1079; L. & N. R. R. Co. v. Wolf, 80 Ky., 82.)

But if the court had erred in this matter the defendant, by its answer, cured the defect. After putting in issue all the affirmative allegations in the petition, it alleged "that the barge was sound and in good condition when defendant began said voyage until it was struck and injured as aforesaid; that said boat was in good condition and properly manned by licensed and competent officers and crew, and was prudently and carefully operated on said voyage."

And the appellees, by reply, controverted these allegations, and the issues were made specific and complete. Appellees' evidence showed that the voyage was begun with the barge about 8 o'clock on a dark, rainy night; the water was high and swift in the river and much drift was moving; that the barge was old and partly rotten and was poorly and insecurely constructed, and was not safe nor fit to convey the corn, and in consequence thereof the corn was lost. Appellees' evidence further showed that there was no evidence of any bruise or indentation upon the front of the barge, or at any place, indicating that it had collided with any hard substance.

Appellant's evidence agreed with that of appellees except it proved that the barge was only about five years old, well and substantially constructed, and was sound and safe; that there was an indentation or bruise on the barge showing that it had collided with some, supposed to be, moving object, which the witnesses did not see; that those in charge of the boat and barge were using ordinary care and caution in the movement of same. All agree that there was a rent in the barge, across the front and back on the sides below the water line which caused the barge to sink, and, according to the evidence of appellant, caused the barge to sink within a very short time. Appellant objects to the testimony of some of appellees' witnesses, describing the repairs and nature of repairs made on the barge after it was sunk. Even if this was error, the appellant's witnesses proved the same facts. The manner in which it was proved was not prejudicial to appellant.

Appellant also contends that the testimony of Bullitt and Bentley, with reference to conversations with and statements of one Smith, one of appellant's managers, within a day or two after the sinking of the barge, was error. Even if incompetent, the statements, in our opinion, were harmless, as they had no application to the real questions at issue. Appellant contends that the judgment was too large by \$49.51, the amount of its charge for the transportation of the corn. The appellees, in their petition, do not fix any price per bushel for their corn, but places the gross sum due then at \$1,252.80. The proof showed that corn was worth 42 to 43 cents per bushel, delivered at Hawesville, and at the price of 42 cents, and after deducting \$72.75 and the \$49.51, it would still leave due the appellee more than the amount it claimed or recovered. Appellant only complains of the latter clause of the third instruction. This instruction was correct. All the instructions were as favorable to appellant as it was entitled to.

Perceiving no error to the prejudice of appellant the judgment is affirmed.

## MCBRAYER v. HANKS' EX'ORS.

(Filed February 19, 1903—Not to be reported.)

**Liens—Partnership**—This action was instituted to enforce a lien for unpaid purchase money on land sold by appellees' testator to S., who sold same to appellant under a contract, in which appellant agreed to pay said lien debt. Appellant set up as a counterclaim an indebtedness due him from decedent on an account of partnership which had existed between them. A reference to the commissioner was had, who took an account of all indebtedness between the parties, and reported a balance in favor of appellees, for which the court rendered judgment and ordered a sale of the land to pay same. Held—That the report of the commissioner and judgment of the court appear to be fair and equitable.

T. L. Edelen and W. P. Marsh for appellant.

F. R. Feland for appellees.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Settle.

This equitable action was instituted in the Anderson Circuit Court by Thomas Hanks to recover of appellant a debt of \$2,712, alleged to be due on land which Hanks sold and conveyed to J. W. Stephens, who thereafter sold and conveyed it to appellant. It being recited in the deed from Stephens to appellant that the latter assumed payment of the sum due Hanks from Stephens on the land, and which was secured by a lien thereon.

Hanks died pending the litigation, and the action was thereupon revived in the name of his executors who prosecuted it to judgment. By way of set-off against the amount due on the land debt appellant's answer sets up numerous alleged items of indebtedness claimed to be due him by Thomas Hanks, growing out of a partnership between them in the manufacture of whisky, and otherwise, all of which was denied by the reply. After the issues were formed, by consent of the parties the case was referred to the master commissioner to make and report a settlement of all matters in dispute between them. The commissioner, under the order of reference, was authorized to consider the proof already in, and such as might thereafter be taken. The commissioners very properly allowed the claims of each party that were undisputed, and rejected all disputed claims where the pleader had the burden, and the claims were unsupported by the proof. It also properly accepted the agreement of counsel that the cost of the manufacture of whisky made by the partnership was 25 cents a gallon.

The first report filed by the commissioner showed appellant indebted to the Hanks' estate in the sum of \$1,448.86. The supplemental report increases that indebtedness \$310. Numerous exceptions were filed to the commissioner's reports and all overruled by the court. We think the account between the parties is stated by the commissioner with great clearness, fairness and brevity, and the lower court is to be commended for basing its judgment upon the findings of the commissioner, although it is more favorable to appellant by \$800 than the last report of the commissioner would seem to justify. The judgment, as rendered by the court, allows appellees the amount of the lien debt assumed by appellant in the deed from Stephens to him, viz., \$2,712, with 6 per cent. interest from October 11, 1881, until



paid, and his costs, subject to credits of \$810 as of September 21, 1888, \$1,000 as of December 8, 1888, and \$791 as of February 20, 1887.

The judgment likewise enforces appellees' lien upon the land described in the petition, and directs its sale to pay their debt and costs. An examination of the pleadings and commissioner's report will show that the credits of \$810 and \$1,000 allowed by the judgment were undisputed, but that of \$791 was allowed appellant as due him from the settlement of the affairs of the partnership, and is credited on his indebtedness to appellees as of the date the partnership should have been settled.

Finding no error in the judgment of the lower court it is hereby affirmed.

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LOUISVILLE RAILWAY CO. v. POE.

(Filed February 19, 1908—Not to be reported.)

Street railways—Negligence—Instructions—This appeal is prosecuted from a judgment for \$1,200 damages for injuries sustained by appellee by being run over by a street car at a street crossing, alleged to have been caused by negligence of appellant, its agents and servants. Appellant urges as a ground for reversal the refusal of the court to instruct the jury that it was the duty of appellee when approaching a crossing to look and listen for an approaching car. Held—That the court did not err in refusing to give such instruction, and the instructions given fully present the law of the case.

Fairleigh, Straus & Eagles for appellant.

Caruth, Chatterson & Blitz for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Nunn.

The appellant appeals from a judgment of the Jefferson Circuit Court in favor of appellee for \$1,200.

The appellee, in substance, alleges in her petition that while she was in the act of crossing Portland avenue at or near the intersection of Twenty-Fifth street, which streets were in a thickly populated territory in the city of Louisville, Ky., and much used and frequented by citizens and vehicles, she was, by the carelessness and negligence of the appellant's agents and employes in operating its street cars, run into and against by one of its electric cars, knocking her down, breaking the bones of her body and otherwise bruising her, from which she has suffered and would continue to suffer great mental and physical pain and anguish, and that she was permanently injured and disabled; and that before said collision her perilous position was seen, or by the exercise of ordinary care could have been seen, by the employes and agents of appellant in charge of said car in time to have slackened the speed of or to have stopped the same and saved her from said injuries; and that appellant's agents and employes in charge of said car negligently and carelessly operated the same at a high and reckless rate of speed, and gave no signal or warning of its approach to the Twenty-Fifth street crossing by ringing the gong or bell on said car, or otherwise.

The appellant, by its answer, traversed all the allegations of appellee's petition, and pleaded the usual or ordinary plea of contributory negligence.

The appellee, by her reply, denied the contributory negligence. Upon these issues the evidence was heard. According to appellee's evidence the appellant's employes in charge of the car were guilty of gross negligence in the management and operation of same. They did not ring the bell or gong or give any warning of its approach to the Twenty-Fifth street crossing and was running at a high rate of speed. According to some of the evidence, those in charge of the car had plenty of time to stop the car after discovering appellee's danger. The appellant's evidence showed that the car was prudently managed and operated; was running at a slow rate of speed and under the control of the motorman; the bell was rung and the gong sounded on its approach to the Twenty-Fifth street crossing and the motorman and colored man on the platform with him states that they saw appellee in time to have stopped the car and slowed it up for that purpose, and that the appellee stopped, and looked at the car, when in about three feet of the track, and thinking that she would remain there until he got past the motorman moved the car forward, and when in about ten feet of her, she moved upon the track and was run upon and injured. The motorman also stated that he was then unable to stop the car after he saw her perilous position.

Appellee stated that she did not stop and look at the car; and the proof also showed that the appellee was severely injured by having her leg broken between the ankle and knee, collar bone broken and otherwise bruised and injured. Appellant's counsel in their brief do not complain of the instructions given by the court, except the second instruction, which is as follows: "But it was the duty of the plaintiff, when she started across the street, to exercise ordinary care for her own safety; and if you shall believe from the evidence that at the time she failed to exercise ordinary care for her own safety, and by reason of her failure in that respect she helped to cause or bring about the injury of which she complains, and that she would not have been injured but for her failure in that respect, the law is for the defendant, and you should so find, unless you shall further believe from the evidence that those in charge of the car, by the exercise of ordinary care, could have discovered the plaintiff's peril, after she was in peril from the car, and by the exercise of that degree of care have avoided the injury of which she complains. If such was the state of facts, then the law would be for the plaintiff, and you should find for her."

The appellant contends that the court should have instructed the jury as follows in lieu of the first part of instruction No. 2: "The court instructs the jury that it was the duty of the plaintiff as she approached the defendant's tracks, for the purpose of crossing same, to listen and look for approaching cars before going onto its tracks, and if the jury believe from the evidence that in the exercise of ordinary care she failed to do so, and such failure on her part caused or helped to bring about the injuries complained of, then the law is for the defendant, and the jury should so find."

Instruction No. 2, as given by the court, has been approved by this court in several cases, to wit: 21 Ky. Law Rep., 1641, in the case of the Owensboro City R. R. Co. v. Hill, and the case of Pittsburg, &c., Ry. Co. v. Lewis, 18 Ky. Law Rep., 957, and the case of Louisville Ry. Co. v. French, 24 Ky. Law Rep., 1280.

Perceiving no error in the case it is, therefore, affirmed.

SHEA, &amp;c. v. SHEA'S ADM'R, &amp;c.

(Filed February 19, 1903—Not to be reported.)

Decedents' estates—Homestead—S. died intestate, leaving his wife and seven infant children surviving him. He was the owner of two tracts of land, on one of which he lived at the time of his death. The widow instituted an action to have the homestead allotted to her, in which proceeding an allotment was made of sixty-six acres. In a subsequent action by the administrator to sell the lands to pay the debts of the intestate the land was sold, and purchase-money bonds remain uncollected. In this proceeding the widow sets up claim that the land allotted to her was worth only \$600, and that she is entitled to an allotment of land of the value of \$1,000. No exceptions were taken to the sale of the land. Held—That the widow is entitled to have allotted to her from the proceeds of the tract of land \$400, and to have it invested in real estate or in some good personal security, and the interest paid over to her for the benefit of herself and children during her life, and until the youngest child arrives at the age of twenty-one years, to make up the difference between \$600, the admitted value of the homestead allotted to her, and the \$1,000, to which she was entitled before the general creditors could get anything.

W. A. Lee for appellants.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Burnam.

This suit was instituted by the appellee, P. A. Alexander, as administrator of the estate of Peter Shea, deceased, for a settlement of his accounts as administrator. He alleges that the decedent left surviving him a widow and seven infant children, whose ages ranged from one to sixteen years, and who were made defendants; that there came to his hands \$1,425.91 from the personal estate, which he had applied to the debts of his intestate, but there remained still due and unpaid debts which aggregated \$1,085, and that it would be necessary to sell a part or all of the real estate belonging to the decedent to realize a sufficient sum to pay this balance. He further alleged that his intestate was at his death the owner and in possession of a tract of about seventy acres of land, and that he also held the fee-simple title to another tract of land which adjoined the seventy acres, but which was subject to a life estate of his mother and to a charge of \$400 due to his brother and sisters.

Shortly before the institution of this suit by the administrator the appellant, Mary Shea, brought suit in the circuit court, setting out substantially the same facts and asking that a homestead should be allotted to her and her infant children from the real estate of her deceased husband. These suits were consolidated and a judgment entered directing the master commissioner, in conjunction with two other persons, to allot to the widow and children a homestead out of the seventy-acre tract, and also adjudging that Nora Shea, Helen Maloney, Ben McFarland and John McFarland had a claim of \$100 each against the decedent, which were prior liens upon the 100-acre tract of land purchased by Peter Shea from his mother, Maria Shea. The judgment also provided that, after allotting to the widow a homestead, he should sell the 100-acre tract of land subject to the life estate of Maria Shea.

Pursuant to this judgment there was allotted to the appellant, Mary Shea, and her children sixty-six acres of land, this being all the land owned by decedent outside of his 100-acre tract, and which the commissioners valued at \$792. The 100-acre tract was then sold by the master commissioner to the appellee, G. M. Smith, at the price of \$1,000. Appellants filed exceptions to the allotment of homestead, claiming that the land set apart to them was not worth exceeding \$600. Upon the trial of these exceptions it was admitted as a fact of record that the land allotted as a homestead was not worth more than \$600. It further appears that the deceased, Peter Shea, lived previous to his death with his wife and children at the old homestead, upon the 100 acres of land, and that his mother, Maria Shea, lived with him; and that the wife and children continued to live with the grandmother up to the entry of the judgment. But before the day of the sale Maria Shea died, thereby vesting the heirs at law of Peter Shea with the complete fee-simple title to this tract of land, subject to the charge of \$400 in favor of the parties enumerated above. No exceptions, however, seem to have been taken to the confirmation of the sale to Smith, but there seems to have been no order of distribution or collection of the bond for purchase money executed by him. Under this state of fact the four children of Maria Shea were entitled to be paid \$100 each, and they were properly adjudged a first lien upon the proceeds of the 100-acre tract of land. Appellant was then entitled to have allotted to her from the proceeds of the sale of that tract of land \$400, and to have had it invested in real estate, or in some good personal security and the interest paid over to her for the benefit of herself and children during her life and until the youngest child arrived at the age of twenty-one years, to make up the difference between \$600, the admitted value of the homestead allotted to her, and the \$1,000 to which in law she was entitled before the general creditors of the decedent could be paid anything therefrom.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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CRABTREE COAL MINING CO. v. SAMPLE'S ADM'R.

(Filed February 19, 1903—Not to be reported.)

Negligence—Fellow servant—Continuance—Instructions—This action was brought by appellee as administrator of S. to recover damages of appellant for injuries caused by the negligence of appellant, resulting in the death of S. It was alleged in the petition that deceased, with other miners, were at work under a mine boss superior to them, in making a "break through," and that deceased believing that it was dangerous, quit work, but under assurances from the boss that the place was safe, resumed work, and a great quantity of slate and other debris fell on him, causing his death a few hours later. The answer denied that the boss was superior to deceased in authority, but alleged that he was a fellow servant, and further pleaded contributory negligence by continuing to work in a place that he knew was dangerous. A trial resulted in a verdict in favor of plaintiff for \$1,400, from which this appeal is prosecuted. It is insisted that the lower court erred in refusing to grant appellant a continuance of the case on account of

the tired condition of its attorneys and a lack of opportunity to prepare the case for trial; also on account of the absence of two important witnesses. Held—That the court did not err in refusing a continuance, as appellant's attorneys appeared and conducted the defense, and the statements of the affidavit as to the testimony of the absent witnesses were read in evidence. It is also insisted that the court erred in refusing instructions. Held—That while two of the instructions refused might have been given, other instructions given correctly set forth the same principles of law. The court properly submitted to the jury the question as to whether the party alleged to be the boss was superior in authority to deceased, and as there was some evidence sustaining this position the court did not err in refusing to give a peremptory instruction for appellant. The court also correctly instructed the jury as to whether deceased was put in the place of danger by his superior; also as to whether the danger of complying therewith was so obvious and imminent that it would have been known and could have been avoided by an ordinarily prudent man. The jury properly considered these matters, and their finding shows that no passion or prejudice influenced them in making it. The primary duty of the master of using care to furnish a reasonably safe place for the servant is more important than the duty of the servant to use reasonable care to protect himself, because the master is required to use a degree of care in the preparation and subsequent inspection of an entry to a mine that is not primarily demanded of a servant.

C. J. Pratt, Roy Salmon and C. J. Waddell for appellant.

J. F. Gordon for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Settle.

Appellant was sued in the Hopkins Circuit Court by appellee, W. J. Cox, as administrator of the estate of George M. Samples, deceased, the action being for the recovery of damages for the death of his decedent, which occurred as averred in the petition, as the result of an injury to his person received while at work in appellant's coal mine, and in its service, which injury is alleged to have been caused by the gross negligence of appellant, its agents and servants, and without fault on the decedent's part.

It is alleged in the petition that the decedent was when injured engaged with other servants of appellant in the making of what is commonly called a "break through," which rendered it necessary to remove certain coal and slate overlaying same; that this work was being done under the direction and immediate supervision of one of the appellant's lank bosses, or mine foreman, one N. Sweeney; that said foreman was superior to the decedent in the service of appellant, and as such had the right to command and direct the labors of the decedent, and it was the duty of the latter to obey him; that while engaged in the work indicated the decedent objected to continuing under certain coal and slate, saying that it was not safe, but the mine boss directed him to continue thereunder, assuring him that it was safe for him to do so, whereupon the decedent, relying upon the assurances of the boss, did continue the work, when, without fault on his part, much of the slate, coal and other substance overhead fell upon his body and limbs, thereby crushing him to the ground, and so injuring and wounding him as to cause his death a few hours later.

The petition further avers that the mine boss knew, or by the exercise of

ordinary care might have known, of the unsafe condition of the mine and of the danger to the decedent from continuing said work, and that the latter did not know, of the danger of remaining in that position; that the place where the decedent received his injury was a dangerous place, and not reasonably safe, but not so obviously so that an ordinarily prudent servant situated as was the decedent would not have incurred the risk, or refused to obey the orders of his superior to continue work therein.

The answer specifically denies the acts of negligence complained of, or that the decedent died of the injuries received in its mine, and avers that the person designated in the petition as mine boss or foreman, was not the superior of the decedent, but only his fellow servant; that his knowledge of the condition of the mine was no greater than that of the decedent to whom every part of the mine was familiar.

The answer further alleges that the decedent was a miner of unusual skill and experience, and that on the occasion of receiving his injuries he saw and knew the danger of the place where he was at work, and in remaining therein and continuing work he was guilty of negligence, which contributed to his injuries to such an extent that but for same he would not have been injured. Reply was filed traversing the affirmative matters of defense contained in the answer, and upon the trial a verdict of \$1,500 in damages was returned by the jury in appellee's behalf.

Appellants thereupon filed grounds and made motion for a new trial which was overruled by the court, of which action the court, and of the judgment rendered against it for the damages awarded by the jury, appellant complains, hence this appeal. It is earnestly contended by counsel for appellant that the lower court erred in refusing to continue on its motion and the affidavit filed in support thereof the case at the term at which the trial occurred. The affidavit was made by the secretary and treasurer of appellant and was signed also by its attorneys. It in substance states that appellant was not ready for trial, first, because of the exhausted condition of its two attorneys, who had been keeping night watch at the bedside of a sick member of their family, and constantly engaged during the day for three weeks in the trial of cases in court; second, that R. M. Salmon, the author of the affidavit for the continuance, who alone had control of appellant's mine, and had been acting with the appellant's attorneys in the preparation of the defense, had been so constantly engaged for several months in protecting appellant's property from injury at the hands of lawless men, then in the county, as to prevent his giving the attorneys needed assistance in preparing the trial; third, that owing to the then existing mining troubles in the county, the state of lawlessness, and the inflamed condition of the public mind, appellant could not get a fair and impartial trial, and fourth, that two important witnesses for appellant, whose names are mentioned in the affidavit, were then absent, by whom certain material facts could be proved, which facts were set forth in the affidavit, as well as the statement showing diligence in the effort to procure the attendance of the witnesses.

The lower court very properly, we think, overruled the motion for a continuance, for appellant's attorneys were both physically and mentally able to attend to the case on the trial, as the defense interposed by them appears from the record to have been ably and skillfully presented, and if any in-

jury resulted to the health of either of them from the labor performed in conducting the trial that fact is not disclosed by the record.

The affiant and officer of appellant, R. M. Salmon, was present to advise with its attorneys, and testified as a witness at the trial. Appellant could not have been prejudiced by the absence of the two witnesses named in the affidavit, as appellee consented to the reading before the jury of that part of the affidavit containing the facts to which it was claimed they would testify, and the small amount of damages named in the verdict shows conclusively that the jury were not influenced by the alleged prevailing lawlessness, nor by the inflamed state of the public mind complained of in the affidavit. Counsel for appellant insist that the lower court did not properly instruct the jury, and that it erred in refusing the instructions asked by appellant.

The evidence, though conflicting on the point as to whether appellant's servant, Napoleon Sweeney, was the superior of the decedent in the work of operating the mine does tend to show that his position in the service of appellant was one of some sort of control, or leadership. Some of appellee's witnesses denominate him "the boss of the night crew," and several of them testified that he was authorized to direct the decedent in his work, and that it was the duty of the latter to obey him, at any rate the question of whether he was the superior of the decedent, under the pleadings and proof in this case, was one to be determined by the jury. They obviously came to the conclusion that he was, or else their verdict would have been for the appellant instead of appellee.

The verdict can not be disturbed on the ground that Sweeney was not the superior of the decedent, unless it could be said that there was no evidence conducing to show that fact, and as we are not prepared to say that there was no such evidence it is manifest that the lower court did not err in refusing the peremptory instruction asked by appellant. Assuming, therefore, that there was some evidence to authorize the jury to find that Sweeney was the "boss or superior" of the decedent, there yet remains the further question of whether the latter at the time of receiving his injuries was put in a place of danger by the act or direction of his superior, Sweeney; and further, whether, notwithstanding the order of the superior, the danger of complying therewith was so obvious and imminent that it would have been known to and could have been avoided by an ordinarily prudent man. In *Ashland Coal and Iron Co. v. Wallace*, 19 Ky. Law Rep., 849, which was an action by the servant to recover of the master damages for injuries received in a coal mine, this court said: "In actions like this questions of negligence are for the jury to determine. The ordinary care which parties are required to use in the discharge of their respective duties varies so much with the situation of the parties, and the circumstances of each particular case, that the policy of the law to relegate these questions to the juries has been long settled."

The court in the case *supra*, quoting with approval *Gibson v. Ry. Co.*, 46 Mo., 168, further said: "The degree of care required of the master and servant in particular cases is generally different, whilst each is required to exercise that degree of care in the performance of his duties which a reasonably prudent person would use under the circumstances. The primary duty on the part of the master of using care to furnish a reasonably safe

place for the servant is more important than the duty of the servant to use reasonable care to protect himself, because the master is required to use a degree of care in the preparation and subsequent inspection of an entry to a mine that is not primarily demanded of a servant. The master must inspect the entries in which the servant is engaged in work, and the servant has the right to presume when directed to work in a particular place that the master has performed this duty and to proceed with his work, relying upon this presumption, unless a reasonably prudent and intelligent man in the performance of his work as a servant in a mine, under like circumstance, would be able to discern risks which defects in the mine indicate. \* \* \* Defects in the roof of a mine which might be perfectly apparent to the eye of an inspector might have no significance to a laborer, or an employee, who has had no experience in this special employment, and it would be unreasonable to charge him with contributory negligence simply because he sees defects, unless a reasonably intelligent and prudent man would, under like circumstances, have known or apprehended the risks which those defects indicated. The dangers and not the defects alone must be so obvious that a reasonably prudent man would have avoided them in order to charge the servant with contributory negligence."

The decedent, according to some of the witnesses, was drilling and blasting at the "break through." He seemed to fear danger from the overhanging slate and stepped out of the way, saying he believed it was dangerous. Napoleon Sweeney stepped under it and sounded it and said: "No; he thought it was all right." Decedent then said: "Maybe it is," and returned to the place, and the slate fell.

Appellant's counsel lay much stress upon the decedent's familiarity with the condition of the mine. Much of the evidence introduced by appellant was directed to this point, and to attempting to prove that the decedent did not die of the injuries received in the mine, but of heart disease. It was, however, the province of the jury to determine how and of what he died, and whether his own negligence caused his death. The facts all went to the jury, and if the instructions given correctly present the law of the case, this court will not disturb the verdict. We have carefully examined the instructions given and refused by the lower court, and are of the opinion that those given fairly and correctly presented to the jury the whole law of the case. They authorized a verdict for appellee if the jury believed from the evidence, first, that Sweeney was appellant's servant and the superior of decedent; second, that he assured the decedent that his place of labor was safe, when it was not so; and, third, that decedent relied on such assurance, and by reason thereof continued to work at the place of danger and lost his life by the falling slate; and, fourth, that the danger before the falling of the slate was so obvious and imminent that an ordinarily prudent man would not have continued at the work.

Upon the other hand, the jury were fully instructed as to the law under which appellant might escape liability, as they were told by the court to find for the appellant if they believed from the evidence that Sweeney was not the superior in authority over decedent, or that the latter did not rely on Sweeney's assurance of safety, if any was given, or that decedent's death was produced by a cause other than the falling of the slate, or that his death



was caused by his own negligence. The instructions also properly defined the measure of damages, ordinary care and contributory negligence. We have also carefully examined the refused instructions, and while two of them might, with propriety, have been given, yet as the propositions of law contained in them were substantially presented in the instructions given, it can not be said that appellant was prejudiced by the court's refusal to give them.

Being unable to find any error in the record the judgment of the lower court is affirmed.

Judge Nunn not sitting.

#### ILLINOIS CENTRAL R. R. CO. v. SCHEIBLE.

(Filed February 3, 1903—Not to be reported.)

Railroads—Negligence—Loss by fire from engine—Evidence—Appellee brought this action to recover damages for loss of rails, posts, fruit trees and timber trees by fires alleged to have been caused by sparks escaping from appellant's engines. Appellant admitted two fires, but appellee proved that the other fire alleged to have occurred from which the greater loss was suffered was caused by sparks that escaped from either one of two engines, describing them by number. A verdict and judgment for \$400 damages in favor of appellee resulted, from which appellant prosecutes this appeal. Appellant claims that it was conclusively proven that at that time both of said engines were furnished with the most perfect screens and spark arrester, and that they were in perfect order. It also contends that the lower court erred to appellant's prejudice in permitting appellee to prove by many witnesses that appellant's engines shortly before and during the time he claimed to have sustained the losses emitted large quantities of sparks and cinders, and started and caused many fires along its road on and in the vicinity of appellee's farm, and that cinders from the size of a pea to the size of a man's thumb cover the ground along the track and out beyond appellant's right of way on and in the vicinity of appellee's farm. Held—That said evidence was competent, and the jury properly considered this evidence in arriving at their verdict; besides, there was no proof to show the condition and position of the screens and spark arrester while passing appellee's farm, and the verdict will not be disturbed.

W. H. Marriott, J. M. Dickinson and Pirtle & Trabue for appellant.

L. A. Faurest for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Hardin Circuit Court for \$400, in favor of appellee against appellant for the loss of rails, posts, fruit trees and timber trees.

It was alleged by the appellee that this loss was occasioned by five different fires started by defendant's engines, all of the fires having occurred between April 8, 1901, and August 21, 1901. The appellant admits four of the fires, the small ones, doing damage to the extent of \$67.43. Appellant states that no report of the fires was made at the time, and it was unable to ascertain the engines from which the sparks were emitted, and for that reason could introduce no evidence as to the condition of the engines. But appel-

lant claims that the fire which caused the only considerable damage occurred on April 9, 1901, and was caused by one or the other of two engines, Nos. 4 or 363, and that it was conclusively shown that at that time said engines were furnished with the most perfect screens and spark arresters, and that they were in perfect order, and appellant further claims that the lower court erred to its prejudice in permitting appellee to prove by many witnesses that appellant's engines, shortly before and during the time he claimed to have sustained the losses, emitted large quantities of sparks and cinders, and started and caused many fires along its road on and in the vicinity of appellee's farm, and that cinders from the size of a pea to the size of a man's thumb cover the ground along the track and out beyond appellant's right of way on and in the vicinity of appellee's farm, and he cites two authorities to support his contention. One is the case of *N. N. & M. V. R. R. Co. v. Terry*, 16 Ky. Law Rep., 316, which is not reported in full and is an opinion by the Supreme Court, and which seems to support appellant's contention. The other is the case of *L. & N. R. R. Co. v. Dalton*, 19 Ky. Law Rep., 1318, opinion by Judge Hazelrigg. As we understand this opinion, it is against appellant's position. The court in that opinion used this language: "Before liability can be fastened on the company for want of proper screens on its engines, or because of their defective condition, there must be some evidence to show such want or defective condition, such as that an unusual quantity of live sparks were being emitted while the train was going at an ordinary rate of speed or the same engine started several successive fires on the same trip, or the like. In the case before us there is no evidence or circumstance of this character to rebut the testimony of a number of witnesses for the company who testified as to the perfect condition of the appliances, after a thorough examination immediately after the fire." In this case the evidence of the witness, Hart, shows that one of these engines started a fire on the same day, very near the fire complained of, and there is much proof in this case that the engines of appellant, during the time mentioned, emitted large quantities of live sparks and started fires in that vicinity. In the case referred to the court said that the jury were not at liberty to reject the testimony of the railroad's witnesses, but in effect saying that with such evidence before them as in the case before us it was the question of fact for them to determine as to the condition of the spark arrester and the management of the engine at the time the sparks were emitted and the fire started. It is well settled in this State that a railroad company is not liable for injuries resulting from sparks escaping from its locomotive if it is furnished at the time with the best and most approved screens and spark arresters in practical use when these appliances were in perfect order, if not otherwise guilty in the operation of its engines.

In the case of *L. & N. R. R. Co. v. Samuel's Ex'ors*, 22 Ky. Law Rep., 304, the above principle was approved, and in that case, and in that connection, the court used this language: "The law is well settled in this State that a railroad company, authorized by its charter to use steam power, has necessarily the right to use fire as a means of generating steam; and it is not liable for injuries resulting from the sparks escaping from its locomotive if it was furnished at the time with the best and most approved screen and spark arrester in practical use, when these appliances in perfect order, if not

otherwise guilty of negligence in the operation of its engine. But it is equally well settled that in an action against a railroad company to recover for loss by fire alleged to have resulted from negligence in operation, or for failure to have the spark arrester in proper condition, the testimony showing that sparks and cinders escaped from the locomotive in unusual quantities was competent, and will, of itself, warrant the presumption that the arrester was out of order, or was improperly adjusted, and that the defendant was consequently guilty of negligence in this regard." And again: "The question in that case was whether it was competent to show, about the time when the fire occurred, that sparks and burning coals were frequently dropped by other engines passing on the same road and upon previous occasions, and it was held that such testimony was competent."

In the case of the Kentucky Central R. R. Co. v. Barrow, 89 Ky., 649, this court, by Judge Lewis, said: "The evidence on the trial of which appellant complains was, substantially, that trains frequently set fire to fences and grass at other places in the vicinity of appellee along the line of that road, and at different times during the fall of 1881. It was also stated that the trains usually passed with the screen or fender up or laid back."

The court sustained this evidence and affirmed the case. To the same effect is the case of the L. & N. R. R. Co. v. Taylor, 92 Ky., 57.

As stated before, appellant contends that when its two witnesses, McGariger and Turner, testified that the particular engines which started the fire were provided with screens or fenders that would effectually prevent the escape of sparks of fire from the chimneys of the locomotives, that this concluded the case, and that the jury were not at liberty to reject the evidence of these two witnesses. McGariger said that when the engines arrived at Louisville that night that he examined them and found the screens to be all right and in proper position. Turner said that before the engines left Paducah he examined them and found that the screens were all right, and in proper position. And they both stated that these screens were of the best and most approved appliances for the arrest of sparks and cinders. The appellant did not introduce those in charge of the said engines, Nos. 4 and 363, to show how said engines were managed and operated, whether properly or not, at the time and while passing the place where the fire started, nor show the condition and position of the screens and spark arresters at that time, and for these reasons it was a question of fact for the jury to determine as to how the engines were managed and operated, and as to whether or no the screens and spark arresters were in proper position and condition.

Perceiving no error the judgment is affirmed, with damages.

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LOUISVILLE & NASHVILLE R. R. CO. v. DICKEY, &c.

(Filed February 20, 1903—Not to be reported.)

Injunction—Contracts—Supply of water to citizens—This action was instituted by the trustees of Cave City for the use and benefit of all citizens, together with several citizens in their individual capacity, seeking a mandatory injunction against appellant, restraining it from refusing to supply the citizens with water and permitting them to attach their water pipes to the water pipes of the company. The action was dismissed as to some of

the plaintiffs, but the court finally adjudged in favor of appellees the relief sought. In 1854 parties owning the lands where Cave City now stands made a contract granting to appellant the right of way through said lands; also the right to maintain a depot, a water station and the privilege of obtaining its water supply from a large spring near. In 1863 a corporation known as the Knob City Land Co. had acquired the tract of land and laid out and platted the town of Cave City at and around the depot and water station mentioned in the deed of 1854. It seems that this corporation also established a waterworks at what is known as the Sink Hole Spring for the purpose of supplying the citizens with water. G., the president of the land company, made a written contract with appellant that it would turn over its waterworks to appellant in consideration that appellant would maintain same and furnish to the citizens water in a fixed quantity. It was also agreed that should the appellant fail to keep the machinery of the waterworks in repair the land company, on giving to appellant sixty days' notice, should have the right to take possession of the waterworks and operate same. Under the terms of this contract appellant took charge of the waterworks and proceeded to carry out the provisions of the instrument up to the 30th day of October, 1871, when said corporation, by G., its president, executed a writing, releasing appellant from its obligations to supply the citizens of Cave City with water. Appellant claims that by said writing it was absolved from all obligation to furnish water as required by said contract; also that the citizens acquiesced in the abandonment of said contract by digging wells, but that several of the citizens had to some extent supplied themselves since with water from the supply pipe to appellant's water tank. Appellees contend that G., the president of the land company, had no authority to execute said release. Held—That he had full authority to execute said release. This release did not interfere with any contractual rights between the citizens of Cave City and the Knob City Land Co. Appellees contend that they stand on different ground from that occupied by the citizens generally; that having had their private pipes connected with appellant's water mains for more than fifteen years, their right to be supplied with water from the mains of appellant has, by long user, ripened into an easement of which appellant can not now deprive them. This contention can not be maintained under the evidence. Whatever rights they have as against appellant they and their vendors obtained by permission of appellant. Their right to take water from the mains of appellant was a mere license which no lapse of time converts into an easement. Further, the provision of the contract cited gave the appellant the right at any time it saw fit to abandon said contract.

Jas. A. Mitchell, E. W. Hines and B. D. Warfield for appellant.

L. McQuown, W. L. Porter and V. H. Baird for appellees.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the trustees of the town of Cave City, Ky., for the use and benefit of all its citizens, together with several citizens in their individual capacity, among whom were appellees, for the purpose of obtaining an injunction restraining appellant, the Louisville & Nashville R. R. Co., from refusing to supply the citizens of Cave City with water.

Without going into the details of the case with unnecessary prolixity, it may be said that the issues were properly made by the pleadings, the evi-

dence taken, and the whole case heard and submitted on the 11th day of July, 1901, at which time the court entered final judgment, dismissing the petition as to G. T. Parker, one of the original plaintiffs, without prejudice, and then adjudging that the appellees, E. Dickey, W. A. Payne and Martin Brothers (who were among the original plaintiffs), were entitled to the relief sought by the petition; that mandatory injunction be granted them against the Louisville & Nashville R. R. Co., and the said Louisville & Nashville R. R. Co. be enjoined, and required to permit plaintiffs (appellees), at their own cost, to attach the water pipes that heretofore conveyed the water to the residences of W. A. Payne and E. Dickey, and to the livery stable of Martin Brothers, to the water pipes of defendant (appellant) at any point between the south water crane and the defendant's (appellant's) water tank; that when said pipes are so connected the defendant (appellant), the Louisville & Nashville R. R. Co., is enjoined and required to furnish water through said pipes to plaintiffs (appellees), Payne and Dickey, for use at their residences, and the plaintiffs (appellees), Martin Brothers, at their livery stable, in the same manner, and to the same extent, that water was furnished to said plaintiffs (appellees), and used by them before their said pipes were disconnected with defendant's (appellant's) water system at Cave City.

No adjudication was had as to the rights of any of the plaintiffs, except appellees, and it does not appear what conclusion the court below reached except as to them. From this judgment appellant has prosecuted an appeal to this court. The essential facts of this action, as we understand them, are as follows: "In 1854 A. C. Hobson and others, being the owners of a large tract of land in Barren county, Kentucky, known as the Duke tract, by a deed of writing conveyed to the Louisville & Nashville R. R. Co. a part of said tract of land, for the purposes of a right of way for the track of said railroad and also for the purpose of enabling said Louisville & Nashville R. R. Co. to erect a depot and waterworks station on their road where it passes through said land, and for such other purposes as they might deem necessary, connected with said railroad. Among other things there was contained in said deed the following grant: 'The party of the first part also hereby grant to the said railroad company the right of way to the Sink Hole Spring, near the late residence of the said Duke, situated on the southeast side of said road, and the use of the water of said spring for all purposes connected with the said road; also the right to erect all necessary machinery, water tanks, hydrants, pipes, etc., in order to elevate and carry water to the line of the road.' This conveyance is made with the express understanding and agreement that the party of the second part are to establish and continue a depot and water station upon the land herein conveyed, and are to occupy it only for such purposes as they may find necessary and convenient, and connected with said road."

This deed, although properly signed and acknowledged by the parties thereto, was not recorded until 1875. Some time prior to the 1st day of June, 1868, there had been chartered, by an act of the general assembly of the Commonwealth of Kentucky, a corporation known as the Knob City Land Co., of which John H. Graham was president, and which had acquired the tract of land, a part of which had been conveyed to the Louisville & Nashville R. R. Co. in 1854, as before stated. This land company platted and

laid out the town of Cave City, at and around the depot and water station of the Louisville & Nashville R. R. Co., mentioned in the deed of 1854. It seems also to have established a waterworks at what is known as the Sink Hole Spring, for the purpose of supplying the citizens of Cave City with water; and it appears, from the evidence, that in selling the lots in said city it was very generally represented to the purchasers, as an inducement to buy the land from the company, that they would be entitled to water from said waterworks free of charge.

Now with this state of affairs in existence, on the 1st day of June, 1863, the Knob City Land Co., through its president, John H. Graham, and the Louisville & Nashville R. R. Co., entered into a contract in writing, which was intended to, and did, modify the contract of 1854 before mentioned. It is not necessary to set forth with any degree of particularity the various modifications which the new contract made in the old contract, so far as the real estate which it involves is concerned. But the contract of 1863 contains the following stipulations, upon which are based, at least in part, both the cause of action of the appellees and the defense of appellant:

"It is agreed that the Knob City Land Co. grants to the Louisville & Nashville R. R. Co. the right to use the waterworks at Cave City as at present constructed for the purpose of supplying water to the locomotives, with the right of access at all times to the pipes and to the cave, for the purpose of making repairs and running the machinery; also the right to erect on the ground of the Knob City Land Co. additional machinery or other implements necessary to carry out the object of this agreement.

"In consideration of the privileges granted to the Louisville & Nashville R. R. Co. said company agrees to keep in repair the waterworks, pipes and machinery, and agrees to supply water to the extent of the capacity of the two pumps as originally constructed, which pumps are driven by a water wheel and have a diameter of four inches and a stroke of sixteen inches, and are single acting.

"The Louisville & Nashville R. R. Co., without guaranteeing a constant and sufficient supply of water at all times, agrees to use their best efforts to supply the locomotives, the hotel and private citizens, to the extent of the capacity of the pumps above described, but in case that there should not be sufficient water, owing to accidents to the machinery or owing to other causes not under the control of the railroad company, to supply the locomotives, the hotel and private citizens, the Louisville & Nashville R. R. Co. shall have the right to supply their own wants in preference to private citizens or the hotel to the extent of not more than 1,000 gallons daily.

"It is understood that if water is unnecessarily wasted by private citizens the Louisville & Nashville R. R. Co. shall have free authority to remedy this evil to the extent of stopping the water from citizens who are guilty of wasting water for such a period of time as may be thought sufficient by the L. & N. R. R. Co. to correct the evil complained of.

"The L. & N. R. R. Co. shall not be obliged to repair hydrants and pipes and cocks, but shall merely keep in repair the main pipes. If water is wasted from branch pipes, hydrants, etc., in the houses for the want of repairs, the L. & N. R. R. Co. shall have the right to stop the supply of water to such pipes and hydrants until the same are repaired.

"If at any time hereafter the population of Cave City should increase to such an extent as to make the enlargement of the waterworks desirable, such enlargement shall be made at the expense of the parties interested in it, and the railroad company shall be entitled to be reimbursed for the expense incurred by the railroad company in raising the additional quantity of water required over and above the quantity which the present capacity of the pumps could furnish.

"The amount and manner of compensating the company shall be agreed upon between the company and the parties interested on the principle that the company shall at no time be at the expense of raising a greater quantity of water than the pumps and two wheels above described could furnish now, nor shall the railroad company be at the expense of maintaining more extensive waterworks than those existing at present.

"It is also agreed that should the L. & N. R. R. Co. fail to keep the present machinery of the waterworks in operation as herein provided, or abandon the same, the Knob City Land Co., on giving sixty days' notice in writing to the L. & N. R. R. Co., shall have the right to take possession of the waterworks now there and operate the same, but without prejudice to the rights of the L. & N. R. R. Co. to establish waterworks for the supply of their engines, as provided in the unrecorded deed aforesaid."

Under the terms of this contract the L. & N. R. R. Co. took charge of the waterworks of the Knob City Land Co., at Sink Hole Spring, and proceeded, so far as this record shows, to carry out the provisions of that instrument up to the 30th day of October, 1871, when the following release was executed and delivered by the Knob City Land Co. to appellant.

"Albert Fink, Esq., General Superintendent of the Louisville & Nashville R. R. Co.: I hereby release you from all obligations to supply the citizens of Cave City with water in accordance with a contract entered into between the Knob City Land Co. and Louisville & Nashville R. R. Co., dated June 1, 1863, and hereby request and direct that you stop the supply.

"JOHN H. GRAHAM,

"October 30, 1871.

President Knob City Land Co."

This release was accepted by the appellant in the following language:

"The Louisville & Nashville R. R. Co. has received the above notice and accepts the release, and will carry out the directions to stop the supply of water to other parties.

"ALBERT FINK,

"Vice-Pres't and Gen'l Supt."

The foregoing instrument was duly and legally acknowledged, and delivered by John H. Graham, as president of the Knob City Land Co., to be his act and deed, on the 30th day of October, 1871, before the clerk of the Jefferson County Court, as appears by the certificate of that officer, which is as follows:

"State of Kentucky, }  
"Jefferson County. } sot.

"I, Chas. M. Thruston, clerk county court for the county aforesaid, do certify that on this day the foregoing release was produced to me in my office and acknowledged and delivered by John H. Graham, as president of the

Knob City Land Co., a party thereto, to be his act and deed, all of which is hereby certified to the proper office for record.

"Witness my hand this 30th day of October, 1871.

"CHAS. M. THRUSTON, Clerk,  
"By H. E. SWEETNEY, D. C."

And being properly certified to the clerk of the county court of Barren county, was by that officer duly and legally recorded, as appears by his certificate, which is as follows:

"State of Kentucky, }  
"Barren County. } sot.

"I. J. P. Nuckols, clerk of the county court for said county, do certify that on this day the foregoing article of release between John H. Graham, as president of the Knob City Land Co. and the Louisville & Nashville R. R. Co. was filed in my office for record.

"Whereupon the same and this certificate, together with the accompanying testimonial, have been recorded.

"Given under my hand this 26th day of January, 1874.

"J. P. NUCKOLS, C. B. C. C."

At the time the appellant took charge of the waterworks of the Knob City Land Co., under the contract of 1863, there existed in the town of Cave City a system of water pipes and hydrants, by means of which the citizens were furnished with free water. It does not appear from the evidence, definitely, at what exact period appellant ceased supplying the citizens, generally, with free water by this system of pipes and hydrants in and along the streets of Cave City; but it does appear that many years before the institution of this action this water system had been entirely abandoned; the pipes and hydrants either removed, or allowed to fall into ruin and decay by disuse and inattention.

Appellant's contention is that it entirely abandoned the contract of 1863, so far as the citizens of Cave City were concerned, upon the execution and delivery of the release before mentioned; and there is great force in its contention, as it is not to be presumed that a business corporation, managed by business men, would accept and put to record a release absolving them from so burdensome an undertaking as the supplying of all the citizens of Cave City with water free, if they did not intend to avail themselves of its provisions. Certain it is, that the town of Cave City, as a corporation, ceased entirely to look to the provision of the contract of 1863 for supplying its citizens with water, and proceeded to have dug a number of wells through the town, for the purpose of affording to the citizens free water.

Considering all the evidence, we have concluded that so far as the citizens of Cave City generally are concerned, appellant never furnished water, under the contract of 1863, after the release of 1871. It does appear that many of the citizens, and especially the colored population, went to the reservoir at Sink Hole Spring, and there got water, and carried or hauled it away; oftentimes catching it in buckets from the supply pipe of appellant's waterworks as it ran from the pipe into the reservoir. But this was a different proposition from the supplying free water to the citizens under the contract of 1863, through and by the system of water pipes, mains and hydrants, as contem-



plated by that instrument. The taking of the water by the citizens at the reservoir was a mere license to which the appellant and its employees would naturally not object, as there was an abundance of water, both for appellant's use and the small needs of those who came themselves with buckets to obtain water.

Appellees contend that the release relied on by appellant is void, as being only the individual act of John H. Graham, and that he had no power to make such release. An examination of the charter of the Knob City Land Co. will show that the entire management of its affairs was placed in the hands of John H. Graham, its president. The contract of 1863, upon which appellees base in part at least their cause of action, was executed by him. We see no reason why he, who made the contract of 1863, upon which appellees rely, should not also have the power, by the consent of appellant, to abrogate said contract in whole or in part. This release of appellant would not, of course, interfere with any contractual rights between the citizens of Cave City and the Knob City Land Co. Those rights, whatever they were, remained precisely the same. The contract of 1863 was between the Knob City Land Co. and appellant. By that instrument appellant undertook, upon certain considerations, to carry out the Knob City Land Co.'s contract with the citizens of Cave City. No good reason can exist for denying the right of the Knob City Land Co. and appellant to dissolve their contractual relations if they saw fit. This left the rights of the citizens of Cave City, under any contract they may have had with the Knob City Land Co., precisely where they were before the making of the contract of 1863. The long acquiescence of the town of Cave City, as a corporation, and of its citizens generally, in the release of appellant from further supplying them with water, and their entire abandonment of the water mains in their streets, at least tends to show that said release was with their consent. But it is contended by appellees that they stand on a different ground from that occupied by the citizens generally of Cave City; that having had their private pipes connected with appellant's water mains for more than fifteen years, their right to be supplied with water from the mains of appellant has by long user ripened into an easement of which appellant can not now deprive them. This contention can not be maintained under the evidence. Whatever rights they have, as against appellant, they and their vendor obtained by permission of appellant. An examination of their deeds, and the deeds of their vendors, whether near or remote, back to the conveyance by the Knob City Land Co., fail to show any covenant for free water, and while they all speak in a vague way about their understanding that they were entitled to free water, their evidence conclusively shows that they asked for and obtained permission from appellant to connect their private water pipes with its mains.

We are of opinion that their right to take water from the mains of appellant was a mere license, which no lapse of time converts into an easement. The money they paid to get the connection with appellant's mains was paid to the plumbers who did the work for them, and has no bearing upon their rights in the case. But, aside from all this, by the terms of the contract of 1863 it was "agreed that should the L. & N. R. R. Co. fail to keep the present machinery of the waterworks in operation as herein provided, or abandon the same, the Knob City Land Co., on giving sixty days'

notice, in writing, to the L. & N. R. R. Co., shall have the right to take possession of the waterworks now there, and operate the same, but without prejudice to the right of the L. & N. R. R. Co. to establish waterworks for the supply of their engines, as provided in the unrecorded deed aforesaid." (Contract of 1854.)

This, in our opinion, gave the appellant the right, at any time it saw fit, to abandon the contract between it and the Knob City Land Co., turning over to said land company, upon said abandonment, the waterworks received by it when the contract in question was entered into. This provision was not placed in the contract alone for the benefit of the Knob City Land Co., as is contended by counsel for appellees, but was clearly placed there for the benefit of appellant also; and whenever appellant saw fit to abandon said contract the right of the Knob City Land Co. to retake possession of the property began.

If appellees' right to free water from appellant was not a mere license, then it was based upon the contract of 1868, and if so, existed so long as that contract was in force, and no longer. Whenever appellant saw fit to exercise the right to abandon said contract then appellees' right to free water from appellant ceased. Now, whatever else may be said about the question as to when appellant abandoned the contract of 1868, it certainly did so when the bottom of the reservoir fell out, and appellant built a new water-tank of its own, and that was prior to the institution of this action; and, at that time, if not before, appellant clearly had the right to refuse to longer supply appellees with water from its water mains. With the question as to when, or upon what notice, the Knob City Land Co. will retake possession of its waterworks, or whether or not appellant will have to make good to it in damages any failure to keep the plant in proper repair, appellees have no concern. These are questions which the contracting parties can settle or adjudicate themselves.

Wherefore, the case is reversed, with directions to dismiss the petition.

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CITY OF CAMPBELLSVILLE v. ODEWALT.

(Filed February 20, 1903—Not to be reported.)

H. W. Rives and H. C. Wood for appellant.

Appeal from Taylor Circuit Court.

Judge Hobson delivered the following dissenting opinion:

The by-law before us in this case is taken from section 2572, Kentucky Statutes, which is in these words: "The person in possession of the premises on which liquor is sold, disposed of, obtained or furnished in violation or evasion of law, by any trick or method whatever, on conviction shall be fined not less than \$10 nor more than \$100 for each offense, and each time such liquor is sold, disposed of or furnished in violation or evasion of law shall be deemed a separate offense under this act against the person in possession of the premises on which said liquor is obtained, furnished or disposed of."

The by-law merely following the statute is not void, unless the statute is

also invalid, for it can not, of course, be maintained that the town authorities could not make a by-law similar to the statute to secure its better enforcement. It is said that the language used is broad enough to make the owner of the premises guilty criminally if a tramp walking by should step off the highway and sell whisky on his land, and other similar illustrations are given. But the statute requires no such rigorous construction. It will be observed that the statute uses the words "in violation or evasion of law." Also the words "under this act." The act was approved February 23, 1894, and is entitled "An act to punish the violation and evasion of the laws of this Commonwealth in relation to the regulation of the sale of spirituous, vinous or malt liquors." (Acts 1894, page 83.) Every section of the act strikes at tricks, subterfuges or devices for the evasion of the laws against liquor selling. The legislature knew that in local option communities blind tigers were frequently run by irresponsible persons, here to-day and gone to-morrow; while the owner of the property could be more easily found, and the purpose was to prevent the evasion of the law. The statute was aimed at those who evaded the law and not at those whose premises might be used for a moment by some tramp without their knowledge. This construction not only harmonizes the section quoted with the general intent of the act as shown by its title and other provisions, but is in accord with the principles of common law. In Bishop on Statutory Crimes, section 132, it is said: "A statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurs with his act, because the common law does not. Hence, what is done from overwhelming necessity is construed as not violating a statute, however contrary to its general terms. And one who, while careful and circumspect, is led into a mistake of facts and doing what would be in no way reprehensible, were they what he supposes them to be, commits what, under the real facts, is a violation of a criminal statute, is guilty of no crime, because such is the rule of the common law and in construction it restricts the statute. Yet in some instances of this sort he incurs a civil liability."

In *Bailey v. Commonwealth*, 74 Ky., 691, this court said: "Words in a statute were always to be understood according to the approved use of language. But there are other rules of construction of equal dignity and importance which must not be overlooked, and which, although not incorporated in our statutes, are as binding upon the court as if embodied in it. One of these rules is that every statute ought to be expounded, not according to the letter, but according to the meaning; and another, that every interpretation that leads to an absurdity ought to be rejected; and still another, that a law ought to be interpreted in such manner as that it may have effect and not be found vain and illusive."

Following this principle, it has been held that the reason of an enactment must enter into its interpretation, and that a case within the letter, but not within the spirit of a statute is not embraced by it. (*Brown v. Thompson*, 77 Ky., 538.) And to sustain a statute and give it effect the court read the statute as though the word "width" was the word "depth." (*Bird v. Commissioners*, 95 Ky., 195.)

The case before us does not require us to go further than the common-law rule quoted above from Bishop on Statutory Crimes. The legislature had in

mind evasions of the liquor laws, and was aiming to punish those who evaded them. Where the liquor is sold on the premises of another, without his knowledge or consent, or under circumstances beyond his control, or not reasonably to be anticipated by him, he is not to be punished. This gives the statute a fair effect. It remedies the evils the legislature had in mind, and it is the duty of the court, if it can do so, to enforce the legislative will, and not render the statute vain and illusive.

By section 1130, Kentucky Statutes, a person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the first conviction, and if convicted a third time, during his life. Yet under this statute it was held that the increased penalties only applied to offenses committed after the former conviction. (*Brown v. Commonwealth*, 100 Ky., 127.) In holding this the court had only to guide it the legislative intent, without any expressions in the statute indicating it. The case here is much stronger, for the phraseology of the statute as well as its title shows that the legislature was aiming at only evasions of the law. It has been held a violation of the statute to carry a pistol concealed in a valise, but if a person walking with a friend carried his valise for him, not knowing there was a pistol in it, he would clearly not come within the purpose of the statute against carrying concealed deadly weapons. Similar illustrations may be given as to nearly all the statutes declaring certain specific acts misdemeanors. To say that the principle stated by Bishop applies to acts done by the defendant, but not to a case like this, is to ignore the principle on which the rule rests, which is that there is at common law no criminality where the defendant acts innocently and there is no fault on his part, actual or constructive.

The evidence in this case proved the facts set out in the statute, and, therefore, made out a *prima facie* case against the defendant. It was one of those cases within the letter, but not within the spirit, of the statute, as above indicated. The burden of proof was on the defendant to show it, and the court should not, therefore, have instructed the jury peremptorily to find for the defendant. In Bishop on Statutory Crimes, section 1022, it is said: "Where the statute is silent as to the defendant's intent or knowledge, the indictment need not allege, or the government's evidence show, that he knew the facts; his being misled concerning it is matter for him to set up in defense and prove."

A number of authorities from other States are cited in support of this principle. And there are many familiar illustrations of it. A mistake of the person or ignorance of a subsisting marriage will, under some circumstances, be a defense to an indictment for adultery, but such things need not be anticipated by the State, and must be shown by the defendant. The same is true of incest, where the defendant may show ignorance of the relationship in defense. There being no proof here rebutting the *prima facie* case made out by the State, the court should, in my judgment, have submitted it to the jury.

The question is not, therefore, presented how far the legislature in the exercise of the police power may, by small and reasonable penalties, provide for those things which tend to the repression of violations of law, as in its discretion the exigencies of the case require. (*Parnell v. Mann*, 104 Ky.,

87.) Of course it is conceded that excessive fines and cruel punishment can not be inflicted. (Constitution, section 17.)

I, therefore, dissent from the judgment of the court.

Judge O'Rear concurs in this dissent.

Judge Settle concurs in so much of it as construes the statute to cover only evasions of the law, but is of the opinion that the burden of proof in such cases as this is upon the Commonwealth to show that the sale of spirituous liquor was made with the knowledge or acquiescence of the defendant; and that fact not having been shown on the trial, the lower court did not err in granting the peremptory instruction in his favor.

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VIOLETT v. COMMONWEALTH.

(Filed February 20, 1903—Not to be reported.)

Criminal law—Unlawful shooting without wounding—Instruction—Appellant was convicted of the offense of unlawfully shooting at another without wounding him, under section 1242, Kentucky Statutes, and fined \$500 and sentenced to confinement at six months in jail, from which this appeal is prosecuted. The court instructed the jury in substance that the defendant was guilty if the shooting was done in sudden heat and passion and without previous malice, and that if they found him guilty they ought to fix his punishment at a fine of not less than \$50 nor more than \$500, or confinement in the county jail for not less than six months nor more than twelve months, or both so fine and imprison in their discretion. Held—That said instruction was prejudicial, as it did not follow the description of the offense as set forth in the statute. It should have included the words "in sudden affray." These words are not synonymous with the words "in sudden heat and passion," and the jury might have rendered a different verdict had they been properly instructed. The instruction also ought to have followed the statute as to self defense.

John W. Rodman for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hobson.

Appellant was convicted of the offense of shooting at Wingate Thompson without wounding him, under section 1242, Kentucky Statutes, and his punishment was fixed at a fine of \$500 and six months' imprisonment in the county jail. The court in substance instructed the jury that the defendant was guilty under the statute, if the shooting was done in sudden heat and passion and without previous malice, and that if they found him guilty they ought to fix his punishment at a fine of not less than \$50, nor more than \$500, or confinement in the county jail for not less than six months nor more than twelve months, or both so fine and imprison in their discretion. By another instruction the court told the jury that if the shooting was done in self defense they should acquit the defendant. The statute under which the conviction was had is in these words: "If any person shall, in a sudden affray, or in sudden heat and passion, without previous malice, and not in self-defense, shoot at without wounding, or shoot and wound another per-

son, or wound a person other than the person shot at, with a gun or other instrument, loaded with ball or other hard substance, without killing such person; or shall, in like manner, cut, thrust or stab any other person with a knife, dirk, sword or other deadly weapon, without killing such person, he shall be fined not less than \$50 nor more than \$500, or confined in the jail not less than six months nor more than one year, or both, in the discretion of the jury." (Kentucky Statutes, section 1342.)

It will be observed that the instruction of the court defining the offense does not follow the language of the statute. By the instruction of the court the offense consists in shooting in sudden heat and passion without previous malice. By the statute it consists in shooting "in a sudden affray, or in sudden heat and passion, without previous malice and not in self-defense." The words "in sudden affray" are not synonymous with the words "in sudden heat and passion." The statutory offense is, therefore, different from that defined in the instruction, and under the evidence in the case the jury might well have concluded that the shooting was done in a sudden affray, and inasmuch as they were allowed by the statute to graduate the punishment, according as, in their judgment, the defendant was in the wrong, the failure of the court to define the offense properly to the jury was prejudicial to the defendant, and in view of the severity of the verdict under the evidence we are of opinion a new trial should be had. The testimony tended strongly to show that while appellant was talking to another, Thompson approached them, and without proper cause, insulted appellant twice very grossly, following this up with a threatening attitude, and that appellant thinking he was about to draw a weapon, drew his pistol and fired the shot in question, and when Thompson said he was unarmed appellant replied that then he would not hurt him. If the court had instructed the jury that if the defendant did the shooting in a sudden affray they should fix his punishment at a fine of not less than \$50 nor more than \$500, or imprisonment not less than six months nor more than one year, or both, they might have rendered a different verdict. As the statute creating the offense provides, as an element of the offense, that the shooting must be not in self-defense, it is better that the instruction should follow the statute in this particular in defining the offense.

Judgment reversed and cause remanded for a new trial.

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GERMAN INSURANCE BANK v. FABEL, &c.

(Filed February 20, 1903—Not to be reported.)

Usury—Surety—Where a surety gives his individual note in satisfaction of a debt which had been previously carried by principal and surety it is not such a novation as to deprive the surety of the right to purge the note of all usury which had accrued before as well as after he assumed the debt.

O. A. Wehle for appellant.

M. A., D. A. & J. G. Sachs for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Chief Justice Burnam.

The appellee, Louise Fabel, brought this suit as administratrix with the will annexed of the estate of Margaretha Fabel for a settlement of her accounts, to ascertain the indebtedness of the estate and for a sale of a sufficient amount of real estate to pay it. Appellant, the German Insurance Bank, was made a defendant and filed an answer, in which they allege that Margaretha Fabel, on the 14th day of July, 1900, executed to them her promissory note, due four months after date, for \$5,000, and at the same time pledged and delivered to them certain shares of stock owned by her as collateral security. They admitted that the note contained \$291.42 of usury, but alleged that the balance, \$4,708.58, with interest from the 17th of November, 1900, was just, due and unpaid, and ask an enforcement of their lien and a sale of the collateral to pay this balance.

Appellee replied, and denied that the alleged balance set up by the bank was the true amount due by decedent. And in the second paragraph of the reply alleges that, on the 30th day of July, 1885, F. Fabel & Sons and Margaretha Fabel borrowed from the bank \$5,000, for which they executed their joint promissory note, due four months after date; that there were numerous renewals of this note by the same makers to the bank, at which interest in excess of 6 per cent. was either paid or added to the principal; that this course of dealing was kept up until the 30th of December, 1895, when she executed her individual note to the bank in lieu of the one signed by F. Fabel & Sons and herself, and that on the note so executed she paid interest at the rate of 7 per cent. and 8 per cent. per annum at each renewal thereof, and that it was finally merged in the obligation sued on, and asked that the entire usury which had been paid from the date of the original loan in July, 1885, should be extracted.

Appellants, in their rejoinder, admit the transaction with F. Fabel & Sons and Margaretha Fabel, and allege that there was due on the old note on the 30th of December, 1895, \$4,705; that on that day decedent executed to the bank her note for \$5,000, the proceeds of which \$4,877.50 were placed to her credit, and that she checked on this sum to pay for the old note, and appropriated the balance, \$172.50, to other uses, and claims that this transaction was an independent loan made to decedent on the credit of the stock, and denies that the usury paid, between the date of the original loan and the date of this transaction by F. Fabel & Sons and decedent, can be legally deducted from the obligation sued on. A demurrer was sustained to this response, and \$1,363.31 of usury deducted and a judgment given for the balance of the plaintiff's debt, and to reverse that judgment this appeal is prosecuted.

Appellant contends that as the proceeds of the note executed by decedent in 1895 were placed to her credit and were in excess of the balance due upon the old obligation, it can not be regarded as a renewal of the previous debt, and seeks to distinguish this transaction from numerous others of similar character, which this court has held to be mere renewals and devices resorted to to escape usury. In *S. Whinery v. R. D. Garrett, & Co.*, ante, 1558, which was decided at the present term of this court, A. J. Crawford, principal, and S. Whinery as security, borrowed from the Somerset Banking Co. \$8,300 by note, which was renewed from time to time until the 24th of January, 1896, interest being paid at each renewal at the rate of 8 per cent.

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In February, 1896, Crawford having become insolvent, Whinery executed his individual note to the bank for the balance due, which he renewed from time to time, making like payments in advance of interest by way of discount. He was sued at the last renewal of the note and pleaded usury. The trial court purged the note of all usury which accrued after the execution by Whinery, but refused to purge the usury paid up to that time by Crawford. It was held that Whinery was entitled to have all the usury extracted, which had been paid by Crawford from the date of the original transaction. In the *Bank of Russellville v. Cooke*, 20 Ky. Law Rep., 291, it was held that where a borrower had paid usury upon an indebtedness which was embraced with other indebtedness in a new note, he had the right to follow such usury into the new obligation and recover the amount so embraced therein. In *Kendal v. Crouch*, 88 Ky., 199, it was held that dropping of the principal obligor and the execution of a new note by the surety was, not such a novation as would deprive the surety of the plea of usury.

We think it is impossible to distinguish on principle those cases from the one at bar, and appellee is not estopped from relying upon the defense of usury in the obligation sued on any more than she would have been if she had merely executed a note to the bank for the exact amount due upon the note of Fabel & Sons and herself, which she took up and paid off.

For reasons indicated the judgment is affirmed.

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FURNISH, SUPT. V. SATTERWHITE, &c., COM'RS.

(Filed February 20, 1903.)

**Mandamus**—Duty of superintendent of asylum to certify claim for premiums of insurance to the auditor—This action was instituted for a mandamus to compel appellant, as superintendent of the Central Kentucky Asylum for the Insane, to join the president of the board of commissioners in certifying to the auditor of public accounts for payments premiums on insurance effected by the commissioners. Held—That the chancellor had authority to compel appellant as superintendent, he being a ministerial officer, to join the president of the board in certifying said claim to the auditor for payment, as section 224, Kentucky Statutes, expressly directs the commissioners to keep the building and furniture constantly insured, and directs that the premiums shall be certified to the auditor as above stated. Section 230, Kentucky Statutes, prescribing the general duties of the steward, does not conflict with the duty of the superintendent, under section 224.

Dallam & Gordon for appellant.

Carroll & Carroll for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Barker.

This action was instituted in the Jefferson Circuit Court, Chancery branch, second division, by the appellees, who are the commissioners of Central Kentucky Asylum for the Insane, against the appellant, who is the superintendent of said institution, for the purpose of obtaining a writ of mandamus, requiring him to join with the president of the board of commissioners of said institution in certifying to the auditor of public accounts



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the amount of the premiums due on certain contracts of insurance effected by the board of commissioners upon the buildings and furniture of said institution.

The appellees, who were plaintiff's below, in their petition state that in pursuance of section 224 of the Kentucky Statutes they have effected contracts of insurance upon the buildings and furniture of the institution of which they have charge, insuring them against loss by fire; that appellee, T. P. Satterwhite, who is president of the board of commissioners of said institution, has certified to the auditor of public accounts of the State of Kentucky the amount of the premiums due on such insurance, but the defendant, J. G. Furnish, who is superintendent of said institution, has failed and refused to certify the amount of said premiums to the auditor, and they further state that because of his failure to certify the amount of said premiums no warrant has been issued by the auditor in payment of said premiums, and that the certification of the defendant is necessary to secure said warrant, and that unless said certification is obtained, and said warrant issued, the policies of insurance on the buildings and furniture of said asylum will be cancelled, and said property left unprotected from loss by fire.

After the filing of this petition the appellant filed a general demurrer to the same, and without waiving said demurrer, filed his answer, consisting of three paragraphs. The answer of appellant admits that the commissioners had obtained the insurance on the buildings and furniture as set out in the petition, and that he has been requested to certify the amount of the premiums due for same, and has refused so to do. He denies, however, that it is his duty to certify the premiums on insurance effected by the board of commissioners, claiming that it is the duty of the steward of said institution, one Samuel Fulton, under the direction of the appellant, to effect said insurance, and pleads and relies upon the fact that it has been the custom at the said institution for the board of commissioners to authorize the steward to purchase insurance as well as other supplies, and that on a former occasion, to wit, the 12th day of January, 1901, the board of commissioners passed a resolution directing said Fulton, the steward of said institution, to purchase insurance of \$50,000, which said Fulton did, and his action was afterwards approved by the said board.

The learned chancellor below overruled defendant's demurrer to the petition, sustained appellees' demurrer to all the paragraphs of appellant's answer and awarded, as a final judgment on the pleadings, a writ of mandamus against the appellant as prayed for in the petition, directing and commanding him to certify to the auditor of public accounts the amount of the premiums on the policies of insurance on the buildings and furniture of Central Kentucky Asylum for the Insane, which had been placed by the appellees as commissioners of said institution. A writ of mandamus, as defined by section 477 of the Civil Code, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act or omit to do an act the performance or omission of which is enjoined by law. The appellant is a ministerial officer of the Commonwealth of Kentucky, having charge of one of its charitable institutions.

The question of the correctness of the judgment rendered by the court below depends upon whether or not it was the duty of appellant to make-

the certification which he admits he has refused to perform. Section 224 of the Kentucky Statutes provides as follows: "The board of commissioners of each institution (charitable institutions) shall keep the buildings and furniture of the institution constantly insured, and the amount of the premiums on such insurance shall be certified to the auditor by the superintendent and president of the board of commissioners, and thereupon the auditor shall draw his warrant for the amount upon the State treasury, payable to the superintendent."

It is very difficult to understand how language could make more plain than does this section that it is the duty of the board of commissioners of the institution in question to keep the buildings and furniture of the institution insured, and that it is the duty of the appellant to make the certification therein required. Appellant, however, contends that the procurement of the insurance in question is governed by section 230 of the Kentucky Statutes, which is as follows: "The steward of each institution, by direction of the superintendent, shall purchase and furnish to the institution all needed supplies, of every description, and shall consult him as to the character, quantity and quality of all such supplies. They shall be bought where they can be bought cheapest, due regard being paid to quality as well as price. He shall not draw on the treasurer for money to pay for such supplies, in whole or in part, but shall cause itemized accounts of the same to be made, in the name of the sellers against the institution, setting forth separately the date of purchase and the name and price of each article purchased, and shall present the accounts, endorsed by the superintendent, to the board of commissioners for allowance, and he shall carefully enter in a book kept for that purpose the number, dates and amounts of warrants issued by the president for the payment of the accounts for supplies purchased by him, and the name of the persons in whose favor they are made."

It is seriously contended by appellant that the insurance provided for by section 224 comes under the head of supplies, which the steward is required to purchase by the terms of section 230, and the construction thus contended for is thought to be aided by the fact that section 233 requires the steward to make monthly reports to the superintendent of his acts and doings, and the condition of the farms and gardens, and the number and character and condition of the stock under his care and control, and that in the statutory form for this monthly report is contained the item, among other things, "insurance."

An analysis of section 230 shows that all of the supplies mentioned therein, to be purchased by the steward under the direction of the superintendent, are such as are to be paid for, after the accounts are allowed by the commissioners, out of the treasury of the institution, whereas the premiums for the insurance provided for by section 224 is to be paid by warrant of the auditor upon the State treasury. Nor does the fact that the printed form of the steward's monthly report contains the item "insurance" add any weight to appellant's argument. This report is intended to show the total monthly expenditures of the institution, and as the greater part of this monthly expenditure is made up of items which the steward is required to purchase, as a matter of convenient book-keeping, it is also required to show certain fixed charges with which the steward has nothing to do. For

instance, the first item on said form is the payroll, showing the salaries of all the officers, and wages of all the employees. It will not be contended that these salaries are supplies to be purchased by the steward, within the meaning of section 230, because with the salaries of the officers and assistants he has nothing whatever to do, they are regulated and provided for by section 240 of the Kentucky Statutes, and yet this item is required to appear in his monthly report, just as the item of insurance is required to appear there.

We do not think, however, that it needs any further argument to demonstrate that the learned chancellor below was correct in all the orders and the judgment entered by him in this case. We freely admit the principle of law so earnestly contended for by counsel for appellant, that it is the duty of the court to give force and effect to every provision of a statute, except in cases of absolute and irreconcilable incongruity; and this plain and irreconcilable incongruity would clearly arise if this court should abrogate the plain letter of the law, as contained in section 224, by giving the construction contended for by appellant to section 230, a construction not only clearly and unmistakably irreconcilable and incongruous to the plain letter of section 224, but equally irreconcilable and incongruous to the plain letter of section 230. By giving the construction contended for by appellees to the two sections in question, every word in each can be enforced without the slightest incongruity.

The fact that the board of commissioners may have heretofore ordered the steward to effect the insurance on the buildings and furniture of their institution, and afterwards ratified his action in the premises, not only does not militate against the construction contended for by appellees, but very plainly militates against the construction contended for by appellant. If it had been the duty of the steward to effect insurance, under the superintendency of appellant, there would have been no need for any order or request upon the part of appellees for him to perform said duty; and the fact that he took orders from appellees, as to his duty concerning the insurance in question, at least tends to show that he did not consider it an independent duty on his part to effect the insurance.

As the judgment of the learned chancellor below is entirely in harmony with the views herein expressed, it is hereby affirmed.

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WEBER v. COMMONWEALTH.

(Filed February 20, 1903—Not to be reported.)

Criminal law—Conspiring to injure others—Constitutional law—Appellant was indicted with others under section 1341a, Kentucky Statutes, for the crime of unlawfully confederating with others and whipping D. unmercifully. Appellant's only defense was an alibi, and the jury having weighed all the evidence, found him guilty and fixed his punishment at confinement in the penitentiary for one year, from which he prosecutes an appeal. It is insisted that said act is in violation of section 51 of the Constitution, in that it relates to more than one subject. Held—That the act relates to but one general subject, and is not unconstitutional. The evidence supports the verdict.

Sweeney, Ellis & Sweeney for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Davies Circuit Court.

Opinion of the court by Judge Hobson.

Appellant, John Weber, was indicted under section 1241a, subsection 1, Kentucky Statutes, for the crime of unlawfully, willfully and feloniously confederating with certain other persons for the purpose of intimidating and injuring William Dowdell. He was convicted, and punishment was fixed at one year's confinement in the penitentiary. The proof shows that a party of men came to Dowdell's house about half past 10 o'clock at night, tied him to a tree and whipped him unmercifully. There is no controversy on this point in the evidence, and there is no attempt to show any facts in mitigation of the offense or to attack in any way Dowdell's credibility or character. The only defense made by the defendant is that he was not present and had nothing to do with the act. He introduced proof tending to establish an alibi, but the evidence was conflicting as to his whereabouts at the time the offense was committed, and there being positive testimony of several witnesses that he was present, assisting in the whipping of Dowdell, we can not disturb the verdict of the jury on the facts.

It is earnestly insisted that the statute is invalid under section 51 of the Constitution, which provides that no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title. The title to the act is in these words: "An act to prevent lynching and injury to and destruction of real and personal property in this Commonwealth at the hands of mobs or other riotous assemblages, and to prevent the posting and circulation of threatening letters and to prescribe penalties for the enforcement of its provisions."

The act is in eleven sections, and all its provisions are germane to the subject expressed in the title. The general subject of the act is the better preservation of the public peace and the suppression of mobs and other unlawful confederations. The whole of the act relates to this subject. While the title of the act might have been more concisely expressed, it seems to us to state the subject of legislation with sufficient clearness to indicate to a person of ordinary intelligence what was meant. It is true the first section of the act provides against persons banding themselves together for the purpose of injuring or disturbing another; the second, against those banding themselves together for the purpose of injuring or destroying property; the ninth, against those who send or put up a threatening notice or letter. But all these things have a natural connection, and fall under the general subject which the legislature had in mind. The work of the legislature would be interminable if such matters as these must all be put in separate bills and could not be united in one act. The sending of threatening letters has a natural connection with the subject of the act, because such letters and notices are means commonly employed to terrify and annoy citizens by the lawless persons aimed at in the other sections of the act. The subject of legislation under section 51 of the Constitution may, as has often been held by this court, be very broad in its nature. Thus the act of February 15, 1854, was entitled "An act to provide for the appointment of special judges of the county court and police or city courts, and under this title there was a pro-

vision authorizing the holding of special terms of the county court by the regular judge. It was held that the general subject embraced was that of courts, and that the section referred to was not foreign to the subject expressed in the title, but had a natural connection therewith. (*Jacobs v. L. & N. R. R. Co.*, 73 Ky., 268.) So the title to the act of March 20, 1876, was in these words: "An act to regulate the civil jurisdiction of justices of the peace, police judges and quarterly courts and the appellate jurisdiction of circuit courts from judgments, and to authorize the quarterly courts to appoint clerks."

The court said that the title went more into detail than it should have done and was objectionable for want of precision, but the act related to only one general subject. (*Allen v. Hall*, 77 Ky., 85.) To same effect, in substance, are *McArthur v. Nelson*, 81 Ky., 67; *Commonwealth v. Godshaw*, 92 Ky., 485; *Conley v. Commonwealth*, 98 Ky., 125; *L. & O. T. R. Co. v. Ballard*, 59 Ky., 165; *Childs v. Drake*, 59 Ky., 146.

Section 10 of the act is as follows: "In any prosecution under this act it shall be no exemption for a witness that his testimony may incriminate himself; but no such testimony given by the witness shall be used against him in any prosecution except for perjury, and he shall be discharged from all liability for any violation of this act so necessarily disclosed in his testimony."

Bud Speaks, who was jointly indicted with appellant, was introduced as a witness for the Commonwealth on the trial. Appellant asked the court to charge Speaks that he need not answer any question unless he voluntarily desired to do so. The court declined to so instruct the witness, and of this appellant complains. Speaks did not decline to testify or to answer the questions asked him, and we are unable to see that appellant has any ground of complaint in this matter. Under the statute, when Speaks testified on the trial of appellant, he was discharged from all liability for the violation of the act disclosed in his testimony, and he could not thereafter be punished therefor. His testimony did not incriminate him, but, on the contrary, it put an effectual bar between him and punishment for the offense.

The court gave the jury an instruction to the effect that appellant could not be convicted on the testimony of an accomplice, unless properly corroborated. But it is complained that the court refused to instruct the jury that they could not convict the defendant unless they believed from the evidence beyond a reasonable doubt that the defendant, and one or more of the parties named in the indictment other than Speaks, confederated together for the purpose of whipping Dowdell. This instruction was properly refused, for although the Commonwealth had disabled itself from prosecuting Speaks by making a witness of him, the fact remained, if his testimony was true, that he did confederate with the appellant for the purpose of whipping Dowdell, and the charge in the indictment was, therefore, sustained by the evidence. To adopt the rule urged by the learned counsel would be to deprive the Commonwealth of all benefit from this section where there were only two in the conspiracy, for if in this event one of the conspirators was introduced as a witness for the State, the other could never be convicted, however clearly his guilt might be shown. We, therefore, conclude that the statute in question is not in violation of the Constitution, and that there was no substantial error on the trial.

Judgment affirmed.

## MOORE, &amp;c. v. METZ.

(Filed February 24, 1908—Not to be reported.)

Guardian and ward—Bills and notes—Appellant, as guardian of her two infant children, executed a note to appellee for \$469.83, reciting that it was executed for merchandise necessary for the use and benefit of the children. In an action on said note the proof showed that said guardian and her father's family resided together as one family on the land belonging to the infants, and that an account for several years was made with appellant for all members of the family indiscriminately, and several payments were made on said account out of the proceeds of the farm. Held—That as the payments made amount to as much as the articles furnished to the infants, appellee can not subject their land to the payment of the note.

S. W. Forgy for appellants.

W. S. Pryor and B. B. Petrie for appellee.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Hobson.

Katie and Mattie Moore owned a farm in Todd county devised to them by their grandfather. They were infants of tender years and their mother, Ida Moore, qualified as their guardian. On August 17, 1896, she executed to appellee, J. Metz, the following note:

"One day after date I promise to pay to the order of J. Metz \$469.22, at 6 per cent. interest from date until paid, for value received in merchandise which was necessary for the use and benefit of my children.

"IDA MOORE,

"Guardian for Katie and Mattie Moore."

Metz filed this suit on the note, alleging that W. B. Cooke was her surety; that he and she were insolvent; that he furnished the goods for which the note was given at her request for the children, and that the same was necessary for them, consisting of shoes, clothing and the like; that the only estate of the wards was the land, and that the guardian spent the income from the land as fast as it accrued. He attached the rent of the land, \$800, and on final hearing the court subjected the rent to the payment of the debt. He filed with his petition an itemized account of the goods sold for the use of the wards. All the allegations of the petition were denied by the answer. The proof shows that Ida Moore, with her two children, who were quite young, moved to the land soon after it was devised to them, and made her home there, her father and mother also living with her. The father, W. B. Cooke, died some years ago insolvent. The guardian has never made a settlement of her accounts, and is also insolvent. They all lived on the land as one family for many years, and were all supported out of the products of the place. The guardian kept no accounts, and her father seems to have conducted the farming operations. The account with Metz is of many years' standing. It appears to have been opened previous to the year 1886, but seems to have been settled down to February 18, 1890, at least the books produced on the trial begin the account at that date, and no balance is brought over, although it appears from the evidence that the account is much older than that. The account is entered on the book in these words: "Mrs. Ida Moore, debtor." Things that were bought for Mrs. Moore per-

sonally, or for her father or mother, or the servants or for family supplies are all entered on this account, as well as things bought for the two girls, without any distinction. From February 18, 1890, to August 3, 1891, the account foots up \$175 65. There is a credit of \$50 cash, followed by this entry: "August 27, settled by note four months after date." On September 2 the account begins again, and runs along until January 23, 1894, when the amount of it footed up \$457.11. There were cash credits on the book for \$340, leaving a balance of \$217.11, which is followed by this entry: "Settled by note one day after date." Neither of these notes are produced, nor is it explained what has become of them. The account begins again on April 30 and runs until March 3, 1898, when it footed up \$354.21, and there were credits for cash, \$157. Underneath this entry are these words: "Settled by note as guardian for Kate and Mattie Moore." This is the first thing on the books as to the guardianship or as to the account being against the infants. In addition to the credits we have named, which appear on the books, receipts are filed for other payments, which Metz says were applied by him to the payment of the other parts of the account not got for the infants. From an inspection of the books and the itemized account filed with the petition it is reasonably clear that this account was made out by going over the books and selecting such items as seemed to be for the use of the wards, although there is nothing on the books themselves to show for whom the goods were bought, and they are all charged, like the other items, to Ida C. Moore. The credits paid on the account first and last amount to more than the amount which it is charged was got for the benefit of the infants. Mrs. Moore testifies that she had no conversation with Metz in regard to her children's estate, and denies that any part of the account was sold on her credit as guardian. But, however this may be, it is apparent from the account itself that no distinction was made between the things got for the wards and those got for other purposes. It is also reasonably clear that the account previous to 1890, which presumably was against Mrs. Moore, has been settled. The payments made since then were all made from the produce of the farm of the wards. The guardian has not settled her accounts. We can not tell, therefore, how she stands with her wards. The goods sued for were all charged to her individually, and not as guardian. The money that has been paid upon the account was evidently the money of the wards or derived from their estate, for the guardian had no other resources. Their money has, therefore, paid for as much of the account as they received the benefit of, so far as the proof shows. Under the evidence we do not think Mrs. Moore was warranted in giving, as guardian, the note sued on, or that it ought to be enforced against the wards as a liability of their estate. The bill of particulars filed by appellee foots up a considerably smaller amount than that named in the note, and we can not believe the note was executed to close this up. On the contrary, it would appear to have been prepared since the note was given for the purpose of sustaining the note. Under all the evidence, and an inspection of the books themselves, our conclusion is that the note was given for the entire balance owing by Mrs. Moore on the account, counting in what was unpaid on the notes previously executed; and it, therefore, represented her debt and not the debt of the wards.

Judgment reversed, with directions to discharge the attachment and dismiss the petition.

## COOK v. COMMONWEALTH.

(Filed February 24, 1903—Not to be reported.)

1. Criminal law—Voluntary manslaughter—Instructions—Appellant prosecutes this appeal from a judgment of conviction for voluntary manslaughter, and insists that the instruction given on voluntary manslaughter was erroneous and prejudicial in so far as it used the following words: "Upon such provocation as was reasonably calculated to excite ungovernable passion, they should find him guilty of manslaughter." Held—That said instruction was substantially correct and not prejudicial. The use of the word "avoiding," in connection with the words "impending danger," in the instruction on self-defense was not prejudicial. The word "feloniously" was not used in the manslaughter instruction, but it was not necessary to use it. The use of that word is only required in an indictment for murder and in a murder instruction.

2. New trial—Newly-discovered evidence—Appeals—The action of the lower court in refusing a new trial on the ground of newly-discovered evidence can not be reviewed on appeal.

Sweeney, Ellis & Sweeney for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Paynter.

The appellant seeks a reversal on two grounds: First, newly-discovered evidence; second, errors in instructions.

It was on the motion for a new trial that it was made to appear that evidence had been discovered after the verdict of the jury. Section 281 of the Civil Code provides that "the decision of the court upon challenges to the panel and for cause upon motion to set aside an indictment, and upon motions for a new trial, shall not be subject to exception." The action of the court in refusing a new trial can not be reviewed by this court. (*Nichols v. Commonwealth*, 11 Bush, 575; *Lewis v. Commonwealth*, 93 Ky., 238.)

The defendant was indicted for murder and found guilty of manslaughter. Instruction No. 2 was on voluntary manslaughter, in which the court told the jury that if they believed from the evidence, beyond a reasonable doubt, that the killing was not done in his necessary, or apparently necessary, self-defense, but was done in sudden heat or passion, or sudden affray, or "upon such provocation as was reasonably calculated to excite ungovernable passion, they should find him guilty of voluntary manslaughter." It is insisted that this is in error, because the phrase quoted did not define any standard by which the jury was to measure the question of provocation. It is true the language gives no definition of what kind of provocation is reasonably calculated to excite ungovernable passion so as to reduce the killing to manslaughter.

In *Payne v. Commonwealth*, 1 Metc., 374, the court told the jury if the killing was done upon legal provocation and without malice, in sudden heat and passion and not in self-defense, they were to find the accused guilty of manslaughter. It is urged that the language in question is equivalent to saying "legal provocation." We do not think so.

This court, in *Lewis v. Commonwealth*, said: "It would have been better to have told the jury that the provocation must be such as is ordinarily cal-



culated to excite the passions beyond control." In the instruction under consideration the court used the words "reasonably calculated," which words are quite as proper to be used as "ordinarily calculated," and are just as favorable to the accused. The law allows the jury to find the defendant guilty of voluntary manslaughter when the provocation is such as is calculated to excite the passions beyond control. The expression in the instruction in question, "excite ungovernable passions," is substantially the same as the expression "excite the passions beyond control," for, if ungovernable passions have been excited, they are necessarily beyond control. If the passions are beyond control, they are certainly ungovernable. But even if there was error in the instruction in the particular mentioned, it could not be complained of, because it did not prevent the jury from finding the appellant guilty of voluntary manslaughter, hence did not prejudice the rights of the appellant. The purpose of the instruction was to enable the jury, if the facts warranted it, to find the appellant guilty of manslaughter, instead of murder. It accomplished its purpose.

In the self-defense instruction this language appeared: "And there reasonably appeared to him no other safe means of avoiding impending danger." If he could have averted or avoided the danger it was his duty to do so, and it was eminently proper to put the expression quoted in the instruction. The word "escape" has been used in instructions, but had been criticised, although this court in some cases since the criticism upon the use of that word has affirmed cases where it was used in the instruction on self-defense. The word "averting" might have been used instead of "avoiding," but it would have conveyed the same idea. The word "feloniously" was not used in the manslaughter instruction, but it was not necessary to use it. The authorities quoted are to the effect that in an indictment for murder it is necessary to use the word "feloniously," and likewise in the murder instruction.

The judgment is affirmed.

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BARNES v. BARNES, &c.

(Filed February 24, 1903—Not to be reported.)

**Liens—Rents—Purchase money**—This action involves the ascertainment of amount of purchase money for land paid by two brothers who purchased same jointly; also the amount paid by their surety; also an account of interest and rents. The true basis of such settlement is set forth in the opinion.

W. P. Sandidge and Browder & Browder for appellant.

Roark & Finn for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Barker.

In 1890 the appellant, William E. Barnes, and the appellee, Clarence Barnes, his brother, purchased a small lot and storehouse, in the town of Olmstead, Logan county, Kentucky, for the consideration of \$700, \$350 of which was paid in cash, and for the balance of \$350, William E. Barnes and

Clarence Barnes, as principals, together with John B. Barnes, another brother, as surety, executed their promissory note.

In 1899 William E. Barnes instituted this action in the Logan Circuit Court against his brother, Clarence Barnes, claiming to have paid the \$350 cash himself, and that he also paid off and discharged the note of \$850 for the remaining part of the consideration; and praying for a judgment against Clarence Barnes for one-half of said sums thus paid by him, with interest from the date of payment by him until the same should be repaid him by Clarence Barnes, and for a sale of the property to satisfy his claim.

Clarence Barnes filed an answer, denying that William E. Barnes paid off the purchase price of said house and lot, and alleging that William E. Barnes had used and occupied said premises for a number of years, and had failed to account to him for any of the rents of said property, and asked a judgment against William E. Barnes on his counterclaim and set-off.

In the action thus instituted J. B. Barnes intervened, claiming to have himself paid off the \$350 note executed for the deferred payment on said house and lot as surety for his brothers, and asking that he be adjudged a lien upon the house and lot in question for the amount thus paid by him. The allegations of this pleading on the part of J. B. Barnes was confessed by Clarence Barnes, and denied by William E. Barnes. The issues were made up along the lines thus indicated, and the case was referred to the commissioner to ascertain the rents with which William E. Barnes should be charged; the taxes, insurance, repairs and improvements which he had made, and with which he should be credited. The commissioner reported that he should be charged with the aggregate sum of \$850 rent, and that he had paid out for taxes, insurance and repairs, the sum of \$345. This report of the commissioner was confirmed by consent of all the parties. The evidence having been taken on the issues involved, and the case having been heard and submitted, the court entered the following judgment: "That W. E. Barnes paid the first payment of \$350 upon the house and lot in controversy, and that the second payment of \$350 was made by W. E. Barnes and J. B. Barnes jointly; it is, therefore, ordered and adjudged that J. B. Barnes has a lien upon the property hereinafter described to secure him in the payment of one-half of the second payment, which was made by him and W. E. Barnes jointly, which amounts to \$290.75. It is further ordered and adjudged by the court that the defendant, Clarence Barnes, shall recover of the plaintiff, W. E. Barnes, the sum of \$350, with interest from date, for which execution may issue, the amount due him for the rent of the place hereinafter described, after deducting taxes, repairs and improvements, to the extent of \$100, making a total reduction of \$350, \$850 having been collected by W. E. Barnes for rents. It is further ordered that the following-described property, to wit: A certain storehouse and lot or parcel of ground at Olmstead, Logan county, Kentucky, described as follows: "Beginning at a stone at Olmstead station, on the Memphis branch of the L. & N. R. R., thirty feet from the center of railroad and corner to Wintersmith; thence on a line of said railroad and parallel with same S. 43 W. 2.88 chains to a stone, corner to B. C. Jenkins' lot; thence S. 43 E. 2.49 chains to a stone in the middle of the Ash Spring road, and corner to said Jenkins; then with said road N. 5 E. 3.95 chains to the beginning, and con-

taining 1 R. and 17 P., being the same house and lot which was conveyed to Clarence Barnes and W. E. Barnes by the Boyd heirs," be sold at the courthouse door in Russellville, Logan county, Ky., upon a credit of six and twelve months, the purchaser being required to give bond with approved security, bearing 6 per cent. interest from date of sale until paid, and a lien be retained upon the property conveyed for the purchase money."

As to the claim of J. B. Barnes, we think that the court correctly ascertained that he paid one-half of the note for the deferred payment on the house and lot in controversy, and was entitled to a lien, by subrogation, for his debt and interest. As to the issue between William E. Barnes and Clarence Barnes, we are not sure that we understand what principle governed the lower court in applying the facts ascertained by the judgment and agreed commissioner's report; but without entering into any analysis of the judgment, we think it is erroneous.

The report of the commissioner, confirmed by agreement, should have been taken as a basis, to wit: Eight hundred and fifty dollars, the aggregate amount of rent collected by William E. Barnes, and \$345, the aggregate amount of taxes, insurance, repairs and improvements paid out by him. The amount of each annual gale of rent should be credited by the amount expended in said rental year for taxes, insurance, repairs or improvements, and the balance should bear interest from the end of the rental year until settled as herein indicated. One-half of the aggregate of these balances, with interest, will show what William E. Barnes owes Clarence Barnes. Then one-half of the \$350 cash paid by William E. Barnes, with interest from the time of payment until settlement of the account as herein provided for, added to one-fourth of the sum paid by William E. Barnes and J. B. Barnes on the note for deferred payment of purchase money, with interest from time of payment until settled herein, will show what Clarence Barnes owes William E. Barnes. A judgment should be rendered for the balance shown, by taking the less of these two sums from the greater; this judgment to be satisfied, so far as possible, out of any balance of the purchase money due the debtor, after payment to J. B. Barnes of his first lien on the whole amount realized by the sale of the property herein involved.

We have not attempted to be minutely accurate in giving the details of this case, but have been satisfied with such substantial outline as we think necessary to illustrate the conclusions reached. We have agreed with the lower court on the findings of facts, but have differed from the conclusions as to the application of those facts and the manner of stating the account between William E. and Clarence Barnes.

Wherefore, the judgment is affirmed as to J. B. Barnes and reversed as to Clarence Barnes, with directions to enter a judgment as to him consistent with this opinion.

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COPE, &c. v. SLAYDEN, &c.

(Filed February 24, 1903—Not to be reported.)

Void judgment—Amended pleading—Process—Homestead—The circuit court had set apart to the widow and infant son of M. a tract of land as their homestead. The infant son owning an undivided interest therein. Appellee

instituted this action, alleging that he was the owner of an undivided one-fifth interest in said land by purchase from one of the heirs, subject to the homestead right of the widow and child, and further alleged that the widow had released to him a one-fifth interest in the homestead, and prayed that the court divide said land and give him possession of one-fifth thereof. Process was duly served on the petition. Appellee, by leave of court, filed an amended petition, alleging that the homestead set apart to the widow and child was of greater value than \$1,000, and prayed that the court so adjudge, and set aside to him one-fifth in value of the whole, adjoining a tract of land owned by him. No process was served on this amended petition, and judgment by default was rendered according to the prayer of the amended petition. The heirs and widow instituted this action in substantial conformity with section 763, Civil Code of Practice, to vacate this judgment as void. Held—That the amended petition set up a separate cause of action from that in the petition. By the amended petition the appellee sought to have the homestead right of the widow and child contracted so as to give them the enjoyment of a smaller number of acres, alleging that the original number of acres set aside for the homestead was worth more than \$1,000. The judgment rendered on this amended petition without service of process was void.

W. J. Webb for appellants.

Spelght & Anderson for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the appellants in the court below for the purpose of vacating a judgment in the case of W. F. Slayden v. B. M. Mason, &c., rendered at the November term, 1901, of the Graves Circuit Court, which appellants claim was void. This proceeding, while not exactly according to the method pointed out by section 763 of the Civil Code, for the purpose of vacating a void judgment, substantially complies with said section, and brings up the question on this appeal as to whether or not the judgment rendered by the court, in the case of Slayden v. Mason, &c., is void, or merely erroneous.

The circuit court of Graves county had set aside a tract of land as a homestead to B. M. Mason, as the widow of T. F. Mason, who owned said tract of land at his death, and to her infant son, Cleveland Mason, the widow having the right of occupancy during her life and Cleveland Mason, her son, the right to occupy it jointly with her until his majority. Cleveland Mason was also the owner of a one-fifth; appellants were, between them, the owners of three-fifths, and W. F. Slayden was the owner of one undivided one-fifth interest in remainder in said land.

With this state of facts existing, W. F. Slayden instituted an action in the Graves Circuit Court, wherein he set up in substance that he had purchased one undivided one-fifth interest in remainder in said land from one of the heirs at law of T. F. Mason, and that as a part of the consideration of his purchase the widow, B. M. Mason, had agreed with him that she would relinquish in his favor one-fifth of her homestead right in said land, so that he would be entitled to immediate possession of his interest; that, notwithstanding her agreement, she in bad faith now refused to carry out the same, and refused to allow him to enter upon said land, or to occupy it in any

way. Whereupon he prayed a judgment against said B. M. Mason, requiring her to carry out her said agreement, and praying that a commissioner be appointed to divide the land between W. F. Slayden and said B. M. Mason, allotting to said B. M. Mason four-fifths for the term of her natural life; and the plaintiff one-fifth interest in fee simple in said land, according to its quantity, quality and value, taking into consideration the adjacency and contiguity of plaintiff's land thereto. Upon the filing of this petition summons was issued against all parties in interest in said land, including appellants in this case, which summons was duly and legally executed upon them.

Afterwards plaintiff, W. F. Slayden, by leave of court, amended his original petition, in which he correctly sets out the holdings of the various owners of the remainder interest in said land, and alleges that the tract of land which had theretofore been set aside to B. M. Mason and Cleveland Mason as a homestead was worth more than \$1,000, and praying that the court should so adjudge; that out of the overplus in said land of the homestead interest there should be set aside to him, and he should be adjudged the owner in fee simple, one-fifth of the whole tract of said land, and that the same be set aside to him out of that part which was contiguous to the adjoining tract of land owned by him.

No process was issued on this amended petition, but the case was at once submitted and a judgment by default awarded by the court against appellants and all the other defendants, by which it was adjudged in substance that said tract of land was worth exceeding \$1,000; that four-fifths thereof was worth more than \$1,000; that said land was susceptible of division, and it was ordered that J. N. Crutchfield, William Baldwin and Robert Newsom be appointed commissioners to divide said land, and they were "directed to go upon the same Wednesday, December 18, 1901, if convenient; if not, upon some convenient day thereafter, and to allot to Cleveland Mason a homestead in said land of the value of \$1,000; if as much of one-fifth of said land remains, said commissioners will allot one-fifth of said entire land to W. F. Slayden on the west side of same, adjoining his other land, in fee simple; and if, after allotting said homestead to Cleveland Mason, there is not as much as one-fifth of said land remaining, said commissioners will add to the land allotted to W. F. Slayden in fee simple enough of the land allotted to Cleveland Mason for a homestead, but subject to the homestead right of Cleveland Mason, as to make one-fifth interest in same. In making said division said commissioners will take into consideration quantity, quality, value and improvements, and they will report their acts to court."

The only question involved in this appeal is whether or not the amended petition sets up a distinct cause of action from that set up, or attempted to be set up, in the original petition. If it does not, then the court properly sustained the demurrer to appellants' petition, because, no matter how erroneous a judgment may be, it can not be attacked in a collateral proceeding such as this. (*Sorrell, &c. v. Samuels, &c.*, 20 Ky. Law Rep., 1498; *Derr v. Wilson*, 84 Ky., 14; *Preston, &c. v. Breckinridge, &c.*, 86 Ky., 614; *Stevenson v. Flournoy, &c.*, 89 Ky., 561; *Price v. Antle*, 90 Ky., 188; *Debard v. Gatewood*, 4 Ky. Law Rep., 230; *Bridgeford v. Fogg*, 12 Ky. Law Rep., 570; *Freeman on Judgments*, section 135.)

If it does set up a distinct cause of action the judgment is void for want of process, and the court erred in sustaining the demurrer to appellants' petition. (Cecil v. Sowards, 10 Bush, 96; McGrath v. Balser, 6 B. M., 141; Rutledge v. VanMeter, 8 Bush, 364; Joyes v. Hamilton, 10 Bush, 544; Dameron v. Osenton, 6 Ky. Law Rep., 218; Kentucky Electric Institute v. Gaines, 8 Ky. Law Rep., 257.)

Appellants and appellee were all owners of undivided fifths in the tract of land in question, subject to the homestead right of B. M. Mason and Cleveland Mason. Neither of them could enter or in anywise occupy, use or enjoy said land until the homestead interest had ceased without the consent of B. M. Mason and Cleveland Mason. In the original petition appellee sought to have the court adjudge that he owned one-fifth interest in B. M. Mason's homestead interest in said tract of land by contract with her. With this question the appellants had nothing to do. B. M. Mason could sell or dispose of any part of her homestead interest in said land that she chose to appellee or to any one else. Appellants had no cause to complain if, as between B. M. Mason and appellee, the court held that appellee was the owner of one-fifth of the homestead right of B. M. Mason. By the amended petition the appellee sought to have the homestead right of B. M. Mason and Cleveland Mason contracted so as to give them the enjoyment of a smaller number of acres, alleging that the original number of acres set aside for the homestead was worth more than \$1,000. If this was so adjudged, appellants were deeply interested in the outcome, for if the court should relieve any number of acres of the tract of land from the burden of the homestead interest as a matter of right and law, then instantly all the other remaindermen were jointly interested in it with appellee, and the court had no more power to deprive appellants of this interest, without due process of law, than to deprive them of their whole interest in the land in question.

This was a separate and distinct cause of action, based upon a different principle from that set up in the original petition, and appellants should have been served with process before a judgment was awarded against them, and in default thereof said judgment is void. The question of the power of the court to contract the homestead right so that it shall rest upon a fewer number of acres of land than was originally set apart to support it is not before us on this appeal, and it is, therefore, not decided.

Wherefore, the case is reversed, with directions to vacate the judgment in the case of W. F. Slayden v. B. M. Mason, &c., rendered at the November term, 1901, of the Graves Circuit Court, and hold the same for naught, and for further proceedings not inconsistent with this opinion.

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RIDDLE v. FANNIN, &c.

(Filed February 24, 1903—Not to be re-ported.)

Lunatics—Exemptions—Homestead—Where the owner of personalty and of real estate not exceeding \$1,000 in value is a housekeeper with a wife and infant children is adjudged a lunatic, and placed in confinement in an asylum, he does not lose his rights to exemptions either in personalty or homestead. 24—110

stead, and the wife can claim said exemptions against his committee for the benefit of the family, as her claim is not hostile to that of her husband.

T. R. Brown for appellant.

R. S. Dinkle and C. L. Williams for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Barker.

The appellee, Carrie Fannin, filed a petition in the Boyd Circuit Court, setting up the fact that she was the lawful wife of Fred Fannin, who had theretofore been adjudged a lunatic by the county court of Boyd county, and who was then in confinement in the lunatic asylum at Lexington, Ky.; that on the 27th day of October, 1901, the appellant, John Riddle, was by the Boyd County Court duly appointed committee of the said Fred Fannin, and thus, as such, had given bond, and qualified according to law. She states that her husband owned a lot of personal property, consisting of about 400 bushels of corn, valued at \$150; one buggy, worth \$60; one saddle, worth \$5, and one heifer, valued at \$20, making in all \$225 worth of personal property, which was not enough to satisfy her exemption under the law; that her said husband owned also a lot of land in Boyd county, Kentucky, which is described by metes and bounds in her petition; that said land was worth less than \$1,000, and that it is subject to a mortgage in the sum of \$350 held by appellee, P. S. Fannin.

She states that the appellant, John Riddle, as committee of her husband, Fred Fannin, has taken possession of said personalty and said real property, and is proceeding to sell and dispose of same, wherefore, she prays that the estate of her husband be settled, and the cause be referred to the master commissioner, to hear proof as to the value of said estate, and what property is exempt to appellee by law, and the same be set aside to her as her exemption. A special demurrer was filed to this petition because the husband, Fred Fannin, was not made a party; and a general demurrer was filed because the petition did not state facts sufficient to constitute a cause of action. The court overruled both demurrers, and of this the committee is now complaining on appeal.

When Fred Fannin was adjudged a lunatic he left his wife in his homestead, with a few articles of personalty described in the petition. All these were clearly exempt from the demands of his creditors, if he had any. He did not lose his rights of exemption in this property by reason of being insane, nor did the misfortune of losing the society and support of her husband, by the affliction which happened to him, deprive the wife of her right to occupy his homestead, and use and enjoy the little personal property left therein. With this the committee had nothing whatever to do, as he, for the creditors of Fred Fannin, would only be authorized to sell such property of the lunatic as was not exempt by law. We do not think Fred Fannin was a necessary party for the adjudication of the matters at issue between the committee and the wife. The wife is making no claim adverse to her husband, nor is she seeking to deprive him of his title to any of same; all she is asking is the right of holding onto his property for him. The homestead is still his homestead, and the property is still his property. The fact that he is necessarily confined in the lunatic asylum leaves his homestead

rights, and his rights to the personality in question, just as they were before his affliction. Should he be ever so fortunate as to recover his sanity, the homestead will be there for him, as well, also, as the right to any such part of the personality as may not be necessarily used up or worn out.

We think the right of the lunatic's wife and family to hold such of his property as is exempt by law from his creditors, and which is indispensably necessary for their maintenance, is clearly provided for in section 2150 of the Kentucky Statutes, and it is so held in the case of the German National Bank v. Engelln, 14 Bush, 708. We have not considered this case from a technical point of view, but have regarded it as an amicable proceeding between the committee of the lunatic and the wife, in which the former, as conscientious trustee, is rather seeking to know his duty than to win a victory on the abstract technicalities of the law. For this reason we have looked only to the merits of the case, which we think are clearly with appellee.

Wherefore, the case is affirmed.

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CITY OF CAMPBELLSVILLE v. ODEWALT.

(Filed February 20, 1903—Not to be reported.)

Municipal government—Ordinance imposing penalty on owner of premises on which liquor is sold—Constitutional law—Appellant was arrested for a violation of an ordinance passed by the council imposing a penalty on the person in possession of premises on which liquor is sold, disposed of, obtained or furnished in violation or evasion of law, by any trick or method whatever. The ordinance does not denounce a penalty for selling liquor in violation of law. It makes the party in possession of the premises responsible for an act that he never had an intention to commit; for an act that might have been done by another not in his presence, but without his knowledge or consent. On the trial the court gave a peremptory instruction to find the defendant not guilty on the ground that said ordinance was unconstitutional. On appeal, Held—That said ordinance violates section 2 of the Bill of Rights, which provides that absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

H. W. Rives and H. C. Wood for appellant.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Paynter.

The appellee was arrested under a warrant which charged that "on the 22d day of September, 1900, in the county aforesaid, the said Jacob Odewalt was there and then in possession of premises on which liquor was sold to one Thomas G. Newton, contrary to the form of the statute in such cases made and provided." It was based upon an ordinance, which reads as follows:

"Be it enacted by the Board of Council for the City of Campbellsville, Ky.:

"That any person in possession of the premises in the City of Campbellsville, Ky., on which liquor is sold, disposed of, obtained or furnished in violation or evasion of law, by any trick or method whatever, on conviction shall be fined not less than \$20 nor more than \$100 for each offense, and each



time such liquor is sold, disposed of or furnished in violation or evasion of law is a separate offense."

The ordinance does not denounce a penalty for selling liquor in violation of law. The warrant was obtained upon the affidavit of Thos. G. Newton, the party to whom it is alleged the liquor was unlawfully sold. It does not charge the appellee with selling liquor, but the charge is that "said Jacob Odewalt was then and there in possession of the premises on which the liquor was sold."

The evidence offered is to the effect that Newton, in a back room of the appellee's store, bought from an unknown party some whisky and beer. There was no evidence showing that the party from whom Newton bought it had any connection whatever with the appellee in a business way, or otherwise, or that the appellee even knew him, or that he had ever been in the store previous to or since that time. The court below gave a peremptory instruction to the jury to find for the appellee, which was accordingly done. The case is not briefed by counsel for appellee, but in the brief for appellant it is stated that the court sustained the motion for peremptory instruction upon the ground that the ordinance in question was unconstitutional. This is a most unusual ordinance. It makes the party in possession of the premises responsible for an act that he never had an intention to commit; for an act that he did not do himself; for an act that might have been done by another not in his presence, but without his knowledge or consent. No presumption of innocence can be indulged; no defense can be made to the prosecution, although he may not have had an intention to commit the offense, although he never was guilty of an act in violation of law, and although he had no knowledge that others were engaged in the violation of law upon his premises.

Under this ordinance parties could enter upon the yard of a citizen at midnight when he was asleep, sell liquor in violation of law, and in consequence of which a fine could be imposed upon the party in possession of the premises. A practical illustration of what might be done under the ordinance is furnished by this case. Newton testified that he bought it from a party unknown to him. He then swore out a warrant for the appellee. Appellee can not contradict Newton because he fails to give the name of the alleged seller. If the ordinance is valid, appellee must suffer the imposition of the fine, with practically a denial of the right to defend himself against the charge. If a legislature or common council of a municipality can enact such a law as this, and it is valid, they could enact a law which would compel an occupant of premises to pay all kinds of fines and submit to all kinds of imprisonment for all kinds of offenses which might be committed upon his premises without his knowledge or consent. While a zeal to punish persons who sell liquor in violation of law is commendable, yet it must be confined to the enactment and enforcement of laws which do not arbitrarily deprive citizens of their liberty and property.

Section 2 of the Bill of Rights reads as follows: "Absolute and arbitrary power over the lives, liberty and property of freemen exist nowhere in a republic, not even in the largest majority."

We can not conceive of a greater attempt at the exercise of arbitrary power than in the enactment of the ordinance in question. Under that ordinance

a citizen's liberty and property can be taken, although he has done no act in violation of law, or even had an intention to do so. The exercise of the same arbitrary power might deprive a citizen of his life, because if this ordinance is valid, a law might be enacted of the same character that would deprive one of his life, although he was not present and although he did not commit a wrongful act or have any knowledge that one was about to be committed. The ordinance in question is quite different from one which would impose a fine upon one in possession of premises for suffering or permitting liquor to be sold thereon. To interpolate words to describe that offense would be in effect adopting a new ordinance. The offense under such an ordinance would not be for being in possession of premises upon which the wrongful act was committed, but for the act of suffering or permitting the wrongful act of another to take place on his premises. Such an ordinance would denounce a penalty for an act which the ordinance declared to be wrong, while the ordinance in question in effect makes one guilty of the wrongful act of another. Our opinion is that the ordinance in question is unconstitutional.

It is suggested that the peremptory instruction should not have gone, as the proof tended to show that appellee was in possession when the selling took place, and, therefore, the burden shifted to him to show that he had no knowledge of it. The ordinance was not enacted as a rule of evidence and to determine its effect, but to define an offense. If it were proper to interpret the ordinance in question as we would one that complied with the constitutional requirements, then the peremptory instruction should have gone, because the evidence detailing the circumstances under which it was sold would rebut the charge that he suffered and permitted it to be sold.

Bishop on Statutory Crime, section 132, reads as follows: "A statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurs with his act, because the common law does not, hence what is done from overwhelming necessity is construed as not violating a statute, however contrary to its general terms. And one who while careful and circumspect, is led into a mistake of facts and doing what would be in no way reprehensible, were they what he supposes them to be, commits what, under the real facts, is a violation of a criminal statute, is guilty of no crime, because such is the rule of the common law, and in construction it restricts the statute. Yet in some instances of this sort he incurs a civil liability."

It is suggested that to follow the doctrine of this section would lead us to hold the ordinance valid. It is difficult to see what this has to do with the case under consideration. The first part of it is to the effect that at common law it was essential to show the intent of the alleged offender, and that statutes do not generally make a criminal offense unless the offender's intent concurs with his act. To enforce the ordinance in question it is necessary to interpolate words describing an act for which a party may be prosecuted, as well as an intention to commit it. In the next clause of the section it is stated that where an act is the result of "overwhelming necessity," it is construed as not violating a statute, however contrary to its general terms. This is not a case for the application of such a principle, because it is not contended that any act was done in this case as the result of "overwhelming necessity."

Again the section says: "And one who while careful and circumspect is led into a mistake of facts and doing what would be in no way reprehensible, were they what he supposes them to be, commits what, under the real facts, is a violation of a criminal statute, is guilty of no crime." We are wholly unable to see the remotest application that this principle has to the case under consideration. There is no evidence here that the appellee was led to do an act as the result of a mistake of facts.

It is suggested that certain rules of interpretation, if followed, would lead to the holding of the ordinance in question as valid. One of these rules is that every statute ought to be expounded not according to the letter, but according to the meaning, and another is that every interpretation which leads to an absurdity ought to be rejected; and again, that a law ought to be interpreted in such manner as that it may have effect and not be vain and illusive. There is no occasion for the application of the first rule of interpretation mentioned, because we have interpreted the statute according to its letter and spirit, and condemn it because in its spirit and letter it is violative of the Constitution. This is no occasion for the application of the second rule, because the interpretation we have given the ordinance does not lead to an absurdity. If it is enforced according to the word and spirit, it would be neither vain nor illusive, but it would be so drastic and effective as to deprive the citizen of his liberty and property. Again, it has been suggested that the reason of an enactment must enter into its interpretation, and that a case within the letter, but not within the spirit, of a statute is not embraced by it. This is not a case for the application of that rule, because the party was in possession of the premises when the sale took place, and if it is an offense, it is not only within the letter, but within the spirit of the ordinance.

Section 460, Kentucky Statutes, provides that "all words and phrases shall be construed and understood according to the common and approved usage of language." There is no question as to the words and spirit of the ordinance—no word is used of doubtful import and no phrase is employed of uncertain meaning. The logic of those who oppose the views herein expressed is to have the court enact an ordinance that would not be subject to a constitutional objection, give it a retroactive effect and declare the appellee has violated it. The business of the court is to interpret, not enact laws.

The judgment is affirmed.

Whole court sitting.

Judge Hobson dissenting, and delivering dissenting opinion.

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#### REYNOLDS v. COMMONWEALTH.

(Filed February 24, 1908.)

1. Criminal law—Self-defense—Instructions—Appellant and his brother were jointly indicted by the grand jury of Letcher county, charged with willful murder. A change of venue to Bell county was had, and a trial resulted in a conviction and sentence to confinement in the penitentiary for life. On appeal appellant insists that the court erred to his prejudice in giving an instruction on self-defense, in that it required the existence of danger to be imminent instead of apparently so. Held—That when the

whole instruction is considered it appears not to be open to such objection. Appellant also insists that the court erred in not giving an instruction on self-defense in accordance with the case of *Oder v. Commonwealth*, 80 Ky., 32. Held—That the court properly refused to give such instruction. This court has time and again decided that it is error to unnecessarily group together facts, or supposed facts, established by the evidence and to place them in the form of an instruction to the jury, thus unnecessarily emphasizing these facts and giving them undue prominence in the estimation of the jury in reaching a verdict. The instruction authorized by the *Oder* case is peculiarly inimical to this principle. The giving of such instruction is accepted by the average jury as meaning that if one has been threatened or been assaulted in the past, when he meets his foe afterwards, he may without more ado assassinate him. The principle is unsound by every canon of criminal law, and is unwarranted by any authority. All the facts recited in such instruction are competent as evidence to be weighed by the jury, but they have no place in an instruction.

2. Overruled case—*Oder v. Commonwealth*, 88 Ky., 32.

3. Argument of attorney for the Commonwealth—The argument of the Commonwealth's attorney to the jury was not improper, and the conviction is amply supported by the evidence.

Salzer & Baker, W. G. Colson, A. B. Smith and J. G. Forrester for appellant.

M. R. Todd and Clifton J. Pratt for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Noah Reynolds, and J. C. Reynolds were jointly indicted by the grand jury of Letcher county, charged with the willful murder of William S. Wright. The case was transferred, by a change of venue, to Bell county. The trial of appellant by a jury in the Bell Circuit Court resulted in his conviction and his being sentenced to confinement in the penitentiary for the term of his natural life. His motion for a new trial having been overruled, he prosecutes this appeal.

Appellant, by his counsel, urges several objections of small importance, we think, to the court's action, in reference to the admission of and refusal to admit certain evidence. These various objections have no meritorious foundation, and, after a careful examination, we are not willing to say that the substantial rights of appellant were injured by the court's rulings upon the questions involved. There are always arising in a case like this questions of the relevancy and competency of evidence which lie along the debatable line of the rules of evidence of which the trial court can better judge than the Court of Appeals, because often the decisions of these narrow questions are properly influenced by considerations which the lower court sees and understands, but which can not always be fully reproduced in the bill of exceptions. Of such import are all of the questions raised as to the evidence in this case; and as we have said, we do not think, after a careful weighing of them, that the lower court's rulings were erroneous.

Appellant complains of instruction No. 5, which relates to the right of self-defense. His objection is that it required the jury to believe that at the time of the shooting appellant, or J. C. Reynolds, really was in imminent danger of great bodily harm at the hands of William S. Wright, instead of

being apparently so; and he cites, in support of this objection, the case of *Cockrell v. Commonwealth*, 95 Ky., 28. The instruction under discussion is very readily distinguished from that involved in the case cited. Instruction No. 5, if it contained only the language which appellant's counsel quote in their brief, would be inimical to the principle of the *Cockrell* case; but if all the instruction is considered, every substantial right of self-defense, to which appellant was entitled, is found to be carefully preserved. Said instruction is as follows: "Although the jury may believe from the evidence beyond a reasonable doubt that the defendant, in Letcher county and before the finding of the indictment in this case, shot and killed deceased, yet if they believe from the evidence that at the time defendant shot and killed deceased, the deceased was then and there about to do him or the said John Reynolds some great bodily harm, and that to shoot deceased was necessary, or seemed to the defendant to be necessary, in the exercise of a reasonable judgment to protect himself or John Reynolds from such injury, either real or to the defendant apparent, you will find the defendant not guilty on the grounds of self-defense and apparent necessity."

It will be observed that this instruction required the jury to acquit the defendant if they believed from the evidence that at the time defendant shot and killed deceased the deceased was then and there about to do him or the said John C. Reynolds some great bodily harm, and that to shoot deceased was necessary, or seemed to the defendant to be necessary, in the exercise of reasonable judgment to protect himself or the said John C. Reynolds from injury, either real or to the defendant apparent; and this was all to which appellant was entitled.

It may be that this instruction is not drawn as artistically as the learned counsel for appellant would have written it, but, as a whole, it protects every right of self-defense which the law awards to one standing in the position of appellant. Appellant also complains that under the evidence in this case, he was entitled to the instruction authorized by the case of *Oder v. Commonwealth*, 60 Ky., 32. We freely admit that there was evidence in this case to have warranted the court in giving the instruction authorized in the case cited, if the principles enunciated therein can be upheld, either in reason or on authority. The instruction in the case of *Oder v. Commonwealth* is as follows: "If the jury shall believe, from all the evidence, that previous to the time of the killing the deceased, Volney Hall, lay in wait for the defendant, and menaced and threatened to kill him, and attempted violence upon his person with a deadly weapon, or did any or either of them, then he had the right to consider the same in determining whether he was in danger of losing his life or of suffering great bodily harm at the hands of Hall, whenever with or near him. These alone will not excuse the killing, but the defendant had the right to bear arms openly, and when he met the deceased, if from such lying in wait, threats, menaces and attempted violence, if any, and from the circumstances attending the meeting, or if, from the circumstances attending the meeting alone, he in good faith believed, and had reasonable grounds to believe, that he was then and there in danger of losing his life, or of suffering great bodily harm at the hands of the deceased, then he was not obliged to wait until he was actually assaulted, but he had the right to use such means as were at hand, and as were necessary,

or apparently necessary, to protect himself from such immediate danger; and if in doing so he shot and killed deceased, he is excusable on the ground of self-defense, and should be acquitted unless the jury shall believe from all the evidence beyond a reasonable doubt that at the time of the killing the defendant sought the deceased with the intention and for the purpose of killing him, in which case he is not entitled to an acquittal on the ground of self-defense."

This instruction, the court said, did not sufficiently protect the defendant because by its terms he was excluded from considering the menace, lying in wait and threats, unless the jury believed from all the evidence that this actually occurred; whereas in law the defendant had a right to act upon them, whether they actually occurred or not, provided he in good faith believed, and had reasonable ground to believe, from the circumstances as they appeared to him, that the deceased had waylaid and threatened him. The question, said the court, is not whether the jury believed the deceased threatened and waylaid the defendant, but whether the defendant believed, and had reasonable ground to believe, he had done so, and the jury should have been so instructed and allowed to decide. Said the court: "The maintenance of self-defense in a court of justice under such a state of facts as exhibited by this record requires, upon the part of the court, the utmost care, as that the accused may not be deprived of its right upon the one hand and assassination excused on the other.

"After a careful review of the authorities on the subject we declare the law to be this: That when a person has been merely threatened by even the most lawless character it furnishes no legal excuse for taking his life.

"But when a person has been threatened, waylaid, menaced and assaulted with a deadly weapon, and he afterwards casually meets his foe, if from his character, antecedent conduct, and the circumstances of the meeting and his presence, he believes, and has reasonable grounds to believe, judging thereof for himself, but at his peril, that his foe is about to inflict upon him loss of life, or great bodily harm, or will then and there carry into execution his design to kill him, or do him such harm, unless prevented, he is not bound to wait until actually assaulted, but he may lawfully use such force as shall be necessary to avert such impending danger; but it is always a question for the jury to judge of the reasonableness of the apprehended danger, and the unfeigned belief of its existence by the person imperiled by it.

"And in this connection, in view of the qualification added to the instruction quoted, it is necessary to determine the rights of the accused under an opposite tendency of the evidence from that contemplated by the qualification.

"It must be recorded as a right to which all citizens are entitled that the accused 'may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose,' and while so engaged, having reasonable grounds to believe, and in good faith believing, that he had been threatened, waylaid and assaulted with a deadly weapon, he had the right to carry arms openly, and keep a lookout for his enemy, or procure information of his movements in good faith, and alone for the purpose of guarding himself from surprise, or being taken unawares; and if, under such circumstances, a meeting casually occurs, then the law of self-defense applies in

the same manner, under similar circumstances as indicated where the meeting is casual, and without precaution against surprise, further than being armed for the purpose of self protection; but in no state of case is one person allowed by law to hunt down or seek another for the purpose of killing him, and in pursuance of such an intention, accompanied by such an act, take his life. hence if the defendant sought the deceased with the intention of killing him, or purposely brought about the meeting between them, or made his presence a mere pretext for slaying him, he can not rely upon the law of self-defense to excuse his act, although he may have believed that he had been threatened, waylaid and assaulted by the deceased, who would, at some future time, execute his design. It will be seen from this view of the law that the instruction was erroneous in two aspects: First, in making the right of the appellant to rely upon the threats and waylaying of him by deceased dependent on the establishment of their existence to the satisfaction of the jury by the evidence; second, in not informing the jury, in connection with the qualification, that the accused had the right to keep a lookout for the deceased, or procure information of his movements, for the sole purpose of avoiding a surprise."

We freely agree with the language of the court in this case, in so far as it asserts that in giving the instruction authorized by the reasoning of the opinion that there is great danger that assassination may be excused. This court has, time and again, decided that it is error to unnecessarily group together facts, or supposed facts, established by the evidence, and to place them in the form of an instruction to the jury, thus unnecessarily emphasizing these facts and giving them undue prominence in the estimation of the jury in reaching a verdict. The instruction authorized by the case cited is peculiarly inimical to this principle; it gathers up all the testimony as to former threats or attempted violence on the part of the deceased, together with the truisms that the defendant had the right to bear arms openly; to go about his ordinary business; that he might keep a lookout for his enemy, and then adds, that if he casually meet him, he need not wait to be assaulted, but may consider all of the past, and if he believes that he is in apparent danger of great bodily harm at the hands of his enemy, he may shoot him down.

We believe that, as a practical detail, the giving of the instruction authorized by the case of *Oder v. Commonwealth* is accepted by the average jury as meaning that if one has been threatened or been assaulted in the past, when he meets his foe afterwards he may, without more ado, assassinate him. The principle enunciated is unsound by every canon of the criminal law, and is unwarranted by any authority with which we are acquainted. All of the facts which the opinion authorizes to be placed in the instruction of self-defense are competent as evidence, to be weighed by the jury in connection with all of the other testimony adduced on the trial, in considering the defendant's plea of self defense; but they have no place in the instruction, and when placed there are, as a rule, considered by the jury as warranting one in assassinating the enemy who may have previously threatened to do him violence. In so far as the case of *Oder v. Commonwealth* is inimical to the principle here laid down it is overruled.

Appellant further complains of the closing speech of the Commonwealth's

attorney. We have examined this speech carefully, and we do not believe that it contains any thing which would warrant us in reversing this case. Some of the statements are exaggerated; some of the conclusions are overdrawn; but there is some evidence tending to support every statement made; and while the speech in question is florid in style, and quite zealous in seeking a conviction of appellant, on the whole we can not say that it is substantially out of the line usually adopted by the Commonwealth's attorneys in criminal cases.

The evidence fully warranted the conclusion the jury reached; the killing of William S. Wright by appellant and his brother, John C. Reynolds, was admitted; the theory of appellant, that William S. Wright rode up behind him and his brother, who were walking along the road, each with a Winchester rifle in his hand, and that the deceased, seeing them thus armed, himself on horseback, with his pistol in a holster under his vest, attracted their attention by calling them vile names, and telling them he was going to kill them, attacked them, under these circumstances, without first drawing his pistol, is a proposition which staggers even credulity itself. Every man of any experience is bound to know that it is exceedingly difficult, while mounted upon a restive horse, to use a pistol with any degree of accuracy; and for one mounted on a horse thus to attack two men on foot, each armed with a repeating Winchester rifle, would be practically to commit suicide. The jury heard this story of appellant, and they rejected it as untrue; they believed from all the evidence in this case that appellant and his brother assassinated William S. Wright in cold blood.

For these reasons the judgment is affirmed.

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COMMONWEALTH v. LYON.

(Filed February 24, 1908—Not to be reported.)

Constitutional law—Construction of statutes—Interest—Appellee instituted this action and recovered a judgment for services rendered with reference to the construction of the branch penitentiary at Eddyville. The suit was instituted under permission given under a joint resolution passed by the legislature. It is urged on appeal that the resolution did not authorize the suit against the State as it was not adopted in compliance with section 231 of the Constitution; also that it is in violation of section 59 of the Constitution, prohibiting the passage of local or special acts. It is also insisted that the court erred in allowing interest on the claim. Held—That said resolution authorizes the suit and does not violate either provision of the Constitution cited. The court had the discretion to allow interest on the claim, and in doing so did not violate a sound discretion.

C. J. Pratt for appellant.

T. L. Edelen for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Paynter.

H. B. Lyon instituted this action against the Commonwealth of Kentucky to recover for certain services alleged to have been performed with reference



to the construction of the branch prison at Eddyville, Ky. It is based upon a joint resolution (approved by the governor), which reads as follows:

"Whereas, W. Carpenter, H. B. Lyon and J. M. Thomas have rendered certain services to the State of Kentucky in the construction of the branch prison at Eddyville, Ky., for which they have not been paid; now, therefore, be it

"Resolved by the general assembly of the Commonwealth of Kentucky:

"Section 1. That said W. Carpenter, H. B. Lyon and J. M. Thomas, or their heirs or personal representatives, if any of said parties be deceased, be, and they are hereby, authorized to institute suit for payment of said services against this Commonwealth in the Franklin Circuit Court."

It is insisted:

1st. That the resolution did not authorize the plaintiff to sue the State, because it was not adopted pursuant to section 231 of the Constitution, which reads as follows: "The general assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."

2d. That it is violative of section 59 of the Constitution, which provides that the general assembly shall not pass local or special acts concerning certain subjects.

3d. The court erred in allowing interest upon the judgment.

The first and second questions have been passed upon in the case of the *Commonwealth v. Haly, & Co.*, 106 Ky., 719. The same constitutional questions were raised in that case as in this. On the first question the court said: "While, therefore, the voluntary grant to these appellees by the joint resolution is not an attempted compliance with the provisions of section 231, and is not, therefore, a law within the meaning of that section, it is nevertheless an effective consent of the sovereign to subject itself to the jurisdiction of the Franklin Circuit Court in the particular matter involved.

The legislative department of the government, with the approval of the chief executive, has consented that the sovereign might be sued. It is just as effective as if a law had been enacted, and we are of the opinion that the appellee was authorized to maintain the action under the joint resolution in question.

In the same case the court passed upon the question as to whether such a resolution was violative of section 59 of the Constitution, and the court there decided that it was not. We will not again state the reasons for the court's conclusion. On the third question it is sufficient to say that interest is not allowable as a matter of law upon an unliquidated claim. Its allowance or disallowance is left to the discretion of the court or jury, to be executed according to the circumstances of the case. (*Henderson Cotton Mfg. Co. v. Lowell Machine Shops*, 86 Ky., 667; *Morford v. Ambros*, 8 J. J. Marshall, 688.)

When the legislature gave its consent that the sovereign might be sued, it left it to the court to determine what, if any, recovery should be had, and the same discretion existed with reference to interest as in other cases. The only difference between the sovereign and an individual is that it requires the sovereign's consent to be sued, but when that consent has been obtained,

then the court has the right to determine the question of interest as it would have in a suit of one citizen against another.

Judgment is affirmed.

Whole court sitting.

Judge O'Rear dissenting.

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WALL, &c. v. DIMMITT, &c.

(Filed February 24, 1908.)

1. Wills—Undue influence—Practice—This is an appeal from a verdict and judgment of the circuit court refusing to probate a will on the ground of undue influence of the son and husband of testatrix. Held—That the verdict is palpably against the evidence, and the case is reversed, with directions to grant a new trial. Ordinarily the same rule of practice obtains in will cases as in other jury trials.

2. Evidence—The statements of a testator, whether made before or after the execution of the will, are not competent as direct and substantive evidence of undue influence, or to show that the will was procured thereby, but are admissible to show the mental condition of testator at the time of the making of the will and her susceptibility to influences by which she was surrounded at the time. The acts and declarations of the husband of testatrix were competent as tending to support the contention of contestants that he had unduly influenced his wife in the execution of the will as he was a beneficiary under the will. The court erred in sustaining objections to questions propounded to the husband as to statements made by him to his wife in disparagement of the character or claims of other devisees under the will.

G. S. Wall, E. L. Worthington and L. Apperson for appellants.

Sallee & Sallee and Wm. D. Cochran for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Burnam.

This is an appeal from a judgment of the Mason Circuit Court rendered pursuant to a verdict of a jury, refusing to probate as the last will of Elizabeth A. Wall a testamentary paper duly executed by her on October 31, 1896. The will was assailed in the court below on the ground that it was procured by the undue influence of the husband and son of testatrix. Mrs. Wall was at the date of its execution eighty years of age, and her husband was then eighty-eight years old. She died about eighteen months later, leaving surviving her as her heirs at law her husband, Dr. A. H. Wall, her daughters, Mrs. Lydia E. Dimmitt, who had one child, Mrs. Mary W. Apperson, who had two children, and a son, Garrett S. Wall, who had three children. Her entire estate consisted of a tract of about 450 acres of very valuable land, conceded to be worth in the neighborhood of about \$100 an acre. Prior to the making of the will testatrix and her husband had advanced to each of their children about \$18,000. For many years prior to her death her son, G. S. Wall, and his family had lived with testatrix in her residence in Maysville, Ky. Her relations with each of her children were most cordial, frank and affectionate. In the latter part of the year 1891 Mrs. Wall made a will, by which she gave one-third of her 450 acres of land to her son in fee, one-third to Mrs. Apperson in fee, and the remaining third to Mrs. Dimmitt for

life, with remainder to her son, Hal Dimmitt, and in case he died without children, then to revert to Garrett Wall and Mary W. Apperson and their children. Hal Dimmitt was at that time, and so continued, a married man, with one child. The will of 1891 was retained by Garrett S. Wall, and was in his custody until two days before the making of the will of October 31, 1896. In the will of 1896 testatrix changed the devise to her daughter, Mrs. Lydia E. Dimmitt, so as to give to Mrs. Dimmitt one-third of the 450 acres for life, and then provided that at her death her executor, named in the will, should sell and convey this tract of land to the highest bidder, and divide the proceeds equally between her six grandchildren, share and share alike. It appears from the testimony that the provisions of the first will were well known by all the family of the deceased, but that the existence of the second will was not known to Mrs. Dimmitt until after the death of her mother, although she testifies that their relations continued to be of the most affectionate character, and that she assisted in nursing her for several weeks immediately preceding her death. Mrs. Dimmitt testified, upon the trial before the jury, that a short time before the execution of the will of 1891 that her mother said to her that her father desired her to make a will and to leave to her only a life estate in one-third of the land, and that at her death it should go to her brother and sister, to which she objected, and that her mother replied that it would be unjust and she would not make such a will, but would make a will giving the land to witness and her son, Hal Dimmitt, during their lives, and at the death of both to her grandson, son of Hal Dimmitt; that subsequently she frequently talked with her mother about this will and was assured by her that the will had been written as she promised; that she never heard of the execution of the last will until some time after the death of her mother, when she wrote to her brother concerning the probation of the first will; that in response to this letter Garrett Wall, for the first time, informed her by letter of the will of 1896, in which he assured her that he had nothing to do with it except to write it. By the same mail Mrs. Dimmitt received the following letter from her father:

"Maysville, Ky., May 7, 1896.

"My dear daughter—I have read the letter to your brother. I will now answer it. I do know what she did in the provision of the land was after many weeks' reflection, all caused by your prodigal son, who you can not trust with money or anything he can sell to bring money. You have one-third interest during life, or its income. As to the doctor's thinking it a reflection on him, I have no idea it ever entered her mind, as she certainly had the highest regard and love for him. I am interested in her will, and will certainly have it probated. We each had a will, and had I died first everything was left to her and vice versa. I will be disappointed if she hasn't left everything to me. I have done through life what I thought due to my children, and shall die so. I am going to do the best I can for you all whilst I live, and try to part in peace. Much love.

"Affectionately your father,

"ALEX. H. WALL."

That after the reception of this letter she went to see her father, and he began the conversation by saying: "Daughter, you can not break your mother's will, it is no use trying, and don't reproach your brother. I am

the one to blame. Blame me with the whole thing." She also testified that her father had a very strong will, and that her mother was gentle and yielding, and had always been delicate, and during the last two or three years of her life had failed perceptibly. G. S. Wall testified that he had written both wills at the instance of his mother, and had always retained them in his possession; that when he prepared the last will that his mother, after giving Mrs. Dimmitt a life estate in one-third the land, directed that at her death it should be sold and one-half the proceeds should go to Mrs. Apperson's children and one-half to his children, but that at his suggestion his mother changed and directed that the land should be sold and the proceeds divided equally among her six grandchildren, so that his children would get three-sixths, Mrs. Apperson's two sixths and Hal Dimmitt one-sixth. This was substantially the only testimony which was admitted upon the trial which tends, even under the contention of appellee, to establish undue influence in the procurement of the will.

The law is well settled in this State, and is abundantly supported by the text-writers and decisions of other States, that the statements or declarations of a testator, whether made before or after the execution of the will, are not competent as direct and substantive evidence of undue influence, or to show that the will was procured thereby, but are admissible to show the mental condition of testator at the time of the making of the will and her susceptibility to influences by which she was surrounded at the time. (Jones on Evidence, sections 492-493; Wharton on Evidence, section 1010; notes to *In re Hess's Will*, 81 Am. St. Rep., 690; Bigelow's Notes to Jarman on Wills, 71; Underhill on Wills, section 161; Williams on Executors (1st edition), 64; *Goodbar v. Lidkey*, 43 Am. St. Rep., 301; *Milton v. Hunter*, 76 Ky., 168.)

And when we eliminate the declarations of testatrix, testified to by Mrs. Dimmitt, there is very little evidence left in the record bearing upon the question of undue influence, certainly not sufficient to authorize the conclusion that the will was the result thereof. We are, therefore, of the opinion that the verdict upon the case as presented by the record is palpably against the weight of evidence, and for this reason the judgment must be reversed. But in view of the fact that the trial court excluded from the consideration of the jury the testimony of Dr. Alex. Hunter, Con Gullfoile and William C. Johnson as to the declarations made to them by Dr. A. H. Wall, to the effect that he would see that his grandson, Hal Dimmitt, received no part of the Wall estate, and which, in our opinion, was entirely competent, and would have furnished some basis for the verdict of the jury, if it had been admitted. We would not be justified, therefore, in remanding the case with an order to probate the will.

In *Broadus' devisees v. Broadus' Heirs*, 73 Ky., 299, it was held that the General Statutes required that this court should on appeal give the same effect to the verdict of the jury in a will case as is given in other civil cases, and repealed that part of section 519 of the Civil Code, which provides that the Court of Appeals should in such cases try both the law and facts; and that a new trial would be awarded on the reversal of a will case except in those cases where there was no evidence to sustain the verdict. In that case it was held that there was no evidence, and the will was ordered to probate. And it has been followed in two or three instances where the court

found that there was no evidence to sustain the verdict. But ordinarily the same rule of practice obtains in will cases as in other jury trials. And this case will have to go back for a new trial before a jury, and we are of the opinion that it was competent for contestants to prove acts and declarations of Dr. Wall which tended to support their contention, that he had unduly influenced his wife in the execution of the will. He is a beneficiary under the will, and was active in its probatio, and the appeal from the judgment of the trial court is prosecuted in his name. The fact that as a tenant by courtesy he would have taken substantially the same interest in the estate of his wife as came to him as devisee under the will, can not change the well-established rule in this State that admissions and declarations of a legatee or devisee under a will are competent not only against himself, but also as to the interest of his co-legatees or devisees thereunder. This question was fully considered by this court in *Beal v. Cunningham*, 40 Ky., 399; *Rogers v. Rogers*, 41 Ky., 334, and in *Milton v. Hunter, &C.*, 76 Ky., 163. And in the very recent case of *Gibson, &C. v. Sutton, &C.*, 24 Ky. Law Rep., 868, this court said: "We do not feel at liberty at this late day to disregard decisions which have been generally acquiesced in by the profession as sound, because not in accord with the rule of other States."

The trial court also erred in sustaining an objection to the following questions which were propounded to the appellant, Dr. A. H. Wall, by contestants:

"Q. Did you ever say to your wife that Hal was misbehaving in such a way?

"Q. Did you ever say anything to your wife about his being a spendthrift, and that he would spend the property or dissipate it, and for her to see the matter was fixed in such a way that he would not, in any contingency, get any part of her property?"

For reasons indicated the judgment is reversed and cause remanded for a new trial not inconsistent with this opinion.

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PHILLIPS, &c. v. KEEL, SHERIFF.

(Filed February 24, 1903—Not to be reported.)

Judicial sales—Parties to actions—This appeal was prosecuted from a judgment confirming reports of sales of land, and the sheriff, as public administrator of the estate of one of the former owners of the land, is the only appellee named in statement filed under section 739, Civil Code of Practice. As neither the purchaser of the land nor his transferees are parties to the appeal, the appeal is dismissed.

J. M. Roberson for appellants.

T. L. Edelen for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Burnam.

This suit was instituted by N. L. Phillips, as executrix of Frank Phillips, against his heirs and creditors for a settlement of the estate and for a sale of enough of his land to pay his debts. At the January term, 1901, of the Pike

Circuit Court a judgment was entered, directing the master commissioner of the court to sell seven tracts of land belonging to the estate of decedent, two of which were in the State of Virginia, and the remaining five in Pike county, Kentucky. At the sale A. J. Auxier and J. F. Butler, who represented plaintiffs in the suit as attorneys, became the purchasers of the third, fourth and fifth tracts in Kentucky at the aggregate price of \$118. These three tracts of land were appraised at \$650. They also purchased tract No. 6 at the price of \$700. After the master commissioner filed his report of sale Auxier and Butler transferred their bids on the land to Williamson and York, who were the purchasers of the remaining tract; and on their motion the commissioner was permitted to file a supplemental report that he had made a mistake in reporting their bid to them as attorneys for plaintiff; that it should have been to them as individuals. Numerous exceptions were filed by the infant children of Frank Phillips to the confirmation of the sale, and they also objected to the transfer of the bid from Butler and Auxier as attorneys to Auxier and Phillips as individuals, and insisted that the property was sold for a song. After the judgment of sale Mrs. N. L. Phillips died, and W. J. Keel, sheriff of Pike county and public administrator, qualified as administrator with the will annexed of decedent, and filed his petition to be made a party to the proceeding, and asked that the commissioner's sale of the land should be confirmed. This was done in spite of the objections of appellants, and they have appealed to this court, and ask a reversal upon numerous grounds. But in their statement filed in conformity with section 739 of the Civil Code, the only person named as an appellee is W. J. Keel, sheriff of Pike county, who has no pecuniary interest in the matter so far as we are able to discover. The real parties in interest, the purchasers of the land and their transferees, are not made parties, and would not be affected by any judgment this court might direct to be entered in case we should conclude that the judgment appealed from was erroneous.

We, therefore, conclude that the appeal should be dismissed without prejudice, and it is so ordered.

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WILLIAMS v. WILLIAMS, &c.

(Filed February 24, 1903—Not to be reported.)

Guardian ad litem—Allowances—C. was appointed by the Grant Circuit Court guardian ad litem for infant children, and has made this motion in the Court of Appeals for an allowance for his services as guardian ad litem. Held—That as he was appointed guardian ad litem in the lower court he should make his motion for an allowance in the entire case in that court.

H. Clay White and B. F. Graziana for appellant.

W. W. Dickerson, A. G. DeJarnette and Wm. Carnes, guardian ad litem, for appellees.

Appeal from Grant Circuit Court.

Opinion of the court by Chief Justice Burnam.

William Carnes, guardian ad litem for D. W. Robinson, Charles Robinson, Maggie Robinson, Earl Williams, James McManus, Raymond Mc-

Manus, Monica McManus and M. B. McManus, has filed his petition in this proceeding, reciting the services rendered by him for his infant wards in this court, and asked that he be allowed a fee of \$300 for such services. It appears from the record that Carnes was appointed as guardian ad litem for his infant wards in the lower court pursuant to the provision of section 38 of the Civil Code; and we are, therefore, of the opinion that he should make his motion for an allowance for his services as guardian ad litem in the entire case in that court. (Robinson v. Fidelity Trust and Safety Vault Co. 11 Ky. Law Rep., 313.)

For this reason alone the motion for an allowance is overruled.

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DUGAN'S ADM'R v. CHESAPEAKE & OHIO RY. CO.

(Filed February 24, 1903—Not to be reported.)

Railroads—Contributory negligence—The deceased one night, about half past 10 o'clock, walked onto a trestle on appellee's road over a roadway leading to the boat landing in Maysville, and sat down on the track on the trestle and went to sleep. A short time thereafter a fast train passed and killed him. This action was instituted to recover damages for his death. At the conclusion of the testimony for appellant the court gave a peremptory instruction, directing the jury to find for defendant. The defense was contributory negligence of the deceased. Appellant contends, on appeal, that although deceased may have been guilty of contributory negligence, yet it was the duty of appellee and its servants, when the train was passing through a thickly populated city, to keep a lookout, and to have prevented the injury. Held—That this rule requiring appellee to keep a lookout does not apply where the company owes no duty to the person injured, as was the case toward decedent. Had they discovered the perilous position of the deceased in time to have prevented injuring him, it would have been their duty to have exercised reasonable care to have avoided the injury, but a failure to discover deceased asleep on the track, under the circumstances, was not negligence.

C. Burgess Taylor and J. M. Collins for appellant.

E. L. Worthington, J. G. Wadsworth and W. H. Wadsworth for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hobson.

Appellant filed this suit to recover for the loss of the life of his intestate, and at the conclusion of the evidence the court instructed the jury peremptorily to find for the defendant. The proof tended to show these facts: The track of the railway company runs along Front street in Maysville, Ky. This street fronts on the Ohio river. The railroad track is laid near the north side of the street and about four feet from the steep embankment leading down to the river. The railroad track at the point where the deceased was killed is built on a trestle, or bridge as it is called by the witnesses, and underneath this trestle runs the roadway leading to the boat landing. About half past 10 o'clock at night, on the 13th of August, the deceased went out and sat on this trestle. While there a train came by, about 11 o'clock, running at rapid speed, and killed him. He had dropped to sleep,

and so did not notice the approaching train. No one on the train seems to have been aware of his presence on the trestle. He had been drinking some, and it is conceded that he was guilty of contributory negligence, but it is earnestly argued that the place where he was, near the intersection of Market and Front streets, was much used by the people of the city, and that by reason of this use the duty was imposed on those operating the trains to keep a reasonable lookout, and that by the exercise of ordinary care, if a lookout had been kept, his danger would have been perceived and the injury averted, as the track was straight for nearly half a mile as the train approached him. The cases of *Gunn v. Felton*, 22 Ky. Law Rep., 268, and *C. & O. Ry. Co. v. Keelin's Adm'r*, 22 Ky. Law Rep., 1912, are relied on as establishing the rule that where the presence of the deceased on the track might, by the exercise of ordinary care, have been discovered in time to avoid killing him, the fact that he was guilty of contributory negligence will not preclude a recovery. But those cases have no application to the one before us. The rule they declare only applies where those in charge of the train owe a duty to the deceased, and where by the exercise of this duty, notwithstanding his want of care, and after it had placed him in danger, the injury might have been averted. If the intestate had been in a proper use of the street, as in passing along it or across it, it would have been incumbent on those in charge of the train in running along the highway to exercise proper care to avoid injury to others also properly on the highway. But that is not the case we have. The deceased left the highway and got upon the railroad trestle, which was elevated above the highway, and went to sleep up there at a late hour of the night. Those in charge of the train were not required to anticipate the presence of persons sleeping on the trestle at that time of night, and the deceased's own gross negligence was the proximate cause of his injury. If those in charge of the train had discovered the perilous position of intestate and could, after discovering it, by the exercise of proper care, have avoided the injury to him, the defendant would be liable; but it is not liable simply because they failed to discover him asleep on the trestle. (*L. & N. R. R. Co. v. Kemery's Adm'r*, 23 Ky. Law Rep., 1734; *Embry v. L. & N. R. R. Co.*, 18 Ky. Law Rep., 434; *Lyon's Adm'r v. Illinois Central R. R. Co.*, 22 Ky. Law Rep., 1032.)

Judgment affirmed.

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CLARKE v. LEXINGTON STOVE WORKS.

(Filed February 25, 1903—Not to be reported.)

Corporations—Agents—Instructions—Bills and notes—Appellee subscribed for stock in the Lexington Stove Works to the amount of \$3,500, and paid \$980 thereof, when suit was brought to collect the balance of subscription due. In defense appellant alleged that when \$875 of said subscription was due he had a conversation with S., who was secretary and treasurer of the corporation, and who had charge of said collection, in which it was agreed that appellant should give him a policy of life insurance which had a cash surrender value of \$700 and a cash surrender value of \$1,160, and that S. would borrow \$700 on said policy and credit it on the subscription due; that in accordance with said agreement appellant transferred said policy to S., and executed his note for \$700 and gave it to S., but that S. had failed to



credit him on said subscription with any sum whatever, but had converted said note and policy to his own use, and deprived appellant of same. Issue was made on the authority of S., as agent, to make such an arrangement with S. On the trial the court gave a peremptory instruction to find for plaintiff the full amount claimed on said subscription, from which this appeal is prosecuted. Held—That the court erred to the prejudice of appellant in giving said peremptory instruction. The jury should have been permitted to decide from all the facts and circumstances proven in the case whether the contract alleged was made within the scope of the powers exercised by S. as agent of the company. If they found in the affirmative, appellant was entitled to a credit for the value of said policy taken from him by said agent and converted to his use or the use of the corporation.

Geo. C. Webb and Webb & Farrell for appellant.

A. M. Baker for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Settle.

Appellee, Lexington Stove Works, is a corporation engaged in the business of manufacturing and selling stoves in the city of Lexington, this State. Appellant, George Clarke, subscribed for twenty-five shares, \$100 per share, of its capital stock on which he paid in obedience to the calls therefor as much as \$980, but failing to pay the remainder due on the stock suit was instituted against him by appellee in the Fayette Circuit Court for the sum of \$1,519.50, which was alleged to be the balance due of the amount subscribed by him, and for this sum personal judgment was asked against appellant, in addition to which appellee claimed a lien on his stock, which it sought to enforce.

Appellant filed answer to which a demurrer was filed and sustained. And amended answer was then filed and demurrer sustained to the answer as amended, whereupon a second amendment was filed to the answer, and demurrer was again filed to the answer as amended, but overruled. The answer, as thus amended, admits the subscription of \$2,500 to the capital stock of appellee by appellant, and the payment of \$980 thereof, but denied that appellant owes the \$1,519.50 balance sued for, and avers that he is entitled to further credits of \$700 and \$160, respectively, which appellee had agreed to allow him, but failed to do so; that after payment of the \$980, and when demand was made for \$875 of the \$1,519.50 still owing by appellant, he being unable to raise the money to pay it, advised one Snyder, appellant's general manager, who was collecting sums due on subscriptions to its capital stock, that he owned a paid-up policy of \$2,500 in the Mutual Life Insurance Co., of New York, payable to his estate at his death, which then had a loan value of \$700 and a cash surrender value of \$1,160, and that by agreement between himself and Snyder, as appellant's general manager, the latter took possession of the policy, with an assignment thereof signed by appellant in blank, and also took of him a note for \$700, which was signed and endorsed by appellant and made payable to his order, and Snyder agreed further to negotiate for him a loan of \$700 on the note and policy, which sum was to be applied as a credit on the \$875 then due on appellant's stock.

The answer further avers that Snyder, as such general manager, sent the note and mortgage to a man in Philadelphia, Penn., or to some other per-

won, who procured the money thereon, or still held the note and policy, neither of which was ever returned to him (appellant), and that by the acts of Snyder as general manager he had been deprived of the policy, and by reason thereof suffered the loss, not only of the \$700, its loan value, but also the further sum of \$460, which, together with the \$700, constituted the cash surrender value thereof. Appellant asks credit for these sums on the amount due on his stock subscription to appellee.

After the filing of the reply, which denied all of the averments of the answer, the case was tried by order of the lower court before a jury on the issues of fact raised by the pleadings, and upon the conclusion of appellant's proof the jury, under a peremptory instruction from the court, found for the appellee, whereupon judgment was rendered for appellee for the full amount claimed by it, with costs, and appellant's motion for new trial having been overruled, he prosecutes this appeal. Upon the trial appellant and two other witnesses testified in his behalf, and in addition the minutes of a number of meetings of appellee's board of directors were read in evidence.

The following facts were substantially proved on the trial: First, that appellant, in May, 1896, was owing appellee \$875 of his stock subscription, and that Snyder, as an officer of appellee company, was insisting upon its payment; second, that appellant was then the owner and in possession of a paid-up policy of insurance in the mutual Life Insurance Co., of New York, of \$2,500, which had a loan value of \$700 and a cash surrender value of \$1,160, which policy was delivered to Snyder; third, that Snyder made an arrangement with appellant whereby money was to be raised on the policy, and for that purpose he caused him to execute his note, payable to himself, and endorsed by him, and to execute an assignment of the policy as collateral security for the note, and that the note was also delivered to Snyder with the policy; fourth, that Snyder took the note and policy and disposed of them to some third party, and thereafter wrote letters in which he set up claim to the note and policy, or their proceeds, for appellee, and that he never returned either the note or policy to appellant, and the latter has never received credit on appellee's claim against him for either the note or policy, and the note is still not against him.

In determining whether or not the lower court erred in giving the peremptory instruction, it will be necessary to ascertain whether Snyder was acting as agent of appellee in the transaction with appellant in regard to the note and policy, and if so, whether he was authorized to enter into the arrangement that was made with him. A corporation can only act through its officers or agents, and it will be bound by their acts, if performed within the apparent scope of the agency. It was clearly shown by the minutes of appellee's board of directors that Snyder was its general manager; that he not only acted for appellee in collecting its subscriptions of stock, but also in the sale of stock, for he disposed of some of its stock to one McDonald, and at one time, as shown by the minutes, he reported that all stock had been sold, but some certificates had not been issued because not fully paid for. The minutes show that at another time Snyder, as general manager, secretary and treasurer, made a verbal report to the directors that "the company had made money during the past year, but he was not in a position to say how much; he had not finished taking stock, etc."

In addition the articles of incorporation, by which appellee received its corporate being, provide that "Otis Snyder shall be general manager of said corporation, and perform the duties thereof." We also find that he wrote the Mutual Life Insurance Co., of New York, in regard to appellant's insurance policy, using in doing so a letterhead of appellee, and he likewise wrote a letter to Biscoe Hindman, State agent of the insurance company, in which letter he said:

"We hold a claim of \$700 against the policy No. 737,455, issued on the life of George Clarke, of this city. This policy was sent to Philadelphia, Penn., to negotiate a loan of \$700. We wish to notify you that we have not released our claim to said policy.

"Very truly,

"LEXINGTON STOVE WORKS,

"By O. W. SNYDER, Sec. and Treas."

Still another letter was written by Snyder to the insurance company saying:

"Please take notice that the only valid claim against the policy of George Clarke, No. 737,455, is the one I have. Very truly,

"O. W. SNYDER,

"Of Lexington Stove Works."

It is also shown by the evidence that Snyder was practically in charge of all of appellee's business. Appellant testified fully as to the agency of Snyder, and in view of the many evidences furnished by the record of his agency, we are unable to approve the action of the lower court in granting the peremptory instruction. We think, too, that the lower court erred in refusing to permit appellant to testify as to what were the duties of Snyder as general manager. Appellant was himself, at one time, president of appellee company, and he testified that Snyder's duties as general manager had never been defined by resolution of appellee's board of directors. It was, therefore, proper to prove by parol evidence the nature and extent of those duties. So we conclude that there was evidence to go to the jury which, in the absence of anything to the contrary, would have authorized them to find for appellant. Indeed the evidence introduced by appellant, on the whole, strongly conduces to show that Snyder was authorized as agent of appellee to take such steps as were necessary to collect the sum owing by appellant, and, furthermore, that as such agent he received the note and policy from him and placed them in the hands of an irresponsible party, who either lost them or appropriated to his own use the money realized on them, so after all it may be inferred from the facts adduced upon the trial in the lower court that the note and policy were lost to appellant by the negligence of appellee's general manager; and if so, as they were left in his hands to raise money for appellant which was to be credited on his indebtedness to appellee, and were undoubtedly good for the amount to be realized, appellant ought not to lose the credit through the negligence of the agent selected by appellee to transact such business.

"If officers of the corporation openly exercise a power which presupposes a delegated authority for the purposes and other corporate acts shown that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated

authority will be presumed." \* \* \* (Bank of U. S. v. Dandridge, 12 Wheat., 65; Mohony Mining Co. v. Anglo-Columbia Bank, 104 U. S., 708; Story on Agency, 758; Baker v. Kansas City, & Co., R R. Co., 3 S. W. Rep., 489; Whitaker v. Kilray, 38 N. W. Rep., 607; Ceader v. Land & Son Lumber Co., 49 N. W. Rep., 575.)

It is contended by counsel for appellee that as section 568, Kentucky Statutes (the same as section 193 of our Constitution), provides that "no corporation shall issue stock or bonds except for an equivalent in money paid, or labor done, \* \* \* the taking of the note and policy by its general manager could not have operated as a payment on appellee's stock. The note, secured as it was by the policy, was as good as a bill of exchange. It was, therefore, the equivalent of money, and its acceptance by appellee would have been a payment in contemplation of the statute supra.

We do not understand, however, that the note was accepted by appellee's manager, Snyder, as a payment, but it was taken to be negotiated or sold by him for the accommodation of appellant, and the benefit of appellee, and it was his duty to use reasonable care to obtain the money on it. The money would undoubtedly have been obtained on it but for the negligence of appellee's agent in putting it into the hands of an unreliable man.

We think it would be inequitable to permit appellee to escape liability for the negligent act of its agent in permitting the loss of the note and policy upon the facts presented by the record, and the judgment of the lower court is, therefore, reversed, with directions to that court to set aside the verdict of the jury as well as the judgment rendered thereon, and grant appellant a new trial.

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STEWART v. ROSE.

(Filed February 25, 1903—Not to be reported.)

Contested elections—Fraud and intimidation—Appellant and appellee were rival candidates for police judge of Jellicoe. The result was a tie. Appellee was selected by lot, and appellant filed this action contesting his election, alleging that a number of illegal voters were permitted to vote for appellee, and fraud and bribery were charged. Countercharges of the same nature were made, and much proof introduced showing that the election was unfair and the result in doubt. It obviously would not do to say that in every case where bribery and fraud are practiced the election will be void. But where the illegal voting, the bribery or fraud or intimidation has prevailed so that its effect upon the result is such that no degree of certainty exists as to the fairly-expressed will of the electors the election should be declared void. The voters of the district or community affected by it are entitled to an opportunity by a fair election to select their officials. Under authority of section 12, chapter 5, of acts of extra session 1900, the court should have declared the election void.

K. D. Perkins for appellant.

C. W. Lester for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant and appellee were rival candidates at the election held Novem-

ber, 1901, for the office of police judge of the town of Jellico, a city of the sixth class.

The officers of election certified that each of the candidates received forty-one votes. There were three questioned ballots not counted for either of them. One of these ballots was a blank. The remaining two were counted, one for appellant and one for appellee. The result being a tie, appellee was selected by lot and awarded the certificate. Appellant instituted this contest, and charged that a number of persons who were named in the petition were not legal voters at that election; that they voted for appellee; that a number of voters who were legally qualified voters, naming them, had been prevented, by force, intimidation, bribery and fraud from voting at the election; that they were the adherers and supporters of appellant, and would have voted for him. A large volume of evidence has been taken, from which the circuit court found that it was impossible to determine from the legal evidence for whom illegal votes had been cast.

We are of opinion that the voters, J. H. Singleton, John Lewis, John Powell and Walter Clark, were illegal voters undoubtedly. It is not so clear whether P. L. Garner and George M. Rose were qualified voters. Excepting Garner and Rose mentioned, the other voters each introduced as witnesses on behalf of contestee, after they had been shown conclusively by contestant's evidence to have been illegal voters, testified that they had voted for appellant. Contestant then introduced evidence impeaching their veracity because of their general reputation in the community where they live. No evidence was offered for appellee to sustain them, or any of them.

There must have been an exceedingly spirited contest for this office in this little town. A number of witnesses testified that they had been approached and had been offered money and given whisky to influence them in voting, although none of them state that they had voted because of such influence. One of the witnesses testifies that friends and relatives of appellee agreed to give her \$10 (\$10 seems from the evidence to have been the prevailing price for such votes) if she would move her household furniture, etc., out of the corporate limits of the town a few days before the election and remain away until after the election so as to disqualify her husband and son from voting. She said that she accepted the offer and moved. Her husband, however, returned to town and refused to leave the corporate limits until after the election, and testifies that he voted, and that he voted for appellant. The son was refused the right to vote, although it seems that he was a legal voter. He claims to have been for appellant. Evidences of intimidation and other irregularities are also shown in the record. It is proper to say, however, that appellee is not personally connected with any of it. These acts seem to have been done in the main by his adherents and supporters, whether with his knowledge or approval is not shown in the record.

Some of the witnesses mentioned as being illegal voters stated before the election for whom they intended to vote, and after the election for whom they voted. In *Commonwealth v. Barry*, 98 Ky., 394; *Major v. Barker*, 99 Ky., 806, and *Tunks v. Vincent*, 21 Ky. Law Rep., 475, it has been held that such statements are hearsay, and are not competent to establish the fact of how such voter did actually vote. Under such state of case what are the rights of the constituency affected by this election, and what is the duty of

the court? It is not every act of violence, fraud, or even bribery, that will vitiate an election. Such things, where their effect can be measured with any degree of certainty, will, in a contest involving the result of the election, be eliminated, and the result declared from what remains, if it can be done. So long as existing conditions continue it may be impossible to conduct elections without some unlawfulness on the part of some one, officers or voters or meddlers. It obviously would not do to say that in every such case the election will be void. But where the illegal voting, the bribery or fraud or intimidation has prevailed so that its effect upon the result is such that no degree of certainty exists as to the fairly-expressed will of the electors, the election should be declared void. The voters of the district or community affected by it are entitled to an opportunity, by a fair election, to select their officials. It is of the first importance to the people that their rights, before the claims of rival candidates, be protected and preserved.

The last amendment to the election laws of this State, section 12, chapter 5 of the laws of the extra session 1900, is as follows: "In case it shall appear from an inspection of the whole record that there has been such fraud, intimidation, bribery or violence in the conduct of the election that neither contestant nor contestee can be adjudged to have been fairly elected, the circuit court, subject to revision by appeal, or the Court of Appeals finally may adjudge that there has been no election. In such event the office shall be deemed vacant, with the same legal effect as if the person elected had refused to qualify."

Under all the facts shown in this record we are bound to conclude "that neither contestant nor contestee can be adjudged to have been fairly elected. The circuit court should have so adjudged.

The judgment is reversed and cause remanded, with directions to enter a judgment in conformity with this opinion.

Whole court sitting.

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CADIZ R. R. CO. v. ROACH.

(Filed February 25, 1908.)

1. Contracts—Donation of land for right of way of railroad—Fraud—Consideration—Appellee by a writing donated the right of way over his farm for the purpose of constructing a railroad through same from Cadiz to Gracey. After the workmen had cleared a considerable portion of the right of way over appellee's farm, preparatory to constructing the railroad, appellee forbade them from constructing said road. Appellee instituted this action to obtain a cancellation of said writing. Appellee averred that said contract was obtained by fraud and false representations, to the effect that all the neighbors had donated the right of way. An amended petition was filed, alleging that the contract was without consideration. There was no proof to sustain the charge of fraud, and the court cancelled said contract on the ground that it was without consideration. It is a rule that "where several promise to contribute to a common object desired by all, the promise of each may be a good consideration for the promise of the other." Appellant had expended \$15,000 or \$20,000 in the construction of its roadbed, superinduced in part by the grant from appellee of the right of way over his land, and it would greatly prejudice its rights to withdraw this permission to run its railroad over his land. This was a sufficient consideration to uphold said

donation. Prejudice to a promisee is as valid a consideration as a benefit to the promisor.

2. Estoppel—In view of the conduct of appellee in standing by and permitting the preparation of the right of way and the expenditure of money for the purpose of building the railroad, appellant is equitably estopped from withdrawing said donation.

Sims & Thomas and Sims, Garnett & Burnett for appellant.

Kelly & Son and D. P. Smith for appellee.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Settle.

The appellant railroad company undertook to construct and operate a railroad between Cadiz and Gracey in Trigg county, Kentucky, for which purpose it received subscriptions in money and donations of right of way over the lands of divers citizens of that county.

The appellee, C. J. Roach, gave such right of way over his land, evidenced by the following writing, signed by him and one L. A. Miller, who had likewise given appellant the right of way over his land.

"Office of Cadiz Railroad Co., Cadiz, Ky., February 21, 1901, I hereby donate to the Cadiz Railroad Co. a sixty foot right of way through my farm according to surveys.

"L. A. MILLER,

"C. J. ROACH."

It appears from the record that the route for the railroad had previously been surveyed through appellee's land and marked by stakes. After the execution of the writing mentioned appellant began the work of constructing its road, and while engaged in cutting and removing timber and undergrowth from the right of way through appellee's land the latter met the foreman in charge of appellant's workmen, and forbade the doing of any further work on his land, and soon thereafter instituted this action to obtain a cancellation of the writing, whereby appellant had been granted the right of way over his land, upon the alleged ground that it had been procured by fraud. The original petition avers in substance that appellee was induced to execute the writing upon the false representation made by appellant's agents at the time, that all of the neighbors had donated to appellant the right of way over their lands for its road, and in fact that the right of way had been donated from Cadiz to appellee's farm. It is further averred that this statement was false, but that he, being unaware of its falsity, was induced thereby to execute the writing which he would not otherwise have done. Afterwards an amended petition was filed, in which it was alleged that the writing in question was and is without consideration, and consequently void.

The answer of appellant specifically denies the allegations of fraud and want of consideration contained in the petition as amended, and avers that the work of building its line of railroad was undertaken by the citizens of Trigg county upon subscriptions of money, and donations of lands for the right of way; that appellee's grant of the right of way over his land was made pursuant to this undertaking, and that appellant relying upon these subscriptions and donations, including that of appellee, had commenced the

construction of its line of railroad and proceeded with the same to the extent of expending \$15,000 or \$20,000 in grading and otherwise preparing its roadbed for laying ties and rails.

The answer further avers that the subscriptions and mutual undertaking of the parties to construct the railroad constituted a good and sufficient consideration for the subscriptions made, whether of money or right of way, and in addition that appellant's land will be greatly enhanced in value by the building of the railroad, and the erection of a depot, which will be only a mile and a half from his residence. By consent of parties the evidence on the issues formed by the pleadings was heard orally by the court and the trial resulted in a judgment in favor of the appellee, from which, and the refusal of the lower court to grant it a new trial, appellant prosecutes this appeal. It is proper to say that the charge of fraud in the procurement of appellee's signature to the writing executed by appellee was wholly disproved on the trial, and the only remaining question for this court to determine is as to the plea of no consideration.

We find that appellee, when asked by appellant's agents, Street & Gaines, to give the right of way, said he "wanted the road." In thus expressing himself appellee seems to have been actuated by the general desire that inspired his neighbors and friends to contribute to the one common object, that was expected to benefit the people of the county, which was the securing of a railroad. The undertaking originated with the citizens of Cadiz and vicinity, for they alone seem to have furnished by subscription the capital necessary to the success of the enterprise, some giving money, others the right of way over their lands.

"Where several promise to contribute to a common object desired by all, the promise of each may be a good consideration for the promise of the others." (Parsons on Contracts, volume 2, page 452; *Twin Creek and Colmanville T. P. Road Co. v. Lancaster, & Co.*, 79 Ky., 552; *Stovall v. McCutchen & Co.*, 21 Ky. Law Rep., 1317.)

But whether we are to regard appellee's grant to appellant of the right of way over his land as binding upon the principle of mutuality or not, we can not regard it as a mere gift of his property to a public charity, for by the building of the road he will derive profit from the increase in the value of his land. Besides, it appears that it is three and a half miles or more from the residence to the nearest depot, whereas the building of the new railroad will provide a depot within a mile and a half of his residence.

There is yet another ground which we think in all fairness should operate as an estoppel to the plea of no consideration made by appellee. We find from the record that no work had been done by appellant in constructing its road at the time appellee executed the writing granting the right of way over his land, which was February 21, 1901, but after that date work was begun and continued down to June or July, 1901, during which time the roadbed had been graded from Cadiz, a distance of seven miles, to a point near appellee's land, and as it then became necessary for appellant's servants to grade and construct the roadbed on appellee's land, they went upon the same for that purpose, and had about finished clearing the roadway thereon of timber and other obstructions when appellee met them, and for the first time advised them of his purpose to repudiate the writing granting the right of way, and by his command the work was then and there stopped.



We know of no reason why the law of equitable estoppel should not be made to apply to a case like this. Indeed we are told in the very admirable work of Thompson on the Law of Corporations, volume 4, section 5279, that it may be applied "where a land owner encourages, actively or passively, the appropriation of his land by a corporation for public use," and we may add that a greater reason exists for its application where the land owner has, in writing, expressly consented to such use of his land. There is yet another rule of law which holds that "any advantage to promissor or prejudice to promisee" is a sufficient consideration to support the contract. (Stapp v. Anderson, 1 Mar., 538.)

Applying this rule to the facts of the case at bar we find that appellant, relying in good faith upon the subscriptions and donations made in aid of its undertaking, including the donation from appellee of the right of way over his land, began the construction of its road and completed the roadbed to appellee's land, expending, as alleged, \$15,000 or \$20,000 in so doing. We think, therefore, that in view of the labor and expense thus incurred by appellant, superinduced as it was in part by the grant from appellee of the right of way over his land, it would greatly prejudice its rights to permit appellee to withdraw the permission given to it to run its railroad over his land.

For the reasons herein given the judgment of the lower court is reversed and cause remanded in order that appellee's petition may be dismissed.

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CAUDLE v. FORD, &c.

(Filed February 25, 1908—Not to be reported.)

Bills and notes—Evidence—M. drew a note payable to A., B. and C., and they endorsed it and returned it to M., who sold it to appellant, who instituted suit on same. The defendants, in their answer, alleged that at the time they endorsed said note that it was agreed that D. was to endorse same and M. was to execute a mortgage on land to indemnify them as endorsees, and they further allege that when appellant purchased said note that he had full knowledge of these facts. A trial resulted in a verdict for defendants. On appeal appellant insists that the court erred in permitting the introduction of evidence proving the matters set up in the answer, on the ground that it was forbidden by the rule that prohibits the alteration of a written contract by parol evidence. Held—That said evidence was competent, and the verdict of the jury will not be disturbed.

James Goble for appellant.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 16th of May, 1898, James Matney executed the following obligation:

"\$2,000.

Pikeville, Ky.

"Four months after date I promise to pay to the order of J. W. Ford, W. H. Williams and W. B. Mitchell \$2,000 at the Bank of Pikeville.

"JAMES MATNEY."

The note was endorsed by three payees, Ford, Williams and Mitchell, and returned to the payor, James Matney. Before the maturity of the note it

was sold by James Matney to the appellant, J. D. Caudle for \$1,700, paid in cash; and not being paid at maturity thereof, Caudle instituted this suit in the Pike Circuit Court against the maker, Matney, and the three endorsers, Ford, Williams and Mitchell, to recover from them the sum which he paid for the note, with protest fees, and the cost of a suit which he had instituted against Matney and prosecuted to judgment and return of nulla bona. The defendants, Ford, Williams and Mitchell, in their answer, admit that they signed the obligation and delivered it to Matney, but say by way of defense that it was agreed between them and Matney that before he was authorized to sell the note that he was to procure the name of L. J. Williamson as one of the payees thereon, and he was also to endorse it and to become jointly bound with them; and that Matney was then to execute to them and Williams a mortgage on a farm and a house and lot in Pikeville belonging to him to indemnify them against loss; and that the plaintiff, J. D. Caudle, before he purchased the note, was fully informed of the condition upon which they had executed the obligation, and warned not to purchase or advance money on it until all these conditions were complied with. They further allege that Williamson never in fact became a party to the obligation, and that no mortgage was executed by Matney as agreed. A trial before a jury under proper instructions resulted in a verdict for the defendant, and plaintiff has appealed, and asks a reversal of the judgment rendered pursuant thereto upon the ground that the trial court erred in permitting the defendants to testify upon the trial to the facts connected with the execution of the obligation, which were set out and relied on in their answer, upon the ground that parol evidence is not competent to contradict or vary the terms of a written contract.

We are unable to see how this rule of evidence has any application to the facts of this case. The law is well settled in this State that if a surety executes a note on the payee's agreement to procure the signature of another name thereto, and which the payee failed to do, that this fact can not be relied on as a defense when sued by a purchaser for value who had no notice of such agreement. But if the payee or obligee had notice of such condition or agreement, the fact of the agreement and knowledge thereof on the part of the obligee or payee would constitute a valid defense, and it is entirely competent to show the existence of such knowledge by parol testimony. The gist of the defense in this case is that plaintiff, before he acquired the obligation sued on or parted with his money, knew that the defendants were not bound thereon unless Williamson signed the note, and a mortgage was made to protect them. And it was perfectly competent to show that fact by parol testimony, as it in nowise tended to contradict or alter the obligation sued on. Questions analogous to the one at bar were considered by this court in *Smith v. Moberly*, 49 Ky., 266; *Jones v. Shelbyville Fire and Marine Ins. Co.*, 58 Ky., 58; *Hubbel v. Smith*, 62 Ky., 279. And all these authorities were reviewed in the recent case of *Dills v. Bank of Pikeville*, 22 Ky. Law Rep., 1451.

It is hard to believe that appellant would have advanced \$1,700 in good money for the obligation sued on after notice from appellees of the alleged conditions of liability on their part, and that they had not been complied with by Matney. Yet this is a fact which, under our system, is left to the

determination of the jury, who are the sole judges of the weight and credibility of the witnesses. However much we may be disinclined to agree with the verdict of the jury, we can not say that it was palpably against the weight of evidence, for as against the statement of appellant, that he had no notice of such alleged contemporaneous agreement, the three defendants all testify that he did have such information.

For these reasons, with some reluctance, we conclude that the judgment must be affirmed.

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ILLINOIS CENTRAL R. R. CO. v. MATTHEWS.

(Filed February 25, 1903.)

Common carrier—Damages for injury to baggage—Appellee was a traveling salesman for a wholesale dealer in dental instruments, and had his trunk checked for transmission by train to his destination. The trunk was heavier than was allowed for free baggage, and appellee was required to pay 60 cents extra as overweight charges. The trunk contained about \$1,700 worth of dental instruments. These goods were used not only as samples, but were sold from the stock of appellee and delivered by him to the customers. The goods belonged to appellee's employer. While the trunk was in appellant's possession it got wet and the instruments were damaged by rust, claimed to the extent of \$500. In this action to recover said damage a verdict was rendered in favor of plaintiff for the amount claimed. On appeal appellant insists that the court erred to the prejudice of appellant in assuming as a matter of law that the common carrier is liable as carrier for all damage to the contents of the trunks shipped as baggage without reference to the nature or ownership of such contents, and regardless of the carrier's knowledge or notice or agreement as to such contents. Held—That said instruction was prejudicial. While section 783, Kentucky Statutes, relative to the responsibility of common carriers for baggage of passengers, does not define what shall be considered as baggage, the rules of the common law will apply. Ordinarily only the wearing apparel and similar kindred articles are included in the personal baggage of the traveler, and the carrier knows the probable extent of his liability in the event of the loss or damage of the baggage, and may reasonably be presumed to have regulated his charges and provided means for its safe keeping proportioned to that liability. The common law definition of baggage forms a part of the carrier's undertaking as though expressly stated and assented to at the time of the passage. The parties may of course vary this contract by agreement. If the carrier elects to receive and transport that as baggage which in fact is freight, and which it would have the right to refuse as baggage, on its passenger trains, it ought to be liable therefor upon the same terms as if it were baggage. But this is not because of its common law liability therefor, but because it has agreed by special contract for a consideration to be so bound. The elements of such a contract are sufficiently satisfied by an acceptance of the package or trunk by the carrier for transportation as baggage with knowledge of its contents. But notice in terms of the contents of the trunks is not required. It is sufficient if, from all the circumstances of the case, the jury may reasonably infer that the carrier's agent, charged with the duty of receiving and checking baggage over its lines, knew of the extraordinary contents of the package when he received it and checked it as baggage for the passenger, that it knew that they contained merchandise or other articles than the traveler's wearing apparel.

2. Ownership of baggage—Parties to actions—Although the wholesale dealers owned the instruments that were injured, the drummer had such an interest in same as entitled him to maintain this action for damages.

N. P. Moss, Pirtle & Trabue and J. M. Dickinson for appellant.

J. W. Bennett for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee was a traveling salesman, or drummer, for certain wholesale dealers in dental instruments. He bought a ticket and took passage on one of appellant's trains, and had his trunk checked for transmission by that train to his point of destination. The trunk was heavier than was allowed as free baggage to one passenger, and appellee was required and did pay 60 cents extra as overweight charges. The trunk contained about \$1,700 worth of dental goods, steel instruments presumably. These goods were used not only as samples by which other goods of a like quality were sold for future shipment, but they were sold from the stock in custody of appellee, and then delivered by him to the customers if they so desired. The goods belonged to appellee's employers, the wholesalers. While the trunk was in appellant's possession it got wet, and the instruments were damaged by rust, it is claimed, to the extent of about \$500.

There was evidence for appellee that when the trunk was being loaded on the train the person handling it (whether a porter, roustabout or baggage master, or whether connected with the railroad, he did not know), remarked as to its extraordinary weight, and that appellee replied that it contained dental instruments. For appellant its baggagemaster at the station at which the trunk was checked and shipped testified that he was in sole charge of the checking of baggage at that station, and that he was not apprised of the nature of the contents of the trunk; but that it was customary with that road to ship drummers' sample trunks as baggage. The cause of the damage, and the extent of it, do not seem to be controverted by the proof.

On this state of case the court gave the jury the following instructions:

"No. 1. The court instructs the jury that if they believe from the evidence the defendant, while the plaintiff's trunks were in its custody, left them exposed to rain, and that said trunks or contents became wet, and thereby damaged, they should find for the plaintiffs the actual damages which said trunks or merchandise therein sustained by reason of such injury, not exceeding the sum set out therefor in the petition.

"No. 2. If the jury believe from the evidence the plaintiff's trunks while in the custody and care of the defendant was bursted or torn in handling, through the negligence or carelessness of the defendant's agents or servants, and that it was thereby damaged, they will find for the plaintiffs such damages as they sustained for this injury to their trunks, not exceeding the sum claimed therefor in the petition."

Appellant asked for this instruction, which was refused: "The court instructs the jury that if they believe from the evidence that the trunks shipped by plaintiff contained merchandise which he was carrying for sale, and said merchandise was checked as baggage on the passenger cars by de-

fendant, and at the time of said shipment plaintiff failed to make known to the agent of defendant who checked said baggage, or other agent authorized to ship and have said baggage checked and shipped on its passenger trains, the law is for the defendant, and the jury should so find."

From a verdict and judgment in favor of appellee for \$531.50 damages this appeal is prosecuted. The first instruction given to the jury assumes as a matter of law that the common carrier is accountable under its liability as carrier for all damage to the contents of trunks shipped as baggage, without reference to the nature or ownership of such contents and regardless of the carrier's knowledge or notice or agreement as to such contents. The second instruction is not questioned on this appeal. The only legislation in this State on the subject of baggage is that found in section 788, Kentucky Statutes, as follows: "Every company shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer, or be offered, for transportation, at places established by the corporation for receiving and discharging passengers and freight, and shall, when requested, check every parcel of baggage taken for transportation, if there is a handle, loop or fixture, so that the same can be attached, and shall give to the person delivering such baggage a check for the same."

We are thus left to determine what is meant by the term "baggage" by reference to the common law. A very considerable number of adjudications have been rendered on this subject, as might naturally be expected. From them it may be stated that the word "baggage," as used in the connection under discussion, refers only to what the passenger takes with him for his own personal use and convenience, and which he has committed to the care of the carrier. Generally the articles allowed as baggage to accompany the passenger, and which the carrier is bound to transmit as an insurer, are the personal apparel of the passenger, but may include a number of other articles, which may not unreasonably be designed for his pleasure, business or convenience upon the journey which he is prosecuting.

"In a general sense, it may be said to include such articles as it is usual for persons traveling to take with them for their pleasure, convenience and comfort, according to the habits and wants of the class to which they belong." (Oakes v. N. P. R. Co., 20 Oregon, 393.)

Story on Bailments, section 499, thus states it: "By baggage we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use; and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as sale or the like." (Boman v. Maxwell, 9 Humph., Tenn., 624; Macrow v. Great Western R. R. Co., L. R., 6 Q. B., 612.)

Rorer on Railroads, 988, states it this way: "It is difficult to enumerate the articles that may be included, in each particular case, in the term baggage. This depends much on the condition, habits and circumstances of life of the passenger. Ordinarily it includes a trunk or trunks, with the necessary wearing apparel for both comfort and dress suitable to the condition in life of the person; \* \* \* but not money in larger amount than for necessary expenses, nor articles of merchandise or of virtu." \* \* \*

As ordinarily only the wearing apparel and similar kindred articles are included in the personal baggage of the traveler, the carrier knows the probable extent of his liability in the event of the loss or damage of the baggage, and may reasonably be presumed to have regulated his charges and provided means for its safe keeping proportioned to that liability. If, on the other hand, the passenger might include in his parcel valuable jewels not properly classed as baggage, or plate, or merchandise, bonds or money, of many thousands of dollars in value, and the carrier made liable for its loss without knowledge or notice of its extraordinary value, he is compelled to assume a responsibility for which he has not been paid in fact, and without an opportunity to provide that extraordinary care and attention which by common prudence would be due to such a valuable charge. Baggage, to a certain reasonable limit, and belonging to a passenger, is carried free, as an incident of the passenger's contract for passage. The common law definition of baggage forms a part of the carrier's undertaking as though expressly stated and assented to at the time of the passage. The parties may of course vary this contract by agreement. If the carrier elects to receive and transport that as baggage which in fact is freight, and which it would have the right to refuse to take as baggage on its passenger trains, it ought to be liable therefor upon the same terms as if it were baggage. But this is not because of its common law liability therefor, but because it has agreed by special contract for a consideration to be so bound. The elements of such a contract are sufficiently satisfied by an acceptance of the package or trunk by the carrier, for transportation as baggage, knowledge of its contents. (Hutchinson on Carriers, section 685, 1st edition; Texas, &c., R. R. Co. v. Capps, 2 Tex. App., Civ. Cas., section 83; Jacobs v. Tutt, 33 Fed. Rep., 412; Perry v. Humphreys, 33 Fed. Rep., 417; Humphreys v. Perry, 148 U. S., 827.)

The fact that the passenger paid for the extra weight of the trunk does not vary the rule, for if the trunk or trunks contained enough of those articles clearly entitled to be classed as personal baggage of the passenger as to be over the weight allowed, and reasonably allowable, to each passenger for free carriage, he would have to pay a just compensation for its being carried. This fact alone is not notice that the package contains anything beside the usual articles entitled to be taken as personal baggage, the nature and probable value of which are generally well known. The carrier might refuse to carry on its passenger train articles not properly baggage. It could not be required to carry freight on passenger trains. Delivering to the carrier a trunk or closed package, ostensibly ordinary baggage, without a statement as to its contents, is equivalent to a representation by the passenger that it belongs to him, and contains only such articles as are properly classed as personal baggage. (Haines v. Chicago, &c., Ry., 29 Minn., 160; Michigan Central R. R. Co. v. Carrow, 73 Ill., 348.) If it contains other articles, and the carrier is not informed of the fact, it is a deception upon the carrier as to such articles, and as to such they are not covered by the carrier's contract. (Story on Bailments, 9th edition, section 565.) In the event of loss of or damage to such articles while in the carrier's possession, without notice of their character when received and checked as baggage, or without a special agreement with reference thereto, it is not liable, except as in case of a bailee

without hire. But notice in terms of the contents of the trunks is not required. It is sufficient if, from all the circumstances of the case, the jury may reasonably infer that the carrier's agent charged with the duty of receiving and checking baggage over its lines knew of the extraordinary contents of the package when he received it and checked it as baggage for the passenger, that is, knew that they contained merchandise or other articles than the traveler's wearing apparel. (*Sloman v. Great Western Ry. Co.*, 67 N. Y., 208; *Brown v. Camden, &c., Ry. Co.*, 83 Penn St., 816.)

While it is true that a carrier can not be made liable for the goods of another than the passenger, or a member of his family traveling with him, which may be included in the passenger's baggage, yet the facts in this case tend to show that although the goods belonged to the wholesale merchants, by an agreement between them and appellee he had such an interest in them, by reason of his being responsible to them for their loss or damage, and required to replace them in such event, that they may fairly be treated as his for the purposes of this action. The damage fell upon him; they were being carried for him; he was the passenger. We, therefore, conclude that the court erred in assuming appellant's liability for the damage to the dental instruments shipped as baggage.

The judgment is reversed and cause remanded for a new trial under proceedings consistent herewith.

Whole court sitting.

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PARSONS v. WELLER, &c.

(Filed February 25, 1908—Not to be reported.)

Injunction—Office and officer—Appellant instituted this action against appellees to enjoin them from molesting or depriving him of his office of chief engineer of the city of Louisville, alleging that he was entitled to hold said office for four years from the 10th day of December, 1901, and that on said day appellees were nominated by the mayor and confirmed by the board of aldermen to be members of the board of public works for a period of four years after their qualification, which would be on the 17th day of December, 1901, and that they were giving it out, reporting and claiming that when they shall be qualified as members of said board that they will remove appellant from his said office and appoint another in his place. Held—That said injunction was properly refused. When appellant alleges that they were giving it out and claiming that they would, when qualified as members of said board, remove appellant from office, they were simply private citizens, and no official responsibility rested on them. This suit is against three private individuals, and appellant expects these individuals to become members of said board, and when they do become such members they will remove appellant from an office he holds and appoint another person. Such an action can not be upheld on either principle or reason. The action was premature.

O'Neal & O'Neal and Lane & Harrison for appellant.

Kohn, Baird & Spindle and Stanley E. Sloss for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Nunn.

The appellant instituted an action in the Jefferson Circuit Court, Com-

mon Pleas division, against appellees, John H. Weller, John Vreeland and John Phelps, to enjoin them from molesting or depriving him of his office of chief engineer of the city of Louisville.

After setting forth in his petition facts showing the importance of the office to him, as well as to the city, and his right to hold the office for the term of four years from the 10th day of December, 1901, and that it was to his interest and to the interest of the public that he be permitted to hold said office without being disturbed or interfered with in the performance of his duties or the exercise of his official powers, the following allegations are made: "This plaintiff says that the defendants hereto, John H. Weller, John Vreeland and John Phelps, were each, at a meeting of the board of aldermen of the city of Louisville, held at its chamber on the evening of the 10th day of December, 1901, nominated by the mayor, and their nomination consented to by the board of aldermen, to be members of the board of public works of the city of Louisville for a period of four years after their qualification as members of such board; that said defendants have each consented to said appointment, and will, as this plaintiff is informed and charges to be true, qualify each as a member of said board on the evening of the 17th day of December, 1901, and thereby become members of and constitute a board of public works for the city of Louisville. This plaintiff says that said defendants, John H. Weller, John Vreeland and John Phelps, are giving out, reporting and claiming that when qualified as members of, and as soon as they constitute the board of public works, they will possess, and be invested with full right and power, and that they will remove this plaintiff from the office of chief engineer of the city of Louisville, and will appoint another one in the place and stead of this plaintiff, and put such appointee so made by them in possession of said office and terminate the right of this plaintiff to said office and to its emoluments, salary, etc."

It is further alleged "that the claim of said defendants casts a cloud upon his title to said office, and that his threatened removal from said office impairs his efficiency in the discharge of his public duties, and creates uncertainty and doubt in the mind of the public as to who is entitled and has the right to said office." The petition also states that on the 10th day of December, 1901, when the petition was filed, T. L. Jefferson, John Weller and T. P. Satterwhite were the duly elected, qualified and acting members of and constituted the board of public works in and for the city of Louisville. Appellant gave notice to the appellees that he would apply to the judge of said court on December 23, 1901, for said order of injunction. On that day appellees filed a demurrer to the petition, "because the court has no jurisdiction of the subject-matter, and has no jurisdiction to grant the relief asked; and because the petition does not state a cause of action."

The lower court dismissed the petition, and appellant has appealed to this court. It appears that at the time this action was instituted the appellees had only been named by the mayor and board of aldermen to be members of the board of public works, and that appellees had merely consented to accept said positions, and would at a future date, December 17, 1901, qualify as such, and thereby become members of the board of public works. At the time when it is claimed appellees were "giving it out, reporting and claiming that when they did qualify as members" they would remove appellant



from his office they were simply private citizens, and no official responsibility resting upon them.

Appellant was premature in bringing this action. If, as stated in his petition, he was legally entitled to hold his office, he should have waited until appellees had accepted their offices and been qualified as such. In the meantime appellees may have reconsidered their "consent" to accept their offices, or perhaps they would have reconsidered their "threats" to remove appellant. At all events, it is fair to presume that after appellees had been qualified as and become the board of public works, they would not violate their oath of office by removing the appellant from his office if he was legally entitled to hold it. It appears that this suit is against three private individuals, and that appellant expects these individuals to become members of said board, and that when they do become such members they will remove appellant from an office he holds and appoint another person. This court is of opinion that such an action can not be upheld on either principle or reason.

Appellant refers to the cases of *Todd, Mayor, &c. v. Dunlap, &c.*, 99 Ky., 449, and *Poyntz, &c. v. Shackelford, &c.*, 21 Ky. Law Rep., 1328, as sustaining his position. The cases are unlike the case before us. The Todd case was where the members of the board of public safety and the board of public works, who were executive boards of the government of the city of Louisville and who were then in office, brought actions against Mayor Todd and the board of aldermen, who were then in office and had the responsibility of their position resting upon them, and were acting under the solemnity of their oaths of office; and under the circumstances it was alleged and proven that they were about to unlawfully remove the plaintiffs from their positions. The issue in that case was the construction of a statute. In the case of *Poyntz, &c. v. Shackelford, &c.*, the facts were about as follows: When Pryor and Ellis resigned their positions as election commissioners Poyntz, claiming the right to do so under the statute creating the board of election commissioners, appointed J. A. Fulton and M. K. Yontz as members of said board, and Governor Taylor, claiming that act to be unconstitutional, and that it was his duty under the law to appoint persons to fill said board, named W. H. Mackoy and A. M. J. Cochran as members of said board. To test the legality of the appointments said Poyntz, Fulton and Yontz filed their action against Shackelford, whose duty it was under the law to administer the oath to Mackoy and Cochran, and Mackoy and Cochran thus making the three defendants, and alleging that Mackoy and Cochran were claiming the right to said offices and were threatening to qualify, and were interfering, and had interfered, with plaintiffs' free exercise and duties of said office. In this case the governor had appointed persons, Mackoy and Cochran, to take the places of Fulton and Yontz on said board of election commissioners. To make the case like this one before us, Shackelford and others should have brought suit against Governor Taylor and enjoined him from appointing any person as a member of said board before he qualified as governor, alleging that he was "giving it out," reporting and claiming that when he did qualify as governor that he would remove Fulton and Yontz, and place others on said board.

Appellants' counsel claim that no wrong or injury could result by granting the injunction, as the bond to be given by him would indemnify the

defendants against loss. In this case there could not be any loss of any consequence that he would be liable for on his bond. These defendants did not want his office; they were not asking for it; they would not, by the injunction, have sustained any loss of salary, but if defendants had qualified as members of said board and made an order removing appellant, and named some person to take his place, and then appellant had sued that person, and these defendants had obtained an injunction against and preventing them from interfering with and removing him from said position, and if that action had resulted against appellant and in favor of the person so appointed in his place, then that person could have obtained remuneration for his loss by action on the bond. An injunction is a harsh remedy, and should not be granted except in cases of the most urgent necessity.

The judgment of the lower court in dismissing the petition was right, and it is, therefore, affirmed.

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FOX v. WILLIS' EX'TX.

(Filed February 25, 1903.)

Attorney's fees—Contract prohibited by law—Money paid for use of another—In 1890 appellant and W. were employed by the board of sinking fund commissioners to prosecute a claim against the United States government for revenue tax wrongfully collected from the city of Louisville, and it was agreed that they should receive for their fees a sum equal to half the amount they should recover. Appellant at that time had like contracts with the Commonwealth of Kentucky and Simpson and Logan counties, except as to the amount of fees he should receive. It was agreed that W. should be employed to assist in these cases, and the fees should be equally divided. The claims were prosecuted with success and sums received at different times by their clients, and the fees paid and divided. Appellant and W. made a settlement and agreement on October 20, 1893, which was in lieu of all other settlements, by which it was agreed that of the fees to be thereafter collected appellant should receive \$7,250 and W. \$11,957.05, and that W. was to pay the fee due Judge Hart, of Washington. In 1893 W. was appointed minister to Hawaii, where he remained until his death in 1897. After this agreement was made the attorneys, after considerable litigation, succeeded in having paid to the commissioners of the sinking fund of the city of Louisville the sum of \$19,017.05. Appellant sued the commissioners for one-half thereof, claiming it as his fee. The executrix of W. resisted this claim and claimed that she was entitled to an equal division of said fee in right of her testator. Appellant resists any claim on behalf of the executrix, contending that under section 5498, Revised Statutes, W. being a minister to Hawaii, was prohibited by law from receiving any fee for the prosecution of any claim against the government. Held—The contract is in fact prohibited by section 5498 of Revised Statutes of the United States, though the statute only inflicts a penalty, because the penalty implies a prohibition. If W., while an officer of the United States, as attorney had prosecuted any claim against the United States, or assisted in the prosecution of such claim, he was liable to a fine of not more than \$5,000, or imprisonment for not more than one year, or both, and the penalty for doing the act being imposed, the act itself was prohibited by law. The executrix is not entitled to recover any part of the fund as a fee for the prosecution of the claim, but she is entitled to be paid for moneys advanced for the benefit of appellant in the prosecution of

the claim in accordance with their settlement, which amounts, with interest, to \$5,244.76.

Pirtle & Trabue, Hazelrigg & Chenault and J. T. O'Neal for appellant.

J. L. Cleminons for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Nunn.

The substance of the facts of this case are that in the year 1890 the board of sinking fund commissioners of the city of Louisville, Ky., by resolution of the board, renewed the contract with F. T. Fox and A. S. Willis that it had, in 1874, made with F. T. Fox and S. H. Wires to recover from the United States government internal revenue tax wrongfully collected from the city, Wires having died.

By the contract Fox and Willis were to receive a sum equal to one-half of any sum they might recover, they to pay all costs and their expenses. Fox had other like contracts for the recovery of claims against the government, made with the State of Kentucky and Logan and Simpson counties (but they were only to receive on claims of counties a fee equal to 20 per cent. of amount collected), in which contracts he procured the services of A. S. Willis, and agreed with him that they would divide the fees equally after deducting expenses. Under this arrangement they prosecuted the claims, and on the 16th day of March, 1891, they collected from the government \$42,514.03 on the Louisville claim. One-half of this sum, their fee, was divided between them on the basis of their agreement, Willis receiving the sum of \$11,257 and Fox \$10,000. On the 6th of March, 1894, they received further on their Louisville claim the sum of \$13,725.17, \$9,538.54 on their Logan county claim and \$1,296.02 on their Simpson county claim. Their fees on these collections were adjusted and settled between Fox and J. L. Clemons as agent and attorney for Willis, who was then in Hawaii. Fox received \$3,435.58 and Willis \$5,658. This settlement was made on the 6th day of March, 1894, and the basis for same was a settlement made by Fox and Willis on the 20th of October, 1893. The agreement is in words and figures, to wit:

"Louisville, Ky., October 20, 1893.

"It is agreed by and between Albert S. Willis and F. T. Fox that in fees to be received from the city of Louisville, Simpson county and Logan county, Kentucky, and the State of Kentucky, said Fox is to receive \$7,250 and said Willis \$11,957.05; but subject to this addition, that if said Fox can get an allowance for expenses from Simpson county, the same is to be equally divided between them; and if the full claim for the State of Kentucky, then the additional fee for same is to be equally divided between them, the additional sum for said State being supposed to be \$2,117.91. Said Willis is to pay the fee due Judge Hart, of Washington.

"The above settlement is based on the payment of the claims aforementioned, and is to be prorated if any of the claims is rejected. This settlement is in lieu of all others.

"F. T. FOX,

"ALBERT S. WILLIS.

"In the event said Fox can get from Logan county any allowance over the

20 per cent. now agreed to be paid by said company, the same is to be equally divided between them.

"F. T. FOX,

"ABLER S. WILLIS.

"October 20, 1893."

When these last sums were paid by the government it, by its officials, refused to pay the city of Louisville about \$17,000, which had been allowed when the last-mentioned claims were allowed giving as a reason that it had, by some error or mistake, when it paid the \$42,514, paid \$17,000 too much, and in March, 1894, an action was brought to recover this sum. The board of sinking fund commissioners were successful in the lower court, and the government appealed to the Supreme Court and lost again, and on the 30th of July, 1898, paid the sum, with its interest, to wit, \$19,017.05, to the board of sinking fund commissioners of Louisville, Ky., and on the 5th day of October, 1898, appellant, F. T. Fox, sued the commissioners for one-half thereof, claiming that he was entitled to it in his own right. The commissioners answered and admitted that they held the money, but that Willis' executrix was claiming a part of same, as a fee for A. S. Willis, under the resolution of the board employing Fox and Willis in the year 1890, and also stating that they, as such board, had been summoned as garnishees in actions by the Louisville Banking Co. v. Fox and G. W. McCready v. Fox, and that the Louisville Trust Co. had given them notice of a written assignment by Fox to it of his fee in said fund; and asked to be allowed to pay the fund in court and for the court to adjudge to whom the fund belonged, and under order of court said fund of \$9,508.57 was paid in court.

Mrs. Willis, as executrix of A. S. Willis, answered and controverted plaintiff's statement that he was entitled to the whole fee, and alleged that she, as such executrix, was entitled to a part of the fee, to be divided in the proportions and under the contract of Fox and Willis made October 20, 1893; and also alleging that Willis and she, as executrix, had advanced to Alphonso Hart his fee of \$1,500 to prosecute this last action to a judgment, and had paid \$395, costs and claims for printing in and about the proper prosecution of the claims, and asked the court to adjudge to her from the fund a sufficient amount to pay same. The appellant replied to appellee's answer and denied her claim, and stated that A. S. Willis, in the fall of 1893, was appointed by the president of the United States a minister to Hawaii, and that he accepted this appointment; that under section 5498 of the Statutes of the United States Willis was prohibited from prosecuting any claim against the government while holding such office, and that he held same until his death, which occurred in the year 1897; and that, also, he prosecuted the claim in his own name and right, with the assistance of Hart, and that he had no knowledge or information that Willis took any part in the prosecution of the claim, or that he paid any costs or Hart's attorney fee, but says that he himself did not pay Hart nor any costs except \$40. The lower court adjudged that Willis' executrix take \$8,924.85 of the fund, to which judgment appellant excepted and the case is here on appeal.

The first, or main, question to be determined is, can the executrix of A. S. Willis recover any part of the \$9,508 as fee for the prosecution of the action to recover a claim against the United States after Willis became minister to Hawaii?

Section 5498, United States Revised Statutes, is as follows: "Every officer of the United States, or any person holding any place of trust or profit, or discharging any official function under or in connection with any executive department of the government of the United States, or under the senate or house of representatives of the United States, who acts as an agent or attorney for prosecuting any claim against the United States, or in any manner or by any means, otherwise than in the discharge of his proper official duties, aids or assists in the prosecution or support of any such claim, or receives any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall pay a fine of not more than \$5,000, or suffer imprisonment not more than one year, or both."

In 2d edition of American and English Encyclopedia of Law, page 933, this language is found: "That principle of law which holds that no one can lawfully contract to do that which has a tendency to be injurious to the public or against public good is well settled, and may be termed the policy of the law, and courts have not hesitated to declare illegal and unenforceable contracts which they have considered against the public policy."

Again, on page 939, it is said: "In some early cases a distinction was taken in reference to the validity and enforcement of contracts between acts mala prohibita and acts mala in se; but in the words of an eminent jurist, this 'has long since been exploded.' It was not founded upon any sound principle, for it is equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interest of the State. When the statute expressly provides that a violation thereof shall be a misdemeanor, it would seem clear that it was the intention of the legislature to render illegal contracts violating the statute." The same principles are stated in the case of *Steele v. Curle*, 4 Dana, 384.

In the case of *Lindsay v. Rutherford*, 17 B. M., 247, the court said: "A contract is void if prohibited by statute, though the statute only inflicts a penalty, because such a penalty implies a prohibition. If the contract be illegal, it makes no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue or any other object. The question to be considered is, does the statute prohibit the contract attempted to be enforced."

In case of *Ex parte Curtis*, 106 U. S., 371, Chief Justice Waite reviewed the legislation of congress on the subject of the disability of officers of the United States in matters of claims against the United States from the beginning of the government, and referred to section 5498 of the statutes, as follows: "Which prohibits every officer of the United States, or person holding any place of trust, profit, or discharging any official function under or in connection with any executive department of the government, from acting as an agent or attorney for the prosecution of any claim against the United States."

It is admitted that A. S. Willis held the position of minister to Hawaii

from this government from the last of the year 1893 until his death in 1897, and his case comes within the principles above referred to.

The contract is in fact prohibited by section 5498 of the Revised Statutes of the United States, though the statute only inflicts a penalty, because the penalty implies a prohibition. If Mr. Willis, while an officer of the United States, as attorney, had prosecuted any claim against the United States, or assisted in the prosecution of such claim, he was liable to a fine of not more than \$5,000 or imprisonment for not more than one year, or both, and the penalty for doing the act being imposed, the act itself was prohibited by law.

The court is of the opinion that his executrix is not entitled to recover any part of the fund as a fee for the prosecution of the claim. But we are of the opinion that, out of said fund, Willis' estate should be reimbursed for the money advanced for the benefit of appellant in the prosecution of the claim and for the amount due Willis from appellant as shown by their settlement of October 20, 1893, \$4,707.04 less the amount paid him as on their settlement in March, 1894, \$2,222.42, with 6 per cent. interest to the date the sinking fund commissioners paid the fund into court, to wit, October 4, 1898.

The contract of Fox and Willis of date of October 20, 1893, and the settlement of March, 1894, show that at the last date, and after the completion of the settlement, appellant was indebted to Willis in the sum of \$2,484.62, and the proof shows that Willis paid Hart for appellant on the 4th of October, 1894, the sum of \$500. The record shows parties agree that statement in contract of 20th of October, 1893, "that Willis is to pay Hart," had no reference to \$1,500 paid Hart, but referred to other and previous fee, and paid for him for printing a brief, August 13, 1894, the sum of \$60, and March 12, 1896, \$120, and November 1, 1895, J. P. Morton account, \$180, and costs paid for appellant December 11, 1897, by Willis' executrix, \$25, and paid Judge Hart balance of fee on August 20, 1898, \$1,000, making, with interest, the sum of \$5,244.76, the amount which the court should have adjudged to Willis' executrix. The appellant should not complain at the amount of the fee to Hart. A fee for the collection of a claim of \$12,017.05 by suit, when the claim was litigated for a fee of \$500 certain and \$1,000 additional in case of success, seem to us a not unreasonable fee, and we are satisfied that the contract made with Judge Hart by Clemons on such terms proved to be very beneficial to appellant.

For the above reasons the case is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting.

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TRADEWATER COAL CO. v. JOHNSON.

(Filed February 26, 1903—Not to be reported.)

Master and servant—Negligence—Fellow servant—Appellee was unexperienced in mining and was employed in appellant's mines as an assistant to the machinery man, and while removing the dirt preparatory to drilling for a blast, some coal which had been loosened by a former explosion fell and crushed appellant's leg, for which he recovered damages in this action. On appeal it is insisted that appellant and the machinery man were fellow ser-

vants, and appellant can not recover unless gross negligence is shown. Held—That appellant was under obligation to furnish appellee a safe place to work, and its failure to do so, or to notify appellee of his danger, constitutes such negligence as to subject it to damages, and it is not necessary to show gross negligence to entitle appellee to recover. There is no question of fellow servant in the case. Whoever had charge of the work represented the master.

H. X. Morton for appellant.

Drury & Drury, B. F. Saunders and H. N. Davis for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Judge Paynter.

Whilst in the employ of the appellant as laborer the appellee was injured in a coal mine; had his leg broken and crushed. He was inexperienced, having worked only about two hours in the mine when the accident occurred. One Bryant was in the employ of the appellant; was what is commonly called a "machine man;" appellee was his helper, commonly called his "hostler." The mines are divided into rooms; the machine man and his hostler enter a room; the machine man so manipulates the machine as to make an excavation under the vein of coal for a distance of five or six feet. While thus boring under the vein dirt is brought out, and it is the business of the hostler to remove it. After this is done the shooter or driller enters the room, and drills holes into the face of the coal near the top of the vein to the depth of the undermining or excavation which has been made by the machine man. The driller then places an explosive in the holes made by him and touches it off, which results in breaking the coal from the vein between the holes and undermining. This is followed by the loaders, whose business it is to remove any loose coal hanging to the vein resulting from the shots.

In the room where the injury took place the driller had bored the holes eighteen inches further back than the undermining had been extended, so when the explosion took place some coal was left hanging on it partially detached from the vein. The loaders made this discovery, and when Bryant entered the mine they told him of its condition; notwithstanding this, he proceeded to undermine it and, after working on it awhile, the loose coal gave way, causing the injury stated. The appellee had no knowledge of coal mining, and his inexperience did not lead him to discover the condition of the coal.

The uncontradicted testimony is that the room was in an unsafe and dangerous condition, such a condition that Bryant should not have proceeded with the work until the loose coal was removed. There being no conflict in the evidence, and it being of a character that reasonable men could not differ as to the conclusions or inferences to be drawn therefrom, the court can, as a matter of law, say that the injury in this case was the result of negligence. If the master is responsible for the negligence which resulted in the injury, then it necessarily follows that the jury did not err in finding for the appellee. It is urged that Bryant and the loaders were fellow servants of the appellee, and, therefore, there can be no recovery; and, furthermore, if they were not the fellow servants of the appellee, but superior in

authority to the appellee, then the court failed to submit to the jury the question of gross negligence.

It is the duty of the master to furnish his servant a reasonably safe place in which to perform the work assigned to him, and the servant has the right to presume that the master has performed this duty, and if an injury results from failure to perform it, the master is liable, unless a reasonably prudent and intelligent man, under like circumstances, would have been able to discern the defects and failed to do so, thereby contributing to his injury. It is the duty of the appellant to have the rooms in the mines inspected, and see that they are in reasonably safe condition for the servants to work in. (Ashland Coal and Iron Ry. Co. v. Wallace, 101 Ky., 626.) This was a duty that the master could not rid himself of by casting it upon a servant in his employ, as that was a duty which the master owed. If he intrusted the performance of the duty to one who was negligent, it was the negligence of the master. In contemplation of law in such cases, the acts of the servant were those of the master. There is no question of fellow servant in this case, because the servants guilty of the negligence represented the master. This doctrine was recognized in the case of Van Dyke v. M., N. O. & C. Packet Co., 24 Ky. Law Rep., 1288.

As the injury in this case, in contemplation of law, was the result of the master's failure to furnish a safe place for the servants to work, it was not necessary to show gross negligence to entitle the appellees to recover. There was no error in the instruction prejudicial to the rights of the appellant.

Judgment is affirmed.

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LOUISVILLE & NASHVILLE R. R. CO. v. COMMONWEALTH.

(Filed February 11, 1908.)

The word "exoneration" is not used in section 218 of the Constitution. It appears in the statute only. Exoneration is, therefore, only provided for in the statute. The carrier for making a charge against the prohibition in section 218 of the Constitution is guilty of its violation. Whether the railroad commission has been called upon to relieve the carrier from its operation and refused to do so, or has never been called upon to determine whether or not it should be relieved from its operation. When the railroad commission refuses to relieve the carrier from the operation of said section of the Constitution the matter stands as if no action had been taken whatever.

W. C. McChord, E. W. Hines, B. D. Warfield and T. B. Harrison, Jr., for appellant.

H. W. Rives for appellee.

Appeal from Marion Circuit Court.

The following is to be added to Judge Paynter's concurring opinion:

To preserve the unity of history, I desire to add the following to my concurring opinion:

In the Illinois Central case the court had under consideration an indictment which described the offense in language as follows: "The said Illinois Central R. R. Co., a railroad corporation owning and operating, now and at the time hereinafter mentioned, a line of railroad extending from Dean-



field, Ky., through Stephensburg, Ky., and Hardin county, Ky., to Louisville, Ky., did on the — day of October, 1898, and within twelve months before the finding of this indictment, in the said county of Hardin, unlawfully charge and receive of W. N. Oliver, for the transportation of a car load of coal over said railroad from said Deanfield to said Stephensburg, the sum of \$35.40, being at the rate of 6 cents per hundred pounds, when for the transportation of a similar car load of coal of like kind from said Deanfield to said Louisville under substantially similar circumstances and conditions, over the same line, in the same direction, said Illinois Central R. R. Co. did at said time charge and receive of various persons less compensation than 6 cents per hundred pounds, viz., 3 cents per hundred pounds, the distance from said Deanfield to said Stephensburg being shorter than and included in the distance from said Deanfield to said Louisville, and defendant at said time not having been authorized by the railroad commission of this Commonwealth to charge less for the transportation of coal for said longer than for said shorter distance."

The charge in the indictment was for charging W. H. Oliver more for the short than other persons were charged for the long haul, etc. It was a single shipment under consideration.

The word "exoneration" is not used in section 218 of the Constitution. It appears in the statute only. Exoneration is, therefore, only provided for in the statute. Exoneration is "the state of being disburdened or freed from a charge;" it is something that is supposed to take place after a charge has been made.

The carrier for making a charge against the prohibition in section 218 of the Constitution is guilty of its violation whether the railroad commission has been called upon to relieve the carrier from its operation and refused to do so, or has never been called upon to determine whether or not it should be relieved from its operation. When the railroad commission refuses to relieve the carrier from the operation of section 218 of the Constitution, the matter stands as if no action had been taken whatever.

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WREN v. BOSKE, SHERIFF.

(Filed February 26, 1903—Not to be reported.)

Taxation of personal property—Appellant resides in Scott county and owns personal property in Kenton county, which he assesses in the county of his residence. The same property has been assessed in Kenton county, and the sheriff of that county is now seeking to subject same to the payment of taxes. Held—That it is reasonably clear that the legislature contemplated that personal property was to be given in by the taxpayers in the county of their residence. The personal property situate in Kenton county is only taxable in the county of the owner's residence.

J. B. Finnell, J. F. Askew, T. L. Edelen and D. A. Glenn for appellant.

Robt. C. Simmons for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

Appellee, S. T. Wren, resides in Scott county. He has some horses, mules, cattle and sheep on a farm in Kenton county, and has had them there for about eight years. This stock he gave in to the assessor with the rest of his personal property in the county of Scott, where he resided; but notwithstanding this, the stock was assessed for taxation in Kenton county, and he instituted this action to restrain the sheriff of Kenton county from selling the sheep for taxes. It is conceded that the stock had obtained a situs in Kenton county, and if personal property in this State which has obtained a situs in a county other than that of the owner's residence may be assessed in that county, although the owner gives it in for taxation in the county of his residence, then the judgment of the circuit court dismissing the plaintiff's petition is right.

We are referred to a number of decisions holding that personal property of nonresidents of the State, which has obtained a situs in the State, may, if the legislature so provides, be taxed in that State, and the same rule no doubt would apply between the different counties of the same State if the legislature so provided. But the question after all is one of legislative intent. By our statute land shall be listed in the county in which it is located. (Kentucky Statutes, section 4025.) The assessor calls on the taxpayers and takes their lists. (Kentucky Statutes, section 4044.) Personal property of every kind must be stated and valued separately from real estate. (Section 4050.) All taxable estate shall be assessed as of September 15, and the person owning or possessing it on that day shall list it with the assessor. (Section 4053.) The assessor, before returning any one as delinquent, must apply at his residence. (Section 4065.) There is no provision in the statute anywhere for the assessment of personal property in the county in which it is situated, although there are such provisions as to the assessment of land, and, taking the whole statute, together we think it reasonably clear that the legislature contemplated that personal property was to be given in by the taxpayers in the county of their residence. In *Jones v. Commonwealth*, 53 Ky., 2, this court said: "By the general law the owners of property subject to taxation are called on and give in their lists in the county in which they reside, though the property may be in other counties."

Again, in *Gates v. Barrett*, 79 Ky., 296, the court said: "In general movable property is to be assessed for taxation at the place of the owner's residence." Also *Boske, Sheriff v. Security Trust and Safety Vault Co.*, 22 Ky. Law Rep., 181; *Covington v. Wayne*, 22 Ky. Law Rep., 826.)

We, therefore, conclude that this personal property was properly listed by the owner in the county of his residence, and having been taxed there was not subject to taxation in the county of Kenton, under the statute above referred to.

Judgment reversed and cause remanded, with directions to perpetuate the injunction.

DUPOYSTER, &c. v. FORT JEFFERSON IMPROVEMENT CO.

(Filed February 26, 1903—Not to be reported.)

Receiver—Joint tenants—The only question involved on this appeal is the right of a holder of a lien on the undivided three-fifths' interest in a tract of land to have the timber land placed in the hands of a receiver on showing that the owners of the five-eighths' interest are cutting and removing valuable timber from same. Held—That the lower court properly directed its receiver to take possession of the timber land as appellant, as holder of a lien on three-fifths of said land, had such an interest in the land as authorized him to have a receiver appointed under section 298, Civil Code of Practice, co-tenants have no right to injure land by cutting and removing valuable timber from same.

Geo. W. Reeves and John W. Ray for appellants.

J. M. Nichols & Son and F. H. Sullivan for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Paynter.

This is the third time this case has been appealed to this court. The sole question here is: Did the court err in appointing a receiver? As the record now stands, the appellee, Fort Jefferson Improvement Co., is asserting a lien on three-eighths of the land and claiming such interest as belongs to J. C. Dupoyster; this is subject to a certain mortgage lien. Five-eighths of the land is owned by J. B. Dupoyster and Mrs. Edwards. The appellants were in possession of the whole tract, several hundred acres of which is fenced and in cultivation, and the evidence is that the appellant, J. C. Dupoyster, so far as he could, as the agent of the co-appellants, was selling and removing some of the valuable timber from the land, but the evidence is that the land in cultivation is being improved by appellants by building barns, fences, etc. Upon this showing the court made the following order, namely: "This day the motion of the Fort Jefferson Improvement Co. against J. C. Dupoyster, Mrs. R. S. Dupoyster, Jo. B. Dupoyster and Dalva D. and J. P. Edwards, coming on for trial, upon the notice and affidavits filed herein, and it appearing that the said parties are wrongfully cutting and selling valuable timber off of the land in controversy in this action, the court being sufficiently advised, and it appearing that the said Fort Jefferson Improvement Co. is entitled to the relief sought, it is, therefore, ordered and adjudged that Geo. M. Woodward, this court's master commissioner and receiver, be, and is hereby, appointed receiver in this action, and the said J. C., Jo. B. and R. S. Dupoyster and Dalva and J. P. Edwards are hereby ordered and directed to surrender at once the possession of all of the timber lands in controversy in this action to the said receiver, who will take and hold the possession of said lands under this order, and he will forbid and prevent the said parties and all others from cutting, removing or destroying any timber whatsoever on said lands, except he may permit the said parties and their tenants to cut and use such timber as may be suitable and necessary for firewood, or for fence posts, rails or planks to be used on fences in necessary and reasonable repairs. And if any person should attempt to cut, remove or destroy said timber the said receiver is directed

to apply to the Ballard Circuit Court, or to the judge thereof, for rule against them, to show cause why he should not be fined for contempt."

It will be observed that only the timber land is placed in the hands of the receiver, and the appellants have the right to remove from it firewood, fence posts, rails, timber and planks for repairs, etc. The effect of the order is to leave the appellants in possession of the land under cultivation.

The question is, have the parties who own five-eighths of the land, through their agent, J. C. Dupoyster, or otherwise, the right to cut and remove from the entire tract the timber upon it? The lien asserted by the Fort Jefferson Improvement Co. will not probably be satisfied by the sale of the interest which may be sold to pay it.

Section 298 of the Civil Code is as follows: "On the motion of any party to an action who shows that he has, or probably has, a right to a lien upon, or an interest in, any property, or fund, the right to which is involved in the action, and that the property or fund is in danger of being lost, removed or materially injured, the court, or the judge thereof during vacation, may appoint a receiver to take charge of the property or fund during the pendency of the action, and may order and coerce the delivery of it to him. The order of a court, or the judge thereof, appointing or refusing to appoint a receiver shall be deemed a final order for the purpose of an appeal to the Court of Appeals, provided that such order shall not be superseded."

The record shows the appellee has at least a lien upon whatever interest in the property which is owned by J. C. Dupoyster and is interested in protecting that right. Certainly the court would not sustain an order appointing a receiver to take charge of the land belonging to J. B. Dupoyster and Mrs. Edwards unless they, through their agent, were producing the injury to the property complained of. The fact that they owned five-eighths of the land did not give them the right to remove valuable timber from it. We think the court properly placed the timber land in the hands of a receiver. It is suggested that on a former appeal of this case the court intimated that the lower court had erred in originally placing the property in the hands of a receiver. This intimation was evidently made upon the idea that there were no grounds to justify the court in taking the land, especially the land in cultivation, from the possession of J. B. Dupoyster and Mrs. Edwards, and placing it in the hands of a receiver. Upon the facts as they appeared on the former appeal the court may have been of the opinion that the receiver should not have been appointed, but that opinion would not prevent the court upon a subsequent state of facts from holding that the court thereafter properly appointed a receiver to take charge of that part of the land which was being injured by some of the co-tenants.

The judgment is affirmed.

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GLOVER, &c. v. CHECK, &c.

(Filed February 26, 1903—Not to be reported.)

Personal representatives—Extra compensation—Appeals—It is the rule that where extra compensation is made for special services rendered the estate, such extra compensation should be paid to the individual representa-

tive who has rendered such service. The Court of Appeals will not consider the question of apportionment of fees between two or more personal representatives where such question was not presented in the lower court. The parties should be permitted to litigate the question as to the proportion of services rendered in the lower court.

Helm, Bruce & Helm and Caruth, Chatterson & Blitz for appellants.

Albert S. Brandels for appellee Check.

J. C. Poston for appellee Cross.

Appeal from Jefferson Circuit Court, Chancery division.

Chief Justice Burnam delivered the following extension of opinion:

In the petition for rehearing filed in this case by Geo. W. Check it is claimed that all the extraordinary services to the estate of decedent, for which the allowance in excess of \$2,639.85, upon money handled by the executors jointly, were exclusively rendered by him; and that he alone is entitled to such extra allowance, and in support of his contention cites the 17 Am. & Eng. Ed. of Law, 2d edition, 683, where the question of special compensation for extra services of the character rendered in this case was discussed, and the author says: "When special compensation is allowed for extra services by an executor or administrator, as may be done in some jurisdictions, the amount belongs of course to the representatives by whom the extra services were rendered."

We think this is a sound and just rule, but are unable to apply it in this case for the reason that no such question was made in the trial court, and the case had not been prepared with the view of showing what proportion of the extra services were rendered by the individual executors; that this matter may be fairly determined and the relative rights of the executors to the allowance for extraordinary services determined, upon the return of the case to the lower court they should be allowed to present their claim with reference to this fund by proper pleadings, and to take proof thereunder, and to have the matter determined. To this extent the opinion heretofore rendered is extended.

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

## KENTUCKY COURT OF APPEALS.

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KNOEDLER, &c. v. TEEGARDEN, ASS'EE, &c.

(Filed February 26, 1903—Not to be reported.)

Assignment for benefit of creditors—Discharging assignee—T. and B. made a deed of assignment for the benefit of their creditors to appellee. He qualified and proceeded with the administration of his trust for more than two years, when an order was entered in the county court that a motion was made by the assignee to be discharged from his duties and liability as assignee. On the same day an order was entered, reciting that proof was made of publication of notice of said motion, and ordering that the assignee be discharged from further liability. Subsequently appellants, as creditors, filed this action, alleging that the order releasing the assignee was void, and that since his alleged release he had collected assets sufficient to pay the debts. The petition was dismissed. Held—That the court erred in dismissing the petition. The motion made under section 93, Kentucky Statutes, for a release by the assignee, is a special proceeding, and to be valid must be in strict pursuance of said statute. Said section directs that the motion must be made in court after due notice, by publication, has been given, and at the second regular term of the court, after the motion is made, if no objection is made, the order releasing the assignee may be entered.

John B. Clarke for appellants.

W. A. Byron for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Hobson.

The firm of Teegarden & Bonfield, in Bracken county, made a deed of assignment on March 6, 1894, to appellee, Jeff Teegarden, of all their property for the benefit of their creditors. He qualified and proceeded with the administration of his trust until October 12, 1896, when he appeared in the county court, and on his motion was discharged as assignee and released from all further liability on account of the trust. On October 12, 1899, ap-

pellants, who were creditors of Teegarden & Bonfield, filed this suit, setting out their debts, which had been duly proven up, and alleging that but little or none of them had been paid; that the order of the county court discharging the assignee was void; that since it was made he had collected other moneys belonging to the estate, which he had not distributed; that there was a large amount of property in his hands as assignee, which he had not accounted for, and which was more than sufficient to pay all the debts in full; that he had made no settlement of his accounts in the county court, and that the order of the county court discharging him was obtained by fraud. The circuit court sustained a demurrer to the petition.

The only question we deem it necessary to notice is as to the validity of the order of the county court discharging the assignee. On October 12, 1896, this motion was entered: "Now comes Jeff Teegarden, as assignee of Teegarden & Bonfield, and moves the court to release him from any further responsibility as such assignee, for the reason that the longer keeping open of said assignment will result in expenses, to pay which there is no money on hand, and the assignee has paid out all the money that came to his hands."

On the same day the court made this order: "This day Jeff Teegarden came personally into court and adduced proof showing the publication as by law required of his application to be discharged as assignee of Teegarden & Bonfield. It is, therefore, ordered that the motion herein be sustained, and that the said Jeff Teegarden be discharged from his trust as assignee aforesaid, and released from all liability on account thereof."

This order was entered by virtue of section 93, Kentucky Statutes: "The assignee may, when he becomes satisfied that it is no longer to the interest of the estate to keep the assignment open, move the county court to discharge him from the trust and release him from all liability on account thereof and he shall cause notice to be published in four issues of some newspaper published in the county, if any; if not, by notice posted at the courthouse door for at least four weeks, of his application to be discharged; and at the second regular term of the county court held after the motion is entered the court shall, upon proof that the required notice was given, enter an order discharging the assignee from his trust and releasing him from all liability on account thereof, unless objection is made; if objection is made, the court shall hear the same and make such orders as are proper."

This is a special proceeding, and to be valid must be strictly in accordance with the statutory requirements. It will be observed that the statute requires the motion to be entered in the county court and notice given of the motion, and then at the second regular term of the county court held after the motion is entered the court shall, upon proof that the necessary notice was given, enter an order discharging the assignee, if no objection is made. The purpose of requiring the delay until the second regular term of the county court after the motion is entered is to give the creditors an opportunity to learn of the proceedings and determine what course to follow. In this case, on the same day the motion was entered, the court heard the motion and discharged the assignee. This it had no jurisdiction to do. Its jurisdiction in the premises is special, and the order in question not being within its jurisdiction, was void. We are, therefore, of opinion that the court erred in sustaining the demurrer to the petition.

Judgment reversed and cause remanded for further proceedings consistent herewith.

MOONEY v. ANCIENT ORDER OF UNITED WORKMEN, GRAND  
LODGE OF KENTUCKY.

(Filed February 26, 1908.)

**Insurance—Suicide—Insanity**—M. held a certificate of membership in the appellee, a corporation, which sets apart its funds for the benefit of the families of its members. The certificate held by M. was payable to his mother, and action was instituted to recover on said certificate after M. had shot and killed himself. The defendant resisted recovery on the ground that the assured, while sane, voluntarily took his own life, and at the conclusion of the evidence the court peremptorily instructed the jury to find for the defendant. Neither the application of M. for membership, nor the certificate issued, contained any mention excusing appellee from liability in case that the assured should commit suicide, or take his life while sane or insane. Held—That as no such condition is attached to the certificate, it can not affect the recovery under section 679, Kentucky Statutes. The fact that the by-laws of the corporation provide that no loss will be paid where the assured commits suicide can make no difference. The further question involved on this appeal is whether it is a defense to the action that the deceased while sane voluntarily killed himself. Held—That the courts, on the ground of public policy, will not permit recovery on a policy or certificate of life insurance where the assured while sane voluntarily takes his own life, on the theory that to permit a recovery in such case would be a fraud on the company, but the court will not extend such exemption to cases where policy holders while insane take their own lives, where the contract provides for no such exemption from liability. The court should have submitted to the jury the question whether the assured voluntarily killed himself while sane. It should also have instructed the jury that the deceased was insane at the time of the shooting if he was then without sufficient reason to know what he was doing, or to distinguish right from wrong, or if he had not then sufficient will power to govern his actions by reason of some insane impulse (the result of mental unsoundness), which he could not resist or control.

Pratt, Mahan &amp; Waddill for appellant.

Yeaman &amp; Yeaman for appellee.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Hobson.

Appellee, the Ancient Order of United Workmen, is a corporation created by the laws of Kentucky. It consists of a supreme lodge and subordinate lodges; a beneficiary fund is set apart for the benefit of the families or heirs at law of deceased members; benefit certificates are issued to the members and they have the right of naming their beneficiaries. It is a fraternal association, governed by the lodge system under the supervision of a supreme lodge, which pays no commission and employs no agents, except in the organization of local subordinate lodges, and supervising their work. John G. Mooney held a certificate in the order, and while in regular standing shot himself on March 2, 1900. His mother was named as his beneficiary, and sought in this action to recover of the order on the benefit certificate. The defendant resisted recovery on the ground that the assured, while sane, voluntarily took his own life, and at the conclusion of the evidence the court peremptorily instructed the jury to find for the defendant.



The certificate sued on is in these words: "This certificate issued by the Grand Lodge of the Ancient Order of United Workmen of Kentucky, witnesseth: That Brother John G. Mooney, a workman degree member of John L. Dorsey Lodge, No. 98, of said order, located at Dixon, in the State of Kentucky, is entitled to all the rights, benefits and privileges of membership in the Ancient Order of United Workmen, and to designate the beneficiary to whom the sum of \$2,000 of the beneficiary fund of the order shall at his death be paid. This certificate is issued subject to and is to be construed by the laws of the order. He designates as beneficiary, under the terms hereof, Sarah Jane Mooney, bearing to him the relation of mother.

"In witness whereof the Grand Lodge has caused this to be signed by its Grand Master Workman and Grand Recorder and the seal thereof to be attached this 29th day of November, 1899.

"JOHN W. BAKER, Grand Master Workman.

"J. G. WALTER, Grand Recorder."

It will be observed that there is nothing in the certificate in regard to suicide or providing that the company shall not be liable if the assured killed himself. It was, however, pleaded by the defendant that this was stipulated in the laws of the order, and that by the terms of the certificate it is to be construed and controlled by these laws. The only thing in the laws of the order on the subject is in section 8, article 10 of the by-laws, which, among other things, prescribes a form of application to be used by applicants for membership. In this form so prescribed these words are used: "I further agree that if within two years after the date of my taking or receiving the workman degree my death should occur by suicide, whether sane or insane, except in delirium resulting from disease, or while under treatment for insanity, or after a judicial declaration of insanity, then the only sum which shall be paid, or which is payable, to my beneficiaries named in my beneficiary certificate shall be the amount which I may have paid into the beneficiary fund of the order during the term of my membership."

But the application which the deceased in fact signed was on a different form, and was in these words:

"November 29, 1899.

"To the Grand Lodge of Kentucky:

"I, John G. Mooney, having made application for the workman degree in John L. Dorsey Lodge, No. —, Ancient Order of United Workmen, State of Kentucky, do hereby agree that compliance on my part with all the laws, regulations and requirements which are, or may be, enacted by said order is the express condition upon which I am to be entitled to have and enjoy all the rights, benefits and privileges of said order. I certify that the answers made by me to the questions propounded by the medical examiner of this lodge which are attached to this application, and form a part thereof, are true. I further agree that the beneficiary certificate to be issued hereon shall have no binding force whatever until I shall have taken the workman degree of said order, and until my medical examination has been approved by the supreme or grand medical examiner, as the case may be. I hereby authorize and direct that the amount to which my beneficiaries may be entitled (to wit, \$2,000) of the beneficiary fund of the order, shall at my death be paid to Mrs. Sarah Jane Mooney, bearing relation to me of mother."

It would seem from the evidence that the by-law providing for the form of application above quoted was of recent adoption, and that forms of application made out according to it had not been sent out to the subordinate lodge at the time the deceased joined. The proof on this subject is not clear, but, however it may be, he in fact used the old form, and so far as the proof shows, knew nothing of the other form. We are, therefore, of opinion that his contract can not be tested or in any way affected by a mere form of application which had been ordained by the grand lodge, but which was not in fact used in his case. In the Supreme Commandery of the United Order of the Golden Cross v. Hughes, 24 Ky. Law Rep., 984, it was held that section 679 of the Kentucky Statutes is applicable to societies such as appellee, and that the application for the certificate or the by-laws, or other rules of the corporation, unless attached to and accompanying the certificate, can not be received in evidence or considered a part of the contract in any controversy between the parties interested in the certificate. As the by-law in question was not made a part of the certificate or attached to it, it can not be considered, and the defense to the action based on this by-law can not be maintained. The peremptory instruction of the circuit court to the jury to find for the defendant by reason of the by-law was, therefore, erroneous.

There being nothing in the certificate in regard to suicide, the question remains, is it a defense to the action that the deceased, while sane, voluntarily killed himself? The proof shows that the deceased was about twenty-two years old; his father had died four months before, leaving the deceased, his mother and a younger brother surviving him; the deceased had been made postmaster in the room of his father at the town of Dixon, Webster county. He had no other insurance on his life. His health was good. So far as the evidence goes, he had no reason to complain of life. At the death of his father he had acted very singularly, and this he had kept up from time to time since. Not a few of his friends before he shot himself thought him of unsound mind. His conduct on the night before his death, and at the time of the shooting, tended to sustain this conclusion, and there was sufficient evidence to go to the jury on the question as to whether he was sane or insane at the time. The rule as to suicide, where the policy is silent on the subject, is thus well stated in 19 Amer. and Eng. Ency. of Law, page 78: "If the insured in a contract of life insurance taken out for the benefit of his estate, or payable to a beneficiary, the designation of whom may be changed at the option of the insured with the consent of the insurer, commits suicide, the policy is void if the insured was sane when he took his own life, and this for two reasons. In the first place, every contract of life insurance must be construed to contain an implied condition that the insured will not intentionally terminate his life, but that the insurer shall have the benefit of the chances of its continuance until terminated in the natural ordinary course of events. It is upon these chances that the premium is calculated and the contract is founded, hence the suicide of the insured operates as a fraud upon the insurer, and especially is this so when the insurance is taken out in contemplation of the act. In the second place, the enforcement of the contract in case of death by suicide is opposed to public policy. If the contract should expressly include death from this cause, the provision, even if not prohibited by statute, would be contrary to public policy in that

it tempted or encouraged the insured to commit suicide, and it is obvious that the court will not imply a condition which if expressed in the contract would render it void. But when the policy is made payable to a nominated beneficiary, and contains no stipulation that it shall be void in case of the death of the insured by suicide, it may be enforced, notwithstanding the insured dies by his own hand, unless, perhaps, where the policy was taken out in contemplation of suicide" (*Hartman v. Keystone Mutual Life Insurance Co.*, 21 Pa. St., 426; *Smith v. National Benefit Society*, 123 N. Y., 86; *Ritter v. Mutual Life Insurance Co.*, 169 U. S., 139; *Knights Golden Rule v. Ainsworth*, 46 Amer. R., 332; *Bliss on Life Insurance*, section 242; note to *Breasted v. Fadners, &c., Co.*, 59 Am. Dec., 487.)

It is earnestly insisted that if the insured when he fired the fatal shot had sufficient mental power to know that it would take his life and fired the shot with that intention, there can be no recovery. We are referred to authorities so holding under certain policies containing stipulations as to suicide when insane, but we do not think this rule applicable to a case where the policy is entirely silent. The only reason that the death of the insured by his own hands is allowed to defeat the policy in such a case is in the end that it is a fraud on the company. But there can be no fraud by one who is insane. Those who issue such policies know that men are liable to become insane, and that insane persons at times commit suicide. If they wish to protect themselves from this risk they should so provide in their policies. Where the policy is silent, we are unwilling to go beyond the rule above laid down exempting the company from responsibility where the insured voluntarily kills himself while sane, for the contract of insurance must be treated like any other contract, and the act of an insane person is not a defense to actions on any other contract, so far as we know. Under the evidence the court should have submitted to the jury the question whether the assured voluntarily killed himself while sane. We intimate no opinion as to what should be the rule where the policy has under the terms of the policy become incontestible.

The deceased was insane at the time of the shooting, if he was then without sufficient reason to know what he was doing or to distinguish right from wrong, or if he had not then sufficient will power to govern his actions by reason of some insane impulse (the result of mental unsoundness) which he could not resist or control.

Judgment reversed and cause remanded for a new trial.

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FRANCK v. FRANCK, &c.

(Filed February 26, 1903—Not to be reported.)

Wills—Execution—F. made a will giving to his daughter-in-law all personal property that he had or may have after his death, and all the lots of ground described in the will. After making the will the testator purchased two cottages, and after his death an execution was levied on it as property belonging to the heirs. The daughter-in-law, by her petition, claims same as belonging to her, as a devisee under the will. Held—That the cottages purchased after the making of the will did not pass to her as devisee. The rule laid down by section 2068, Kentucky Statutes, providing that the con-

version of property advanced to one of the testator's heirs into other property is not an ademption of the legacy, only applies to devisees who are heirs of testator. Said property passed to the heirs as undevisee estate.

Burnett & Burnett and Wallace Coulter for appellant.

Harris & Marshall for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Chief Justice Buruam.

This is the second appeal in this case, and as the facts out of which the litigation grew are fully recited in the former opinion (21 Ky. Law Rep., 1093), it will not be necessary for us to restate them. We declined in the former opinion to pass upon the question as to whether the two cottages on Madison street could be subjected to appellant's judgment for \$2,707.90, rendered as of the 5th of May, 1897, because they were in the possession of and claimed by Mrs. Clara Franck, the wife of John L. Franck, and who was not a party to this action upon that appeal. After the entry of the mandate in the lower court the appellant, Katie Franck Bollinger, known in the former record as Katie Franck, had an execution issued upon her judgment, which was by the sheriff levied upon the Madison avenue cottages. Thereupon Clara B. Franck tendered, and was permitted to file, a petition to be made a party to this proceeding, in which she alleged that under the 4th clause of the will of Jacob F. Franck, deceased, which is as follows: "I give and bequeath all personal property that I have, or may have, after my death to my daughter-in-law, Clara Franck; also all the ground or lots on both sides of Pote street shall belong to her; also all ground fronting on Frankfort avenue west of Pote street, and extending back to Hunter's line; also the old dwelling house shall belong to my daughter-in-law, Clara Franck, free from the control of her husband."

The cottages sought to be subjected belonged to her, and to support this contention she says that when the will of Jacob F. Franck was executed he held a mortgage on these lots; and that after the will was made he brought suit on his mortgage and bought in the property at a judicial sale made to satisfy his judgment; and that the effect of this purchase was simply to convert money loaned upon the lots into the lots themselves; and that under the will she was to have all the money owned by testator at the date of the execution of his will as well as such as he might have after his death; that these lots passed to her; and that she was then, and had since the death of Jacob F. Franck been, in the full and adverse possession thereof, and she asked that plaintiff, Katie Franck, and the sheriff should be enjoined from levying on or selling them under execution. A demurrer was interposed by plaintiff to this answer and overruled. And the plaintiff, Katie Franck Bollinger, tendered and offered to file a reply, in which she controverted all the affirmative averments of the answer of the appellee, Clara B. Franck, and alleged that the mortgage held by Jacob F. Franck on the Madison avenue cottages was not for loaned money, but was made to indemnify him as surety of one John C. Struss; and that they were not his property at the time the will was written, but were acquired several years thereafter. And she alleged that they were not disposed of by the will, but passed under the law to J. L. Franck, and asked that they be subjected to

the payment of her judgment. The appellee, Clara Franck, filed a general demurrer to the answer and cross petition of Katie Franck Bollinger, which was sustained, and the property adjudged to Clara Franck as devisee under the will of Jacob Franck, and Katie Franck Bollinger has appealed.

It is perfectly clear that Jacob F. Franck intended that his daughter-in-law, Clara Franck, should at his death inherit his entire real and personal estate, excluding the special bequests. But it is equally manifest that the Madison street cottages are not included in the specific devise of real estate to her in the fourth clause of his will, and these lots not having been disposed of by will, passed under the statute to John L. Franck as his heir at law, and were liable to his debts. This question was fully considered by this court in the recent case of *Todd v. Gentry*, 22 Ky. Law Rep., 1319, and in the opinion in that case all the Kentucky cases bearing upon the question, as well as the leading text-writers, are considered, and the conclusion reached that whatever may have been the intention of testator, that real estate not disposed of by his will passes to his heirs at law as undivided property. Section 2068 of the Kentucky Statutes, which provides that "the conversion in whole or in part of money or property or the proceeds of property advanced to one of the testator's heirs into other property or thing, with or without the assent of testator, shall not be an ademption unless a contrary intention on the part of the testator appear from the will, or by parol or other evidence," only applied where the devisee is an heir of testator. (*Hazelwood v. Webster*, 82 Ky., 409.)

The order of December 1, 1900, sustaining the motion of John L. Franck to have the judgment for alimony rendered on the 15th of May, 1879, set aside and vacated, except as covered by the judgment of the 15th day of May, 1897, for \$2,707.90, was purely interlocutory, and does not in anywise effect the right of appellant to enforce the collection of the latter judgment. We are of the opinion, therefore, that the court was in error in adjudging the Madison avenue cottages to be the property of the appellee, Clara Franck, as devisee under the will of Jacob F. Franck. Upon the former appeal of this case we overlooked the fact that section 2068 only applied to property devised to one of testator's heirs, and in consequence thereof indulged in comments which were perhaps misleading in their tendency.

But for reasons indicated in this opinion the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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WILLIAMSON v. DILS, EX'TX.

(Filed February 26, 1903.)

Specific performance of contract—Unavoidable circumstances—Rescission—In 1891 appellant made a written contract to purchase from D. an undivided one-third interest in a survey of land supposed to contain within its exterior boundaries some 80,000 acres of land. It was a sale by the acre of a one-third interest in 18,000 acres of land. It was contemplated that in order to ascertain the number of acres in which D. had an interest that a survey was necessary, which was to be made at the expense of appellant. It was to be completed by April 1, 1892, but if not done then, upon a good substantial payment on the purchase money further reasonable time to com-

plete the contract was to be given the appellant. After the quantity of land was ascertained for which appellant was to pay D. was to make him a quit-claim deed. The surveys were not completed by April 1, 1892, although appellant had two corps of surveyors in the field, but being unable to complete it in time he gave D. notice that it could not be done, and made what he regarded as a substantial payment on the purchase money. The survey was never completed. D. brought this suit for a specific performance of the contract, and prayed that a survey might be made at the expense of appellant to ascertain the number of acres for which he agreed to pay. Among other averments in the answer it was alleged that while the surveying party were engaged in making the surveys, without fault or procurement on his part, persons residing within the exterior lines of the patent, in actual possession and claiming title thereto adversely to the title of D., were hostile and threatening, and by threats and hostile demonstration, by force and with arms, alarmed, intimidated and drove the surveying parties from the land. The lower court ordered a specific performance of the contract. On appeal, Held—That it is evident that the parties to this contract did not contemplate that such an obstacle would confront appellant in making the survey as did when he attempted to make it. Had the parties known that it would probably result in loss of life or bloodshed to ascertain the number of acres which the appellant purchased from D., it is certain that they would never have entered into the contract, hence neither of the parties had in contemplation such a condition of affairs as arose. The resistance made by occupying claimants to a survey of the land is a circumstance which so affects the appellant that he could not perform that part of the contract which required him to have the land surveyed. The court should order a rescission of the contract and the money refunded to appellant, but not to draw interest until the mandate is filed.

Hager & Stewart, W. S. Harkins and R. T. W. Duke, Jr, for appellant.

James Goble and Ratliff & Ratliff for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Paynter.

On December 12, 1891, the appellant, Williamson, and Col. John Dils entered into a contract by which the appellee sold to appellant an undivided one-third interest in what is known as the Williamson-Dils survey in Pike county, Kentucky, supposed to contain within its exterior boundaries some thirty odd thousand acres. So much of the contract as is necessary for the consideration of this case reads as follows: "It being the one-third interest in the Williamson-Dils and Joe Hall tract of land estimated to contain 18,000 acres, more or less, which land lies on the waters of Knox and Peter creeks and Tug river, in Pike county, Kentucky. This land is to be surveyed by party of the second part, and at his expense, and when the amount of said land is ascertained by survey, deducting the proper exclusions, then the party of the second part (Williamson) is to pay party of the first part \$2 per acre, for party of the first part's one-third interest in said lands. Said survey shall be completed by the first day of April, 1892, at which time the purchase money shall be paid by party of the second part, and deed of quit claim free of dower shall be made by party of the first part; but in the event that said survey is not at that date completed, but is well under way, and the party of the second part makes to the party of the first part a good sub-

stantial payment on said purchase money, then the party of the second part shall have a further reasonable time to complete said survey, at which time the balance of the purchase money shall be paid and deed made as above stated."

It will be observed that the parties estimated that Dils had a one-third interest in 18,000 acres of land, more or less. It was a sale by the acre, and the contract price was \$3 per acre. The parties understood that all "proper exclusions" should be deducted. It was contemplated that in order to ascertain the number of acres in which Dils had an interest a survey was necessary, which was to be made at the expense of the appellant. It was to be completed by April 1, 1892, but if not done, then upon a good substantial payment on the purchase money further reasonable time to complete the contract was to be given the appellant. After the quantity of land was ascertained for which Williamson was to pay Dils was to make him a quit-claim deed. Before and after April 1, 1892, Williamson had two or three corps of surveyors in the field, with a view of complying with his contract, but being unable to complete it in March, 1892, he gave Dils notice that it could not be done, and made what he regarded as a substantial payment on the purchase money. The survey was never completed.

Dils instituted this suit for specific performance of the contract, and prayed that a survey might be made at the expense of the appellant to ascertain the number of acres for which he agreed to pay. Among other things, it was averred in the answer that at the date of the contract it was not known by either Williamson or Dils to what extent the lands embraced in the Williamson Dils patent had been entered, surveyed and patented prior to the 24th day of June, 1872, the date of the Williamson-Dils patent; that no survey of the land excepted from the grant had ever been made before or after that patent had been issued, and for this reason the provision was inserted in the contract for the ascertainment of the number of acres for which Williamson should pay, and that the sale and purchase would depend upon such survey.

It is also averred in the answer that appellant undertook by means of his surveying parties to prosecute the work with diligence, to ascertain the number of acres for which he should pay; that without fault or procurement upon his part persons residing within the exterior lines of the patent, in actual possession and claiming a title thereto adversely to the Williamson-Dils title, were hostile and threatening, and by threats and hostile demonstrations, by force and with arms, alarmed, intimidated and drove the surveying parties from the land; that that condition prevailed until the answer was filed in this action, and that by reason of such threats and demonstrations by the residents in possession it was impossible to secure a survey of the land to ascertain the acreage in which Dils had an interest and for which appellant was to pay under the terms of the contract.

It is further averred in the answer that more than half of the land was covered by prior surveys, and that about 7,000 acres of it were held under junior patents, under which the patentees had taken possession and were then claiming the land. There were other averments in the answer which are not necessary to be stated here.

The testimony offered by the appellant conduces to prove that he under-

took in good faith to have the survey made; that he prosecuted it with reasonable diligence; that he was engaged for a period of about six months in his efforts to make a survey of the land as contemplated by the contract; that the parties living within the boundaries were hostile to his claim and by threats and intimidation prevented the surveyors from completing the work, and that these threats and demonstrations of force compelled his surveying parties to quit the work, and for that reason did not complete it. Under such circumstances should the court decree a specific performance of the contract? It is a rule in equity that specific execution of contracts is not a matter of absolute right in either party, but upon the reasonable discretion of the court, and unless it is equitable to do so, courts will not adjudge it. (*Cocanougher v. Green*, 93 Ky., 519; *Williamson v. Horsley*, 98 Ky., 582.)

It is evident that the parties to this contract did not contemplate that such an obstacle would confront appellant in making the survey as did when he attempted to make it. Had the parties known that it would probably result in loss of life or bloodshed to ascertain the number of acres which the appellant purchased from Dils, it is certain that they would never have entered into the contract, hence we say that neither of the parties had in contemplation such a condition of affairs as arose.

The appellant was advised by his friends not to go upon the land, as he would be in great danger of losing his life if he did so. He was not required to make such a sacrifice to carry out the undertaking which he had assumed. Neither could he be held responsible because his undertaking was rendered impossible by reason of a threatened danger to those to whom he was compelled to look for the execution of the work. But the plaintiff evidently realized the situation, because in his petition he asked that the land be surveyed at the expense of the appellant, but he seems never to have moved the court to comply with the prayer of his petition by making an order of survey in the case. The appellant did not do it, because his surveying parties had spent almost six months in the field and had failed to accomplish it. It is suggested that the court could have made an order of survey and called upon the officers of the law to protect the surveying parties. Neither side seemed to be willing to venture such an effort, as no motion was made for an order of survey. When the appellant did not accomplish it in the effort which he made, we are of the opinion that he did all which good faith required him to do to comply with the provisions of the contract which obligated him to make a survey of the land at his expense.

Specific performance will not be decreed if the contract and situation of the parties be such that the remedy of specific performance will be harsh or oppressive. (*Pomeroy Equity Jurisdiction*, section 1405.) In explanation of this doctrine, in note 2 to that section, it is said: "This rule generally operates in favor of defendant, but may be invoked by a plaintiff when defendant demands the remedy by counterclaim or cross complaint. The oppression or hardship may result from unconscionable provisions of the contract itself, or it may result from the situation of the parties unconnected with the terms of the contract, or with the circumstances of its negotiation and execution, that is, from external facts or events or circumstances which control or affect the situation of the defendant."



The resistance made by occupying claimants to a survey of the land is a circumstance which so affects the appellant that he could not perform that part of the contract which required him to have the land surveyed. If he could not do so in the usual and peaceable way, the court should not decree that he should have done so.

It is urged by counsel for appellee that as Dils was only required to make a quit-claim deed to Williamson for his interest in the land, therefore, he was compelled to accept whatever title Dils had. The parties agreed that the actual number of acres in which Dils had an interest should be ascertained before Williamson was required to pay for the land or accept any kind of a deed. As we have said, the sale was by the acre, and the appellant encountered the same difficulty in the execution of the survey as he would have encountered had the contract required Dils to make a deed with covenants of general warranty. From our view of the case the character of the deed to be made has nothing to do with it. While Williamson was to accept a quit-claim deed, Dils was never in a condition to tender it to him until the number of acres for which he was required to pay had been ascertained. It would be harsh and oppressive to decree specific performance under the circumstances of this case.

The court below decreed specific performance, but in order to do so was compelled to practically guess at the quantity of land for which the appellant should pay. The contract of the parties did not contemplate that a court should be required to do that in order to ascertain the number of acres for which the appellant should pay the vendor. We are of the opinion that the contract should be rescinded and the money which Williamson has paid on the purchase money should be restored to him, but not to draw interest until the mandate is filed below.

Judgment is reversed for proceedings consistent with this opinion.

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GIVENS, BY, & C. v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed February 27, 1903—Not to be reported.)

1. Railroads—Contributory negligence—Appellant, a boy seven years of age, who was very intelligent, and who resided near appellee's railroad, and was familiar with the dangers attending the operation of trains, was attempting to climb on one of the passing trains when he fell, and the wheels mashed one of his feet so that amputation was necessary. In this action to recover damages the plea of contributory negligence was relied on as a defense, and a trial resulted in a verdict for defendant, from which this appeal is prosecuted. It is urged as grounds for reversal that the child on account of his tender years could not be guilty of contributory negligence. Held—That the court properly permitted the jury to consider the question of contributory negligence on account of his intelligence and acquaintance with the dangers from the trains, and his opportunity to avoid the injury, and the verdict will not be disturbed.

2. Evidence—It is urged that the court erred in admitting as evidence the exclamation of the brother of appellant when appellant was carried home after the injury, which were in these words: "Ah ha, this is what you get for jumping on and off the train; you know pa and ma have been telling you not to do that." Held—That this evidence was competent in view of

other evidence given on the trial. The rule is that in order to affect a party with the statements of others made in his presence or hearing concerning any act or declaration of his, and the truth of which he impliedly admits by a failure to deny it, the statement must have been made under such circumstances as would reasonably or naturally call for some reply from any person similarly situated.

N. B. Hays for appellants.

C. W. Metcalf, J. W. Alcorn and E. W. Hines for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted in the name of the appellant, Edward Givens, by his father, as next friend, to recover damages for the loss of his foot, which was run over by the wheels of one of appellant's cars and so mashed as to render its amputation necessary.

The petition sets forth with unnecessary particularity the acts of negligence complained of, in the following language, viz.: "Plaintiff says at the time of receiving the injuries he was on the main line of defendant's road, and the train was going south on said track, when plaintiff left said main line and got on a siding or track running to the mines; that the defendant switched said train and engine just north of plaintiff on the line which plaintiff had moved to, and in plain view of plaintiff, and without giving any warning, by sounding the whistle or otherwise, negligently and carelessly struck plaintiff, bruising his leg as above stated."

The answer not only traverses the averments of the petition, but in addition pleads contributory negligence, averring that appellant's injury was caused by his improper attempt to jump on the train while in motion. The reply simply denies the affirmative allegations of the answer. The trial resulted in a verdict for appellee, and a new trial having been refused appellants, they have brought the case to this court by appeal. We deem it unnecessary to go into a detailed statement of the evidence, but think it sufficient to say that the evidence introduced by appellants conduces to show that as appellee's train, which runs from Middlesboro to Mingo, was leaving the former place, appellant, who was then a boy seven years of age, ran from the main track forty feet to the belt line track, where he seated himself on the left-hand side of a cross tie of the track, and when so seated that his back was toward the train; that he knew before crossing over and taking his seat that the train was in motion, but he heard no signal from either its bell or whistle as it approached. He did, however, give his attention to the train when it got near him, and when it came within ten feet of him he jumped up to get out of its way, but in doing so struck his "sore" toe against a cinder about a foot from the end of the cross ties and outside of the track, which caused him to stumble and fall, in doing which his foot and leg fell across the rail, and the foot was crushed by the wheels of the passing train.

Upon the other hand, appellee's evidence was to the effect that appellant was not on the cross tie or track in front of the engine, but that he and two other boys ran up to the side of the train while in motion and jumped, or attempted to do so, upon the side of a car, but fell, and his foot was thereby caught and crushed.

Two witnesses, Logsdan and Wood, testify that appellant told them he was walking or running along by the side of the train when hurt. Logsdan carried him home immediately after he was injured, and upon reaching there appellant's brother said to him, "Ah ha, this is what you get for jumping on and off the train; you know pa and ma have been telling you not to do that," and that appellant made no reply to this statement of his brother.

Shumate, fireman on the engine at the time of the accident, says he was looking out on the track in front of the engine and saw no boy on the track, but saw some boys running toward the train.

Appellant was asked on the trial: "Why did you sit down on the end of the tie on the track that leads to Mingo?" to which he answered: "I was tired; I thought the train was going on the main track, and sat down and paid no attention to it."

The evidence shows that the train was moving at the rate of four or five miles an hour, and that the noise of the cars and the engine could be heard at a distance of four or five hundred yards. So it seems to be reasonably apparent from the evidence that the boy's injury resulted from his own negligence, and even if we were disinclined to believe the disinterested witnesses, who say they saw him jumping on, or swinging to, the train, the boy's own statement shows that he saw the train when in ten feet of him, and that he at once got off the tie and on his feet, and would have escaped injury but for stumping his "sore" toe on a cinder, which caused him to fall in such a way as to throw his foot over the rail, where it was caught by the wheel. Besides, if the engineer or fireman on the train saw him sitting on the tie, they had the right to assume that he would get out of the way of the approaching train in time to avoid injury, and the boy in leaving the place where he was seated did the very thing that the engineer had the right to expect of him, and having gotten up and started away from the place of danger, the engineer had no reason to know, and could not have anticipated, that he would strike his toe against a cinder, and by reason thereof fall with his foot on the track, nor would it have been possible to stop the train after the fall in time to have prevented the injuries.

We are aware of the rule so repeatedly announced by this and other courts of last resort that no presumption of negligence is to be indulged as against a child of tender years, but this boy seems to be intelligent, and, besides, it is shown by the evidence that he lives in close proximity to the railroad, and was at the time of receiving the injury familiar with the movements of the train on appellae's road. We think it does no violence to his youth to say that he was possessed of sufficient discretion to know the danger in which he voluntarily placed himself by taking a seat on the cross tie near a moving train, and indeed he manifested his appreciation of the danger by trying to get out of the way of the train as it approached him, which he would have succeeded in doing but for striking his toe against the cinder. So upon all of the evidence we are unable to say that the verdict of the jury was unauthorized.

The alleged errors in reference to the giving and refusing of instructions might, and perhaps should, be refused consideration, because the instructions are not properly incorporated in the bill of exceptions, but we have

nevertheless considered them, and find that, though inaptly expressed, they were not improper or prejudicial to the appellants. They told the jury, in substance, that if they believed from the evidence that if the appellant, Edward Givens, was seated on the end of the cross tie while appellee's engine was approaching, and that those in charge of the train saw, or by the exercise of reasonable care ought to have seen, him in time to have stopped the train before the engine reached him, but failed to do so, they should find for appellants. But upon the other hand, if they believed from the evidence that he was hurt from having his foot caught under a wheel of the train while he was attempting to jump on or off the train while in motion, they should find for appellee.

While one, or perhaps more, of the instructions asked for by appellant, and refused by the court, might with propriety have been given, we do not think the refusal of the court to give them was prejudicial to appellants, as those given presented the only issues of fact necessary to be determined by the jury. Counsel for appellants complain of the action of the lower court in admitting as evidence the declarations of appellant's brother made to him when he reached home just after receiving his injuries. The brother said: "Ah ha, this is what you get from jumping on and off the train; you know that pa and ma have been telling you not to do that," to which appellant made no reply. We would ordinarily attach very little importance to the silence of appellant under such circumstances, as he was doubtless suffering greatly from the wounded condition of his foot, but the statements of the brother were of a character to call for some explanation or protest, and the failure of the appellant to reply would seem to indicate that he was unable to deny the charge made by the brother. In order to affect a party with the statements of others made in his presence or hearing concerning any act or declaration of his, and the truth of which he impliedly admits by a failure to deny it, the statement must have been made under such circumstances as would reasonably or naturally call for some reply from any person similarly situated. (1 Greenleaf on Evidence, section 197.)

In view of the rule stated, and the testimony of several of the witnesses that they saw him swinging on the train when injured, we are of the opinion that the lower court did not err in admitting the evidence in question.

Finding no error in the record prejudicial to the appellant the judgment of the lower court is affirmed.

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STOREY, &c. v. FIRST NATIONAL BANK OF LOUISVILLE, &c.

(Filed February 27, 1903—Not to be reported.)

Bills and notes—Pleading—Evidence—This action was instituted by a personal representative to settle the estate of the deceased, and appellees filed pleadings setting up notes held by them against decedent. The defenses of non est factum and no consideration were interposed. On motion of appellants the court directed issues out of chancery to be tried by a jury. The court gave to the jury a peremptory instruction to find for appellees, from which this appeal is prosecuted. It is contended that the plea of non est factum and no consideration are inconsistent. Held—That said pleas are not inconsistent. It is also insisted that the court erred in admitting as

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testimony the depositions of the president and others interested in the banks as to statements made by deceased relative to said notes. Held—That said statements were incompetent, under section 606, subsection 2 of Civil Code of Practice, provided the witnesses were stockholders in the corporations. A stockholder has a pecuniary interest in the corporation, and would be testifying in his own interest as much so as a member of a partnership would be. It was certainly not the intention of the legislature to make a distinction in favor of those owning stock in a corporation. There is equally as much reason for their being prohibited from giving such testimony as any one else. The court also erred in refusing to permit persons who qualified as experts to testify as to comparison of handwriting of decedent.

J. D. Pumphrey and B. S. Grannis for appellants.

Barnett & Barnett for appellees.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1898 Meshack Storey, a citizen of the county of Fleming, in this State, died testate, and named Newton Storey as his executor. It appears that Meshack Storey had considerable property, and owed many debts at the time of his death. His executor, Newton Storey, filed an action in the Fleming Circuit Court for the purpose of settling his estate, making the heirs and many of his creditors defendants. The appellees, the First National Bank of Louisville and the Louisville Banking Co., of Louisville, Ky., filed their separate answers, making their cross petitions against the executor. The executor filed reply to these separate answers and cross petitions, and pleaded non est factum and no consideration to each and all the notes set up in appellees' pleadings. Appellees contend that these pleas are inconsistent, but this court has decided in several cases that they are not inconsistent.

On motion of appellants the lower court directed an issue out of chancery. A jury was empaneled, the evidence heard, and the court, upon motion of appellees, gave the jury a peremptory instruction to find for them. The jury returned a verdict in accordance with said instruction, and judgment was rendered thereon. The appellants filed reasons and made a motion for a new trial. The court overruled same, appellants taking all proper exceptions, and the case is here on appeal. It will only be necessary for this court to consider a few of the alleged errors of the lower court. It is contended, first, by appellants that the lower court erred in permitting Theodore Harris, president of the appellee, the Louisville Banking Co., to testify to verbal conversations had by him with the deceased, Meshack Storey, with reference to the transactions concerning the notes in this litigation, and to like conversations detailed by other witnesses representing the appellees.

In this we concur, provided the witnesses were stockholders in the appellee corporations. Subsection 2 of section 606 of the Civil Code of Practice is as follows: "No person shall testify for himself concerning any verbal statement of, or any transaction with or any act done or omitted to be done by, one who is dead when the testimony is offered to be given." A stockholder has a pecuniary interest in the corporation and would be testifying in his own interest, as much so as a member of a partnership would be. It was certainly not the intention of the legislature to make a distinction in

favor of those owning stock in a corporation. There is equally as much reason for their being prohibited from giving such testimony as any one else.

In the case of Apperson's Ex'or v. The Bank of Kentucky, 10 Ky. Law Rep., 945, this court, in construing the above section of the Code, said: "While we do not think it was intended to limit the operation of that section to the testimony of a person, a party to, and directly interested in, the result of the suit with the representative of one who is dead, yet to render such testimony incompetent, it must appear that it will have the effect to directly, or indirectly, benefit the person giving it peculiarly."

In the case of Balyess Stove Co. v. McCarthy's Ass'ees, 15 Ky. Law Rep., 366, an opinion by Judge Barbour of the Superior Court, that court said, in discussing the competency of the witnesses, Bayless and Fennell, who were stockholders in the corporation: "To allow parties having the interest that Bayless and Fennell have in the result of this case to testify, under the circumstances stated, would establish a rule which would operate as an unjust and unreasonable discrimination in favor of parties doing business under articles of incorporation, and we do not think that the letter or the spirit of the section of the Code quoted either demands or permits it."

The appellants complain that the court erred to their prejudice in refusing to allow them to read to the jury the depositions of J. L. Rombach and A. E. Burnett. There is nothing in the record to show why the court rejected said evidence. Rombach testified that he was a photographer, and had made photographs of and enlarged several signatures of Meshack Story, which were agreed by the parties to be genuine; and also photographed and enlarged the signatures in dispute in this action, and placed them on the charts numbered 15, 16, 17 and 18. We are of the opinion that Burnett showed himself qualified to testify as an expert, and the court should have permitted his deposition to be read to the jury; and the charts should have been permitted to be used to elucidate his answers to questions as well as other witnesses who referred to them.

In the case of Fee, &c. v. Taylor, 83 Ky., 263, the court said: "The civil and ecclesiastical law permitted the testimony of experts as to handwriting by comparison. The rule in this country varies in the different States. In some of them comparison is allowable between the writing in question and any other writing shown to be genuine, whether it be already in the case or not, while in others it is only permitted as between the disputed paper and one already in the case, and relevant to it. Under the rule as adopted in this State, however, the last exception *supra*, and which allows comparison by the jury, with or without the aid of experts, is not recognized, the reason doubtless being that no necessity exists for it when witnesses are at hand who know the handwriting, \* \* \* but we must not be understood as holding that an expert may not testify as to differences in the letters or words, or speak of other facts as they appear to him upon the face of the writing."

This opinion of the court was rendered in 1885, before the present Civil Code of Practice was amended in 1886, which amendment changed the rule. Under section 604 of the Code as amended, upon the genuineness of the handwriting of a person, other handwritings of such person may be introduced for the purpose of comparison by witnesses with the writing in dispute, but

the writings produced shall be proven to the court or the judge thereof to be the genuine signature of the person represented, and that they were written by the person before any controversy arose as to the genuineness of the writing in dispute, and that notice should be given to the opposite party of the intention to produce such signatures. In this case the parties selected and agreed on a list of genuine signatures of Mesback Storey, and they were produced at the taking of the depositions of the witnesses some months previous to the trial. The appellees had sufficient opportunity to investigate the genuineness of said signatures, even though they had not agreed to their genuineness, which made it unnecessary to prove their genuineness to the satisfaction of the court, and was a waiver of the notice of their intended production. To this effect is 24 Ky. Law Rep., 67-68.

As this case will have to be retried, we refrain from discussing or expressing any opinion as to the weight or credit that should be given to the evidence produced on the trial. The court erred in giving the peremptory instruction.

Perceiving no other errors the judgment of the lower court is reversed and the cause remanded for further proceedings consistent with this opinion.

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SPALDING v. HILL.

(Filed March 3, 1903.)

Fees of county attorneys—Injunction—Construction of statutes—In 1898 fourteen indictments were returned against the L. & N. R. R. Co., and on the trial of two of the indictments fines of \$300 and \$350, respectively, were assessed. The attorney for the railroad company desiring to appeal the cases to test the liability of the company under the indictments, made a private agreement with the attorney for the Commonwealth that in the event of affirmance a fine of \$400 each in four of the remaining cases should be assessed, and the other indictments dismissed. Appellant was county attorney when the indictments were returned, and when the trial of two of the indictments were had, but after his term expired and appellee had succeeded him as county attorney, the Commonwealth's attorney reinstated the indictments and judgment was entered, assessing the fines in the four cases as previously agreed. Appellant instituted this action to enjoin the auditor from paying 25 per cent. of said fines to appellee as his fees, contending that under section 133, Kentucky Statutes, he was entitled to said compensation as he was present and assisted in the prosecution. Held—That it is plain that it was contemplated by the statutes that the county attorney that was present and assisting in the prosecution at the time of the rendition of the judgment was entitled to the per cent. allowed by the statute. The agreement made by the Commonwealth's attorney and the attorney for the railroad was not binding on either party, and certainly was not binding on the court.

J. P. Thompson and S. A. Russell for appellant.

H. W. Rives for appellee.

Appeal from Marlon Circuit Court.

Opinion of the court by Judge Nunn.

Ben Spalding was the county attorney of Marlon county from January,

1898, to the 6th day of January, 1902, on which date appellee, C. S. Hill, succeeded him to said office. During the term of appellant's office the grand jury of Marion county returned fourteen indictments against the L. & N. R. R. Co., and two of said indictments were tried before a jury, the verdict being a fine of \$300 in one case and \$350 in the other. The railroad's counsel, desiring to appeal from the judgment to test the liability of said railroad, made a private agreement with the Commonwealth's attorney, W. H. Sweeney, that the remaining indictments be filed away, and in the event the judgment in the two cases mentioned were affirmed on appeal, then, in such event, the railroad company would consent to a fine of \$400 in each of three of the other cases, the other nine to be dismissed. Some time in the latter part of the year 1901 the judgments in the two cases were affirmed. The Commonwealth's attorney had the twelve cases reinstated on the docket, and at the January term, 1902, and after the appellee, Hill, had been inducted into office, a judgment of \$400 in each of the three cases was rendered against the railroad company, and the nine remaining cases were dismissed. The issue between these parties is as to who is entitled to the 25 per cent. allowed to the county attorney of said last three judgments, each of them claiming that they were present and assisting in the obtaining of the judgments.

The appellant filed his petition, claiming the \$300, and asked the court to enjoin the auditor of the State from paying, and the appellee, Hill, from receiving, the sum. The lower court refused to grant the injunction, and dismissed appellant's petition, and the appellant is here on appeal. Appellant claims that he aided and assisted in getting up the evidence upon which the grand jury returned the indictments; that he was present and consented to the agreement between the Commonwealth's attorney and the railroad's attorney, and that by reason of the private agreement between the Commonwealth's attorney and the railroad's attorney the liability of the railroad was fixed upon a contingency dependent upon the result of the appeal from the two first judgments, and that the judgments were affirmed during his term of office, which he claims fixed the liability of the railroad to pay the \$1,300 (which by the agreement it had promised to pay), although the judgments were not rendered thereon during his term of office.

Section 138 of the Kentucky Statutes provides: "In all prosecutions in the circuit court, when the county attorney is present and assists in the prosecution, he shall receive from the State treasurer 25 per cent. of all judgments rendered in favor of the Commonwealth, etc."

It is plain that it was contemplated by the statutes that the county attorney that was present and assisting in the prosecution at the time of the rendition of the judgment was entitled to the per cent. allowed by the statute. To construe the statute otherwise would bring about endless confusion and litigation, and all outgoing county attorneys would claim and demand a part of the 25 per cent. on each judgment on prosecutions originating during his term of office to the extent of his labor and service rendered therein. The agreement made by the Commonwealth's attorney and the attorney for the railroad was not binding upon either, and certainly was not binding upon the court. The court, or either of the parties, could have ignored it, and it did not fix the liability of the railroad company in



the event the appeals were affirmed. It could have pleaded not guilty, and have had a trial by the court or jury in each, or all, of the twelve indictments, and the Commonwealth's attorney could have forced the railroad to have tried all the cases, and it was within the discretion of the court to render the judgments in accordance with said agreement, as it did, or refuse.

Perceiving no error the judgment of the lower court is affirmed.

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DUDLEY v. CITY OF FLEMINGSBURG.

(Filed March 3, 1903.)

Municipal government—Negligence—Damages—Appellant, in his petition, alleges that the municipal authorities of Flemingsburg knowingly suffered and permitted men and boys for several days to coast down Main street with sleds, and thus create an obstruction in said street to the injury and damage of the citizens and others lawfully using said streets, and that while he was lawfully crossing said street, and when exercising ordinary care for his own safety, was run against by one of the coasters with a sled and knocked down, his head injured and collar bone broken, and put to great expense for doctors and medical bills to effect a cure, and brought this suit to recover \$3,000 damages from the city. The recovery is resisted on the ground that the city is a municipal corporation in the preservation of peace, maintenance of good order and the enforcement of the laws for the safety of the public, possessing governmental functions and represents the State. Held—That said city is not liable for such injuries, as it is clearly a case of misfeasance or nonfeasance on the part of the police officers for failing to prevent the improper use of the street by the coasters. This is the performance of a public duty. It is only where a municipal corporation exercises powers and privileges for private purposes for the benefit of the corporation that a liability for injuries arise. The congregation of coasters on the streets do not constitute an obstruction on the street, rendering the city liable in the same manner as would a post or hole if permitted to remain in the street. The municipal corporation represents the Commonwealth, and municipal officers while engaged in those duties, which relate to the public safety and the preservation of public order, are the servants of the State.

G. A. Cassidy, J. D. Pumphrey and J. F. Maher for appellant.

W. G. Dearing and O. R. Bright for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Nunn.

The appellant sued the city of Flemingsburg, alleging that in the month of February, 1902, a heavy sleet had fallen and the streets of the city were covered with ice and snow, which remained on the street for several days, during which time the mayor and the other officials of the city suffered, permitted and encouraged men and boys to congregate on and coast down Main street, a distance of four or five hundred yards, on sleds and slides, at the rate of about seventy-five miles per hour, to the great danger of persons using this street and other streets crossing it; "that this coasting was kept up almost throughout the entire day of the 7th of February, 1902, the day on which appellant was injured, and many complained to the authorities, the mayor, police judge, councilmen and marshal, and they neglected

and refused to prevent or stop the illegal usage and practice of coasting on the street, although the street was appropriated almost entirely to the use of boys and reckless men, white and black, who were boisterous and riotous in their behavior and manner, and the same was continued for several days with the knowledge of the officials of the defendant, without protest from them, or any effort to prevent it, and that the officials could have prevented the illegal and dangerous use of the streets if they had made any effort to do so; that on the evening of the 7th day of February, 1902, about the hour of 7 o'clock, appellant started to the business portion of the city, and in his effort to cross Main street, and when exercising ordinary care for his own safety, he was run against by one of the coasters with a sled and was knocked down and his head injured, his collar bone broken, and he was otherwise bruised and severely injured, and was put to great expense, in the way of medical and doctor bills, to effect a cure, and that he was permanently injured to his damage in the sum of \$2,000."

The court below sustained a demurrer to that petition, and appellant is here on appeal. There are two general principles underlying the administration of government of municipal corporations. The one is that a municipal corporation, in the preservation of peace, maintenance of good order and the enforcement of the laws for the safety of the public, possesses governmental functions and represents the State. The other, is where the municipal corporation exercises those powers and privileges conferred for private, local or merely corporate purposes, peculiarly for the benefit of the corporation. Under the former the city is not liable for the malfeasance, misfeasance or nonfeasance of its officers. Under the latter it is. Malfeasance is the unjust performance of some act which the party had no right, or which he had contracted not to do. Misfeasance is the wrongful and injurious exercise of lawful authority, or the doing of an unlawful act in an unlawful manner. Nonfeasance is the nonperformance of some act which ought to be performed.

Appellant's petition is, in substance and effect, to recover damages from appellee for personal injuries by reason of the misfeasance or nonfeasance of its officials in authorizing and consenting to the coasting on its streets by disorderly persons and riotous assemblies, and failing to prohibit and prevent same.

In the case of the City of Milwaukee v. Schultz, 49 Wis. Rep., 254, the court said: "The coasting or sliding down Poplar street in the manner and to the extent charged in the complaint was, while being indulged in, a grievous public nuisance, which the city authorities ought to have prevented or suppressed, but this duty is a public or police, rather than a corporate, duty, in the performance of which the corporation, as such, has no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community." And the court in that case relieved the city from liability.

In the case of Faulkner v. City of Aurora, 44 A. M. Rep., 9, a case in which the facts are the same as those in the case at bar, the court said: "It is obvious that in the case before us the injury did not result from any de-

ot in the highway. It was produced by the act of those improperly and unlawfully using the highway, which was at the time, and but for the unlawful act of those improperly using the street, in a reasonably safe and convenient condition for public travel. The complaint is not that the appellant's son was injured because of defects in the street rendering it unsafe and unfit for public use, but because persons, while engaged in improperly using the street, ran their coasting sleds against his son, thereby injuring him. If the appellee is liable for the injury thus produced it would follow, logically, that it would be liable for an injury caused by loafers lounging upon its streets, occurring in the presence of its officers, if it were known that such persons were accustomed to lounge and loaf upon its streets. To hold incorporated cities liable for such injuries would be unjust, and we think without the sanction of law."

In the case of Borough of Norristown v. Fitzpatrick, 94 Penn., 121, the court said: "The appellee could only arrest and stop the sport of coasting upon its streets through its officers and police force, but as held in the same case the appellee would not be responsible for the neglect or failure of its officers to stop those engaged in thus using its streets."

The appellant, in his petition, claims that the use, and the manner of use, of this street by the coasters amounted to an obstruction of the street for which the city was liable. In the case of Faulkner v. City of Aurora, supra, "it is held that anything in the condition of the highway which renders it unsafe or inconvenient for travel is a defect or want of repair. It may be a hole in the highway; or it may consist of a stone or log or other obstacle left on its surface, or a post standing within its limits, or a barrier stretched across it, though not touching it; or it may be trees or walls standing by or upon it, and liable to fall and injure travelers; or it may be an awning projecting over it."

For injuries from such obstructions the city would be liable. Continuing, the court, in that case, said: "But we are not aware of any precedent for holding an illegal use of the highway by men, animals, vehicles, engines or any other object, while movable, and actually being moved, by human will and direction, and neither fixed to, nor resting on, nor remaining in, one position within the traveled part of the highway, to be a defect or want of repair for which the city or town is liable."

It is obvious that in the case before us the injury did not result from any defect or obstruction in the highway. It was produced by the acts of those improperly and unlawfully using the highway, and for which the city or corporation is not liable.

To the same effect is the case of Prather v. City of Lexington, 13 B. M., 563, in which a mob destroyed property of Prather in the city of Lexington. The court, after discussing defects in the petition, used this language: "But we place the decision of the question arising upon the demurrer to the plaintiff's declaration upon broader grounds. The officers of a city are quasi civil officers of the government, although appointed by the corporation. They are personally liable for their malfeasance or nonfeasance in office, but for neither is the corporation responsible." To the same effect is the case of Ward v. City of Louisville, 16 B. M., 191.

In the case of Jolly's Adm'r v. City of Hawesville, 89 Ky., 281, the facts

were that numerous persons congregated on the streets of Hawesville in the presence of and with the consent of the city officials, with guns and pistols, and engaged in sham battle, pursuing and shooting at each other in such close proximity as to endanger the lives of those who were not, as well as those who were, engaged, and this continued from early in the morning until late in the evening, without any effort on the part of the marshal, though aware of it, to stop it, and plaintiff's son, who was not engaged in this unlawful amusement, was shot in the eye with a wad and killed, and the plaintiff sued the city for damages. The court, applying the principles of law above named, dismissed her petition, and the court, in that case, after referring to *Pollock's Adm'r v. City of Louisville*, 18 Bush, 221, and *Greenwood v. City of Louisville*, *ibid*, 221, and the two cases 13 B. M., —, and 16 B. M., —, *supra*, as sustaining the court's position, used this language: "Such has been the uniform ruling of this court, and a different one would be not only perverse of the main design of creating municipal corporations, intended principally as auxiliary of the State government, but open the door for actions against cities on account of every personal injury in any degree attributable to misfeasance or nonfeasance of police officers, and thus impose burdens on taxpayers in no just sense at fault or liable. This long and well-settled doctrine has not been modified by statute of this State except to the extent that section 5, chapter 1, General Statutes (now section 8, Kentucky Statutes), makes a city liable for damages done to property therein by riotous and tumultuous assemblies of people. But the care and particularity with which the conditions of such liability are set out in the statute, and the restriction of it in express terms to cases of injury to property, shows the legislature did not intend to thereby authorize a recovery against the city for personal injury resulting from the malfeasance or negligence of police officers." To the same effect is the case of *Bishop v. City of Madisonville*, 23 Ky. Law Rep., 2863.

These cases all rest on the ground that the municipal corporation represents the Commonwealth, and municipal officers, while engaged in those duties which relate to the public safety and the preservation of public order, are the servants of the State.

Perceiving no error the judgment is affirmed.

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EARLY'S ADM'R V. LOUISVILLE, HENDERSON & ST. LOUIS  
RY. CO.

(Filed March 3, 1903.)

1. Railroads—Negligence—Peremptory instruction—Appellant's intestate was killed near a private crossing by a passing freight train on appellee's road, and this action was instituted to recover damages against appellee. At the conclusion of appellant's testimony the court gave the jury a peremptory instruction to find for appellee. On appeal appellant urges as error for reversal the refusal of the court to grant a new trial, and the action of the court in giving the peremptory instruction. The consideration of the propriety of giving the peremptory instruction will be decisive of both objections, as the only ground relied on for a new trial was the error in giving the peremptory instruction. The facts proven on the trial showed that the

private crossing was about 330 yards from a public crossing at which the train gives signals of its approach; and that a party at or near the crossing where the death occurred could see the track for at least a mile in the direction the train was approaching. There were no eyewitnesses to the killing except the trainmen, and none of them testified for appellant. The evidence heard on the trial did not show whether the deceased was walking on the track or attempting to cross it in front of the train, or lying thereon. It was incumbent on plaintiff to produce evidence to show some degree of negligence on the part of appellee's servants in charge of the train, or facts from which such negligence could properly be inferred. The only duty appellee's servants in charge of the train owed the deceased was to use reasonable care to prevent injuring him after discovering his presence on the track, and a careful examination of the record shows that there was no evidence adduced on the trial that tended to prove the want or absence of such care.

2. Evidence—The court permitted a witness to state that he was called by one of the train men to see the remains of the dead man, and while there the conductor told him that the man killed was lying on the track about three feet east of the crossing when run over by the train, and that they first saw something white on the track which looked like a piece of paper, and that when they discovered that it was a man, they were too close with the train to stop it before striking him. Held—That said evidence was not competent as the statements were made too late to be a part of the *res gestæ*. Even though said testimony was competent, it shows no negligence on the part of the employees in charge of the train. On the contrary, it proves that there was no negligence.

W. P. McClain and Clay & Clay for appellant.

Yeaman & Yeaman, Jas. P. Helm and Chapeze Wathen for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted in the Henderson Circuit Court by the appellant, Farmers Bank and Trust Co., as the administrator of Walter Early's estate, to recover damages for the alleged negligent killing of the deceased by the servants and employees of appellee in charge of one of its freight trains.

The answer denies the negligence complained of, and for further defense avers that the death of appellant's decedent was caused by his own negligence, which is denied by the reply. The trial resulted in a verdict for appellee by reason of a peremptory instruction given by the lower court at the conclusion of appellant's evidence, and a new trial having been refused the appellant, it asks this court to declare that the giving of the peremptory instruction by the lower court was improper, and also that that court erred in overruling the motion for a new trial. The record shows that the only ground relied on for a new trial is the alleged error of the lower court in giving the jury the peremptory instruction to find for appellee. It is patent, therefore, that the question of whether the peremptory instruction was or not proper must be determined from the evidence introduced by appellant on the trial.

Our examination of the record leads us to the conclusion that the following facts are to be regarded as satisfactorily established by the evidence, viz.: First, that appellant's decedent was killed on the afternoon of May 9,

1901, by appellee's westbound freight train, at or near a private crossing one mile from Reed's station, and at a point about 880 yards south of a public crossing; second, that at the point where he was struck he could, if on the track, or within forty or fifty feet of it, see up the track towards Reed's station, whence the train was coming, a distance of at least a mile. Some of the witnesses, not in view of the train itself, say they saw the smoke from it, heard distinctly the noise it was making in running, and heard it whistle for or before reaching the public crossing, which was 880 yards from the point where the deceased was killed; third, that the crossing at or near which he was killed was a private crossing, that is, one made where a road from the adjoining field crossed the railroad track.

The evidence does not disclose whether the deceased at the time he was killed was walking on the track, or attempting to cross it in front of the train, or lying with his body on the track. No eyewitness was introduced to testify as to the manner of his death, unless the statements of one or more of the trainmen made to the witness, Patry, and detailed by him on the trial, are to be considered as competent evidence. Patry testified that when the train stopped, after running over Early, one of the trainmen called him to the place of the accident to see the remains of the dead man, and when he got there he was in substance told by the conductor in charge of the train that the man killed was lying on the track about three feet east of the crossing when run over by the train, and that they first saw something white on the track which looked like a piece of paper, and when they discovered that it was a man they were too close with the train to stop it before striking him.

We do not think these statements competent, and they should have been excluded by the lower court upon the objection made by counsel for appellee, as they appear to have been made too long after the accident to be considered a part of the *res gestae*, but they were admitted by that court, and were probably considered as evidence on the motion for a peremptory instruction, of which appellant can not complain, as the statements were brought out by its counsel on the examination in chief, and thereby became part of its evidence. So if the statements of the conductor are to be relied on, they not only exonerate appellee from the charge of negligence, but show that the deceased was guilty of contributory negligence. If this view of the case is not to be accepted, the manner in which the deceased met his death is wholly a matter of conjecture. But whether he was walking on the track, lying thereon, or attempting to cross it in front of the train, as there was nothing to obstruct the view from where he was for the distance of a mile in the direction of the approaching train, it is as reasonable to suppose that he saw it, heard the noise of its running, and heard it whistle for the public crossing (which was 880 yards away), all in time to have enabled him to get out of its way, as it would be to suppose that those in charge of the train saw him, and realized his peril in time to have avoided killing him by stopping the train before it struck him.

As already stated, the crossing at or near which the deceased was killed was a private or farm crossing, and this court has held that the usual signals are not required of a train in approaching such a crossing. But where a private crossing is maintained by the railroad company for the benefit of a

land owner in consideration of the grant of a right of way through his lands, and it is at a point where the view of the track is obstructed, it being a custom of the trains to give warning of their approach to the crossing, it has been held by this court that one injured by a train at such a crossing may recover therefor when no signal was given of its approach, upon the ground that the failure to give such signal constitutes negligence. (*L. & N. R. R. Co. v. Bodine*, 23 Ky. Law Rep., 14; *Johnson v. L. & N. R. R. Co.*, 93 Ky., 651.)

In *Cahill v. Cincinnati, &c., R. R. Co.*, 93 Ky., 845, the company was held liable for injury inflicted by one of its trains at a private crossing, but it was because of failure of those in charge of the train to signal its approach to a public crossing a short distance from the private crossing, it appearing that it was customary for these signals to be given for the public crossing, and that they were relied upon by persons using the private crossing. The doctrine here announced was reaffirmed in *L. & N. R. R. Co. v. Survant*, 19 Ky. Law Rep., 1576.

The facts of the case at bar do not authorize a recovery as in the cases *supra*. Here the crossing is in a field, and from it a clear and unobstructed view is to be had of the railroad track for at least a mile in the direction of Reed's station, and though one or two witnesses testified that they had known trains to sound the whistle in approaching the crossing, it does not appear that such signals were customary, or that they were not given at the time of Early's death for the public crossing, instead of the private one. There is no presumption of negligence against the appellee any more than there is a presumption of contributory negligence on the part of the deceased. It was incumbent on the appellant to prove negligence on the part of appellee's servants in charge of the train, or facts from which such negligence could properly be inferred. (*Hughes v. Cincinnati, &c., R. R. Co.*, 91 Ky., 526; *Wintusky v. L. & N. R. R. Co.*, 14 Ky. Law Rep., 579; *L. & N. R. R. Co. v. Vittito's Adm'r*, 19 Ky. Law Rep., 612; *Morris, Adm'r v. L. & N. R. R. Co.*, 22 Ky. Law Rep., 1593.)

The only duty appellee's servants in charge of the train owed the deceased was to use reasonable care to prevent injuring him after discovering his presence on the track, and a careful examination of the record convinces us that there was no evidence adduced on the trial that tended to prove the want or absence of such care. We do not attribute to the tests made by some of the witnesses as to the distances from which certain objects placed by them on the railroad track at the point of the accident could be seen, the importance attached to them by counsel for appellant, for we know that objects to which the attention is called in advance can more readily be seen and identified by a person stationed on the ground at a given distance, than by one on a rapidly moving train, however keen his vision, or constant his outlook on the track ahead of the train. But these tests do not of themselves, or in connection with the remainder of the evidence, supply the facts from which negligence on the part of appellee may be inferred, and being of the opinion that the lower court did not err in giving the peremptory instruction, nor in refusing the appellant a new trial, the judgment is affirmed.

## MOSLEY v. COMMONWEALTH.

(Filed March 3, 1908—Not to be reported.)

Criminal law—Evidence—Appellant was convicted for killing H., and his punishment fixed at fifteen years' imprisonment in the penitentiary. The introduction of prejudicial evidence is relied on for a reversal. The persons present at the shooting were appellant and his two sons and deceased and W. and O. W. gave testimony which tended to show that appellant made the first hostile attack. Appellant and his two sons testified to the effect that the deceased had commenced the difficulty, and made the first hostile demonstration and attack. Evidence impeaching appellant and one of his sons was introduced. O. was then introduced by the Commonwealth as a witness, and corroborated appellant's version of the occurrence. His testimony on this point was brought out on cross-examination. Afterwards the Commonwealth recalled O., and asked him if he had not made statements to others since the killing to the effect that appellant made the first attack. Witness replied that he did not remember making such statements. Witnesses were then introduced, proving that O. had made the statements. Held—That this evidence was prejudicial as it tended to prove as substantive testimony that appellant had made the first hostile demonstration. The court should have carefully admonished the jury that the statements made out of court by O. contrary to his evidence, if he made them, were to be considered only as bearing on his credibility as a witness, and in no event as evidence of the fact as to who made the first hostile demonstration. A witness was permitted to testify about a difficulty between the two sons of appellant and deceased which occurred some time previously, and concerning declarations made by the sons against deceased on that occasion when appellant was not present. Held—That this evidence was incompetent upon the separate trial of appellant. It was error to prove by a witness in rebuttal that appellant had admitted to him that he had fired at deceased five times.

John C. Eversole for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant and his sons, Kelse and Robert Mosley, were jointly indicted for the killing of E. L. Hart. Appellant was tried separately, and from the judgment convicting him of manslaughter he has appealed.

The deceased was shown to have been a violent and dangerous man, and quarrelsome. In a controversy between appellant and deceased concerning some timber and saw logs the conduct of the deceased indicated an utter disregard of appellant's property rights, and a purpose to provoke a difficulty. On the fatal occasion the parties met in the road, the deceased being armed with a Winchester rifle. Appellant and his two sons, and two other persons, his employees, were on their way to the log woods to work. They were required to pass by deceased's home, and within a few feet of his house. On the day previous deceased had accosted appellant with a Winchester rifle, using violent and threatening language. Appellant and his sons were also armed on the day of the killing. It looks like they were expecting trouble with deceased. The verdict of the jury finding appellant guilty fixed his



punishment at fifteen years' confinement in the penitentiary. At appellant's age this is probably equivalent to a life sentence.

Although the instructions are complained of, we are unable to say that they are not a fair and clear announcement of the law applicable to this case. The only errors of the trial court are in the matter of admitting evidence prejudicial to the accused. Besides, appellant and his two sons there were but two witnesses to the killing. These were Russell Wooten and William Oliver. Wooten testified that his attention was first arrested by a statement from appellant which was apparently in response to some question put by deceased; that upon turning his head he saw appellant fire his pistol and saw the deceased start to raise his Winchester rifle, which was being carried so that the muzzle of it was pointing in the direction of appellant. The effect of this witness' testimony was that appellant made the first hostile demonstration on this occasion. Appellant and his two sons testified, however, that appellant was accosted by deceased in a manner indicating a purpose to re-open the controversy about the saw logs, and being unsatisfied with appellant's response, started to raise his gun as if to shoot him, whereupon appellant fired.

There is evidence tending to impeach appellant and one of his sons. It may be doubted whether the jury felt warranted in accepting the evidence of appellant and his sons by reason of their interest in the outcome of the trial independent of the matter of impeachment. The other witness to the transaction was William Oliver. His testimony clearly corroborates appellant's version of the occurrence, and was that the deceased began the altercation and followed it up with a demonstration of violence, by starting to present his gun as if to fire at appellant. This witness, as well as Wooten, were introduced in chief by the Commonwealth. Oliver was not asked by the Commonwealth as to who first started to fire, or made the first demonstration to do so. His testimony upon this point was brought out upon cross-examination. Afterwards the Commonwealth recalled Oliver, and then propounded to him a series of questions concerning alleged statements made by Oliver out of court to other persons, to the effect, for example, as follows:

"Q. Didn't you tell Green Morris and Mathew Langdon that Lon (that is deceased) never raised his gun or presented it towards Wyle until after Wyle had fired the first shot?"

"A. I don't remember whether I did or not."

"Q. And you tell this jury that if you said that you don't remember any thing about it?"

"A. No, sir; I don't remember it."

"Q. Didn't you tell them that out in the streets since you have been here?"

"A. I might have said it, but I don't remember it."

"Q. If you did tell them that, have you any idea why you told them that?"

"A. I don't know what all I have told since that; I was never sworn about it until this time."

"Q. Then in talking about it you just told the people any way?"

"A. It was nobody's business as I know of."

This testimony seems to be rather an admission on the part of this witness that he made statements out of court different from his testimony

covering the point in question, and they were very materially different. Although the witness does not admit having made them, he does not deny it, and the impression upon the jury must have been either that it was an admission, or at least tended to destroy his previous positive statements to the contrary.

Section 596 of the Civil Code allows a party producing a witness to contradict him by showing that he has made statements differing from his testimony. The effect of this testimony was not possibly competent in any light as substantive evidence, for if he had answered in the affirmative it would have been to have constituted the statements made by the witness out of court, not under oath, substantive evidence of the fact that appellant had fired at deceased before the latter had offered appellant any violence.

In *Loving v. Commonwealth*, 80 Ky., 511, it was said: "Nor can a witness who fails to testify to substantive facts be asked if he has not made statements to others out of court that such facts existed, for the purpose of proving that he had made such statements, as that would transform declarations made out of court, and not under the sanction of an oath, into substantive testimony."

If the witness had answered in the negative in this case, and the Commonwealth had proven the facts about which the witness was asked, it would have been as fatally erroneous unless the court had admonished the jury at the time that the sole purpose and effect of such testimony was its bearing upon the credibility of the witness, Oliver. This matter was material to the accused because if the jury should not have believed that appellant had begun the difficulty they could not have found him guilty. The effect of letting in the probable admission of Oliver of statements made by him out of court, thereby making them substantive evidence, was to corroborate Wooten, and destroy appellant's statements and theory of defense. Thus it may have appeared that the only two disinterested eyewitnesses were actually agreed in their version, and that they contradicted appellant and his sons. The court should have carefully admonished the jury that the statements made out of court by Oliver, contrary to his evidence, if he made them, were to be considered only as bearing on his credibility as a witness, and in no event as evidence of the fact as to who made the first hostile demonstration.

George Begley, a witness for the Commonwealth, was permitted to testify about a difficulty between Bob Mosley and Kelse Mosley had with the deceased and one Morris some time prior to the killing, and concerning declarations made by Bob and Kelse concerning the deceased on that occasion. Appellant was not present when those statements were made, nor when the difficulty occurred. The court is of opinion that this matter was incompetent upon the separate trial of appellant.

M. V. Davidson was permitted to testify in rebuttal that appellant had admitted to him that he had fired at deceased five times. Appellant had testified that he had shot four times only. We are of opinion that this evidence, whatever it may have been worth, was in chief, and should not have been admitted in rebuttal.

For the errors indicated the judgment is reversed and the cause is remanded for a new trial under proceedings consistent herewith.

## BOHANNAN v. COMMONWEALTH.

(Filed March 3, 1903—Not to be reported.)

Criminal law—Change of venue—Evidence—Appellant was indicted in Breathitt county for murder and was convicted of manslaughter, and his punishment fixed at imprisonment in the penitentiary for fifteen years, from which this appeal is prosecuted. It is urged as grounds for reversal that the court erred to the prejudice of appellant in refusing to grant him a change of venue. The grounds upon which he based his application for a change of venue was that just previous to the killing an election had been held in the county, an exciting election for county officers, at which appellant voted against the successful candidates for county judge, sheriff, school superintendent and jailer, and that said officers felt a resentment against and friendship for the deceased, and being influential men in the county, had control of the juries, and would exercise that influence against appellant, and he would, therefore, have an unfair trial. The court overruled the motion for a change of venue. Held—That the court did not abuse the discretion given it under section 1110 of Kentucky Statutes, in refusing the motion for a change of venue. There is nothing in the record to show that any corrupt or improper influences were brought to bear to secure the conviction of defendant, nor does it appear that either of the officers from whose influence the appellant apprehended danger to himself undertook at any stage of the trial to influence the jury in their finding. It will not be presumed that persons occupying important positions would be so lost to decency and propriety as to prostitute the power and influence which came to them by reason of their position to gratify a mere private malice or prejudice against the defendant. The verdict will not be disturbed as the rule is well settled that in criminal cases the verdict of conviction will not be disturbed if there is any evidence to sustain it.

Pollard & Redwine for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Chief Justice Burnam.

Appellant was indicted by the grand jury of Breathitt county on the 4th day of March, 1902, for the murder of Elkana Smith. A general demurrer was properly sustained to this indictment because it failed to allege that the killing was done with "malice aforethought." The case was resubmitted to the grand jury, who, on the 3d day of June, 1902, returned another indictment for murder in which no defect in form or substance is suggested. A trial under this indictment resulted in the defendant's conviction for manslaughter, and a sentence to confinement in the penitentiary for a term of fifteen years. From the judgment on this verdict of the jury the defendant has appealed to this court.

The first error complained of that it is necessary to notice is an order of the trial court overruling his application for a change of venue. In his petition he says: "That just previous to the killing an election had been held in Breathitt county, which was very bitter and exciting between the candidates and their friends, and engendered a great deal of ill-will and personal strife; and that at this election the county judge, James Hargis, the sheriff, Ed. Callahan, the superintendent of schools, H. P. Noble, and the jailer, William Spencer, were elected; that they are very influential

men, and with those who are closely and intimately connected with them in business, control at least one-half the business interest of Breathitt county; that they will use their influence, as he believes, with their employes and men under their control and the jurors of the court to convict him, although he may be and is proven innocent of the charge against him; that E. Callahan, the sheriff, and James Hargis, the county judge, have, he believes, entire control of the juries of Breathitt county, and can convict or acquit a person charged with crime at their pleasure; that he opposed and voted against all of the above-named candidates and officers, and in consequence thereof had incurred their prejudice; that the brothers of the deceased are influential men, who supported the aforesaid county officers, and they have so moulded the sentiment of Breathitt county against him that it would be impossible for him to get a fair and impartial trial of the case in Breathitt county."

Accompanying his petition were filed the affidavits of six persons, who say in substance that they are acquainted with the state of public opinion in Breathitt county with reference to the defendant, and that owing to the influences and circumstances surrounding the case they did not believe that the defendant could get a fair and impartial trial in Breathitt county. The attorney for the Commonwealth examined orally at the bar each of the persons who made the accompanying affidavits as to the facts and circumstances on which they based their belief that the defendant could not obtain a fair and impartial trial in Breathitt county, and each one of them testified that their opinion was based upon the fact, as they understood it, that the county judge, Hargis, and the sheriff, Callahan, would use their influence in the county to procure the conviction of the defendant, and each one of them expressed the opinion that if these persons should take no interest in the trial, that they knew of no reason why the defendant could not have a fair trial. The attorney for the Commonwealth then called Hargis, Callahan, Noble and Spencer in rebuttal, and each of them testified that they had not prosecuted, and were not going to prosecute, the defendant; that they had no interest in the trial one way or the other, and that they had no feelings or prejudice against the defendant; that they did not know how he voted in the election. On this testimony the circuit judge overruled the motion for a change of venue. Section 1110 of the Kentucky Statutes, after providing for an application for a change of venue by the defendant, says: "The court shall, on said motion, hear all the witnesses that may be produced by either party, and from the evidence determine whether or not the applicant is entitled to a change of venue."

It does not appear to us from this testimony that the trial court abused its discretion in refusing the change of venue. There is nothing in the record to show that any corrupt or improper influences were brought to bear to secure the conviction of the defendant, nor does it appear that either of the officers from whose influence the appellant apprehended danger to himself undertook at any stage of the trial to influence the jury in their finding. We are not willing to believe on such testimony that persons occupying important official positions would be so lost to decency and propriety as to prostitute the power and influence which comes to them by reason of their position to gratify a mere private malice or prejudice against the defendant.

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Appellant also complains that there was no testimony to support the verdict of the jury. We can not concur in this conclusion. The testimony shows that there had been bad blood between the defendant and the deceased for several years, which had on several occasions culminated in violent threats and attempted violence. And the witness, Maloney, who seems to have witnessed the entire transaction, testified that the killing occurred near the boiler of a sawmill, of which he was the engineer; that the deceased was standing on his left, in front of the boiler, when the defendant came up on his right, and asked him to take a chance in the raffle of a shot gun; that as he was stooping down to open the door of the ash box he saw the defendant suddenly draw a pistol; that he turned his head towards the deceased and saw him with his pistol in his hands; that the deceased started to go by the defendant, as though he was trying to get out, and just after the deceased passed the defendant shot him, and that several shots followed in quick succession; that the deceased then turned and ran, and that the defendant fired at him several times; that the deceased was wounded in the right hip, and in one of his arms; and that the last shot passed through his head, killing him instantly; that only one chamber was loaded when the fight began in the deceased's pistol, and he fired that one shot. Whilst there is a great deal of testimony in the record conducing to show that defendant had the right to believe from previous threats and demonstrations that the deceased would attack him, it certainly can not be claimed that there was no testimony to authorize the submission of this case to the jury, and it is only where there is no evidence that we would be authorized to reverse the judgment of a trial court in a criminal case on this ground. No complaint is made of the instructions, and no error is pointed out in the admission or rejection of testimony, and we are, therefore, of the opinion that we would not be authorized in disturbing the judgment.

Judgment affirmed.

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MANHEIMER v. HENDERSON BUILDING AND LOAN ASSOCIATION'S ASS'EE.

(Filed March 8, 1903—Not to be reported.)

Insolvent building and loan associations—Rights of stockholder—Appellee made a deed of assignment for the benefit of its creditors, and the assignee filed this suit for a settlement of the trust. Prior to the assignment appellant, a stockholder, had paid all indebtedness on the stock and had reduced her claim against the association to judgment and filed the judgment with the commissioner, who reported it as a claim on an equal footing with other stockholders. Appellant filed exceptions to said report, insisting that her claim should be allowed as a preferred claim. The court overruled her exceptions, from which order she prosecutes this appeal. Held—That a stockholder in an insolvent building and loan association is not entitled to credits for stock payments made or to the withdrawal value of the stock where same remains with the company unsettled at the time the company becomes insolvent. The uniform rule is that after the assignment of a building and loan association all stockholders are upon an equal footing. The fact that appellant paid in advance all premiums and dues assessed on her stock, or that she gave notice of withdrawal before the assignment, can not alter the relationship of the parties as fixed by the law, nor does the fact that her

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claim has been merged into a judgment change her status as a stockholder or give her preference over other stockholders. The only effect of the judgment was to fix definitely the amount upon which she will be entitled to receive her pro rata after the debts of the association are paid.

Yeaman & Yeaman and J. M. Hartfield for appellant.

M. Merritt for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Settle.

On April 25, 1901, the Henderson Building and Loan Association, of Henderson, Kentucky, being insolvent, executed a deed of assignment to the appellee, C. G. Henson, whereby all of its property of whatsoever kind was conveyed to him in trust for the payment of its debts, and the assignee thereafter, on April 26, 1901, instituted suit in the Henderson Circuit Court for a settlement of the trust.

The appellant, Theresa Manheimer, owned eight shares of the stock of the association mentioned, of \$100 per share, upon which she had paid to the association prior to February, 1901, the entire amount due thereon. On April 26, 1901, the same day on which appellee, as assignee of the association, filed his suit for a settlement of its affairs appellant brought suit in the same court against the association for the sum and interest alleged to be due her on her stock, and which it was claimed by her the association had recognized as due and promised to pay. At the May term, 1901, of the court she obtained a judgment against the association for the sum of \$800 as due on her stock, with interest from February 28, 1901, and costs.

In the meantime the assignee in his suit for a settlement had procured an order referring his case to the master commissioner for a report as to the indebtedness of the association, and appellant, among others, filed her claim with the commissioner, which was in the form of a copy of the judgment obtained by her, accompanied by this statement: "Claimant filed this claim as borrowed money by the association and not on account of shareholder, the within money being borrowed by the said association." Later the commissioner filed his report, wherein appellant's claim was allowed, not as that of a creditor but a stockholder. Appellant filed exceptions to so much of the report as refused to recognize her as a creditor, and her exceptions were at the January term, 1902, of the court overruled, it being adjudged by the lower court that appellant "stand in the same attitude as other stockholders of said association until its indebtedness is paid," and from that judgment she prosecutes this appeal.

We find, therefore, that the only question submitted for the decision of this court is whether the appellant is a creditor or stockholder of the Henderson Building and Loan Association. Unfortunately for appellant's contention the question involved has been too frequently settled by former adjudications of this court to admit of further controversy. The most recent deliverance of this court on the question is found in the case of Vinton v. National Building and Loan Association, 23 Ky. Law Rep., 2091, in which it was held that a stockholder in a building and loan company is not entitled to credits for stock payments made, or to the withdrawal value of the stock, where same remained with the company unsettled at the time the com-

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pany became insolvent. In stating the reasons for the rule mentioned the court, in the case *supra*, says: "In insolvent concerns it is to be assumed that there has been an impairment of the capital stock, growing out of losses in the conduct of the business, and the value of the stock can be determined only when the losses are ascertained and the funds ready for distribution, and we are of opinion that the mere date of an application for withdrawal of stock presents no bar to the right of other stockholders to insist, through the assignee or the receiver, upon the subjection of payments to stock account to the payment of proportionate amounts of the losses and expenses of the concern. To hold otherwise would be to lend the aid of the courts to the placing of a disproportionate part of this burden upon the borrowing member, the class for whose benefit the law is supposed to have been designed, and who, as their stock is in pledge to the association, can not apply for its withdrawal. So long as the stock payments remain in the hands of the association, no matter what the date of the application for withdrawal, they remain subject to this burden."

In *Reddick v. United States B. and L. Association*, 20 Ky. Law Rep., 1730, it was held that a member of a building and loan association, by giving notice of withdrawal of his stock before assignment made for the benefit of creditors of the association, did not under the law governing such associations acquire a priority in the distribution of the assets of the association. The following additional authorities will be found to fully sustain the doctrine announced by the cases *supra*, viz.: *Forward v. Eubank, Ass'ee*, 20 Ky. Law Rep., 1842; *Sumrall v. Commercial Building Trust's Ass'ee*, 20 Ky. Law Rep., 1891; *Cook on Stock and Stockholders*, section 12.

The uniform rule as declared in all of the foregoing authorities is that after the assignment of a building and loan association all stockholders are upon an equal footing. The fact that appellant paid in advance all premiums and dues assessed upon her stock, or that she gave notice of withdrawal before the assignment, can not alter the relationship of the parties as fixed by the law, nor does the fact that her claim has been merged into a judgment change her status as a stockholder, or give her preference over other stockholders. The only effect of the judgment was to fix definitely the amount upon which she will be entitled to receive her pro rata after the debts of the association are paid. It is not claimed by the appellant that she actually loaned the association any money, and the fact that the amount due on her stock remained in the hands of the association, after demand had been made for its payment and until the assignment, did not make it a borrower of the money, therefore, the written statement accompanying the claim filed by her with the commissioner, in which the association was denominated a borrower of her money, inaccurately expressed the relationship of the parties; she still remained, and was only, a stockholder, nothing more.

We are of the opinion that the lower court did not err in overruling appellant's exceptions to the commissioner's report, and the judgment is, therefore, affirmed.

## LOUISVILLE &amp; NASHVILLE R. R. CO. v. GORDON.

(Filed March 2, 1903—Not to be reported.)

Railroads—Negligence—Injuries to brakeman—Appellee, a brakeman on a freight train of appellant, was standing on the top of a car next to the caboose, when the engineer, contrary to the rules of the company, after slowing down the train when approaching a station where he expected orders, started the train with a sudden jerk, throwing appellee from his feet on top of the car, from which he fell on the track and the train crushed his leg, which necessitated amputation. This action was brought to recover damages for said injuries, and a verdict and judgment in favor of appellee resulted, from which this appeal is prosecuted. It is urged as ground for reversal that the court erred in refusing to give a peremptory instruction for appellant. Held—That the court properly refused a peremptory instruction, as the evidence sustains the charge of gross negligence. After the court had given the usual instruction defining compensatory damages to mean such sum as will reasonably compensate the plaintiff for mental and physical suffering and permanent impairment of his ability to labor and earn money, appellant asked an instruction which left out mental and physical suffering as an element of damage; also instructing the jury that they had the right in fixing such damages to take into consideration the probable duration of his life in view of the nature and character of the business in which he was engaged at the time of the injury. Held—The court properly refused said instruction, as it was a contradiction of the former instruction as to the grounds of compensation; also that it gave undue prominence to the fact that compensation should be fixed on the basis that appellee should continue in the same hazardous employment during his life.

W. F. & J. C. Browder and Edward W. Hines for appellant.

B. F. Proctor and Guy H. Herdman for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, H. W. Gordon, while in the service of the appellant, the Louisville & Nashville R. R. Co., as a brakeman on one of its freight trains on the Henderson division near Crofton, was thrown from the top of a freight car, and his leg run over, crushing it so badly as to require amputation, which he alleges was due to the gross negligence of defendant's servants in operating the train. The train consisted of an engine and tender, twenty-six freight cars and a caboose, some of the cars being loaded and others being empty. The first twelve freight cars next to the engine and tender were equipped with air brakes, while the balance of the cars were provided with only the old-fashion hand brake. The crew of the train consisted of an engineer, fireman, conductor, front and middle brakemen, and the appellee, Gordon, who was rear brakeman and flagman of the train. The train was going south on a down grade as it approached the station, Crofton, the appellee, Gordon, was standing on the top of a flat car, immediately in front of the caboose.

Upon the trial the plaintiff introduced proof conducing to show that the rules of the railroad company required the engineer in charge of a freight train when he approached an order station to slow up and have his engine under such control that he could stop if necessary; and to ask for orders by



four sharp blasts from his whistle. If the station agent had orders for the train he answered the signal by the display of a red light, which was notice that the train must stop at the station. If he had no orders it was his duty to display a white light. It was then the duty of the engineer, as a warning to the other employes upon the train, to give two sharp blasts of the whistle before increasing his speed. The particular negligence complained of in this case is that the engineer failed to give the warning of two blasts of his whistle after the display of the white light by the station agent, but immediately started forward with a tremendous jerk. The substance of appellee's testimony as to how the accident occurred is as follows: He says that when the train left Peterboro Hill, about three-fourths of a mile from Crofton, the engineer blew four blasts of his whistle for orders, but received none; that he then proceeded a little further and decreased the speed, when he gave the signal again for orders; that in response thereto the station agent gave the white signal that they had no orders for the train; that as soon as the white light was shown at the station, without giving the regulation warning of two blasts, the engineer opened the steam throttle, and the engine jumped forward, jerking the slack out of the train with great violence, and throwing him from his feet to the top of the car, from which he rolled off to the track below and the train passed over his leg, crushing it badly; that it was during the night, and that he was compelled to crawl about a half mile to the nearest house, dragging his crushed leg behind him; that it was amputated that night and the next morning he was taken to Nashville, where he was confined for several months, and a second amputation performed, as the first one was improperly done. A number of witnesses were introduced as experts, who testified that the slack in a train containing twenty-six cars, equipped with the old-fashioned brake, would be about six feet and that proper railroading required that this slack should be taken up very gradually; and that if this course was pursued little or no jerking of the train resulted, but that if the train was suddenly started, the necessary result, particularly towards the end of the train, would be a violent jerk. The appellee's testimony as to the manner in which the engineer started forward after receiving notice that it was not necessary for him to stop at Crofton is corroborated largely by every man on the train except the engineer. The conductor, Smiley, testified that he was in the cab of the locomotive with the engineer, and that he felt the engine jump forward to such an extent that he fell backwards, and that a jerk that would be felt by a man in the cab would be very severe on the back part of the train. Whether this testimony and other facts developed on the trial sustained the charge of gross negligence were peculiarly the province of the jury to determine and we think the court properly overruled the motion for a peremptory instruction.

Appellee was at the time of the injury thirty-three years of age, and in good health, and in the progress of the trial his counsel introduced an experienced life insurance agent for the purpose of establishing approximately his expectancy of life from the American Tables of Mortality. And after the court had given the usual and approved instruction in cases of this character, the appellant asked the court to instruct the jury that: "That if they should believe from the evidence that plaintiff had sustained actual damage

by reason of or as the direct result of gross negligence of the defendant's engineer in charge of and operating said engine on the occasion in controversy, they had the right in fixing such damages, if any, to take in consideration the probable duration of his life, in view of the nature and character of the business in which he was engaged at the time of the injury as shown by the evidence. And also the extent, if any, to which his earning capacity had been diminished or impaired by reason of such injury, and the measure of damage, if any, was the difference, if any, between the earning capacity of plaintiff before the injury and his earning capacity after the injury."

The court had previously, in instruction No. 2, defined compensatory damages as used in the instruction to mean: "Such sum of money as will barely and reasonably compensate the plaintiff for mental and physical suffering, and permanent impairment of his ability to labor and earn money, as were the direct and natural result of defendant's gross negligence, if any, as set out in instruction No. 1."

We think the court properly refused the instruction asked by appellant. It was contradictory to the instruction already given, in leaving out mental and physical suffering as an element of damage, and it was also objectionable as it called the attention of the jury to this particular fact in the testimony. Appellant was permitted to prove that the employment in which appellee was engaged was more hazardous to life than ordinary avocation in which men engaged, and this fact was before the jury for their consideration. Besides, there is nothing in the evidence to show that appellee intended permanently to pursue the business of railroading. He might, and in all probability would, in course of time have sought other employment. In fact more than half of the witnesses who had testified in this case had formerly been in the railroad service, and had abandoned it for less precarious employment in other pursuits. We, therefore, conclude that the court did not err in refusing the instruction offered by appellant on this point. It is also claimed that the appellee was guilty of such contributory negligence as precluded recovery for the reason that he was standing near the middle of the car, instead of at the brake on the front end of the car. There seems to be no testimony to support this contention. The only witness who testified on the point testified that appellee was in his proper place. Besides, this is a question for the jury, and was fairly submitted to them by the instructions. Whilst the verdict in this case is large, this court had in other cases refused to reverse judgments equal in amount for similar injuries on the ground that they were excessive.

Upon the whole case we perceive no error prejudicial to the substantial rights of the defendant, and the judgment must be affirmed.

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CHESAPEAKE & OHIO RY. CO. v. WILDER, BY, & C.

(Filed March 4, 1908—Not to be reported.)

1. Railroads—Negligence—Unsafe premises—Instructions—Appellee, a young man about twenty years of age, was employed by D., who prized and shipped large lots of tobacco from a depot on appellant's road. While engaged in moving hogsheds of tobacco about in the depot preparatory to shipment a large door to the depot fell and broke his arm. The hinges of the door

had been broken some time, and the door propped by a hogshead. This fact was unknown to appellee, but known to appellant's agent. Appellee recovered a judgment for \$1,000 damages, from which this appeal is prosecuted. Held—That appellant was properly held liable for said damages. It was the duty of the railroad company to keep its premises reasonably safe for the use of persons properly thereon, in the business of delivering or receiving freight. There is no doubt under the evidence of the unsafe condition of the door, and that the agent knew it. The court properly instructed the jury that the railroad company is not answerable to him if he was hurt while working there simply for the furtherance of D.'s prizing business, and not in getting the tobacco ready for shipment on the car then expected.

2. Services of infant—The instruction allowing the jury to compensate appellee for reduction of his power to earn money was not erroneous because it authorized him to recover for the time before he arrived at twenty-one years of age. Held—That as he was nearly twenty-one years of age, and his mother, who was his only parent living, seems to have consented to the recovery, there was no reversible error in the instruction as given.

8. Damages—The verdict and judgment for \$1,000 damages was not excessive.

John T. Shelby for appellant.

J. M. Benton for appellees.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Hobson.

Appellant's depot building at its station Thompson, in Clark county, is situated close to the tobacco barn of A. T. Duckworth, in which he prized tobacco. It was his custom to make shipments whenever he got a car load. As the hogsheads were prized, by an agreement with appellant's agent, he rolled them into the depot, and as soon as enough were there to load a car they were put in it. The cars were ordered from time to time as they were needed. About December 20, 1900, a car was ordered, and in the regular course of business should have reached Thompson about 7 o'clock the next morning. Early that morning, before the arrival of the car, and in anticipation of its coming, Duckworth directed appellee, Gordon Wilder, and another man, who were working for him, to go into the depot and roll the hogsheads together, so as to make room for three more hogsheads then in the barn, so that they could be rolled in and be ready for the loading of the car. There were a number of hogsheads in the room, some belonging to Duckworth and some to others. It was customary for shippers to do this when they wanted to get tobacco in. While appellee was rolling the hogsheads a heavy door fell upon him, breaking his arm, injuring his shoulder, and inflicting a serious, if not permanent, injury. The door was a sliding door to the depot, large and heavy. One of the hinges had been broken some months or more, and the other hinge had been broken a few days before. The door had then simply been set up in its position, and a tobacco hogshead had been rolled against it to hold it in place. When this hogshead was moved the door fell and injured appellee. He did not know that the door was broken, and had no notice of the danger until it fell on him. By the course of business Duckworth was required to put his tobacco on the car, and he could load it on the car, either directly from the barn or bring it into the depot and load it from there on the car. The court instructed the

jury that if the defendant or its employes knew the door to be loose from its fastening, and not in a reasonably safe condition, and he was injured by reason of the door's falling on him, while he was engaged in moving or arranging the hogsheads preparatory to and as a part of the work of loading the tobacco on the defendant's car for shipment, they should find for the plaintiff, unless he knew of the unsafe condition of the door, or could by the exercise of proper care have discovered it, or failed to use proper care in moving the hogsheads. But if at the time he was injured he was not moving or arranging the hogshead preparatory to loading the tobacco on the defendant's car for shipment, or was moving them for the convenience or benefit of Duckworth only, they should find for the defendant. The jury found for the plaintiff in the sum of \$1,000, which is not so excessive under the evidence as to justify us in disturbing the verdict on this ground.

There was evidence from which it might be inferred that the purpose in moving the hogsheads was to get them out of Duckworth's way in the barn, and not with a view to their shipment. The instruction of the court was, therefore, proper; but the evidence on the subject was such that it was a question for the jury, and was properly left to them by the court.

It was incumbent upon the railroad company to keep its premises reasonably safe for the use of persons properly thereon in the business of delivering or receiving freight. There is no doubt under the evidence of the unsafe condition of the door, and that the agent knew of it. The rule is thus stated in 2 Shearman & Redfield on Negligence, section 704: "The occupant of land is bound to use ordinary care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation, express or implied, for the transaction of business, or for any other purpose beneficial to him; or, if his premises are in any respect dangerous, he must give such visitors sufficient warning of the danger to enable them, by the use of ordinary care, to avoid it. This rule is specially applicable to an owner of real property who receives compensation for its use, as, for example, in the case of a wharf master who receives payment for the use of his wharf, a railroad company, with respect to its platform or other structures, or the occupant of premises used for public entertainment, and charging an admission fee." To same effect see Thompson on Negligence, sections 985-987.

The fact that Duckworth at times put tobacco in this depot for his convenience, or that at times his hands set up hogsheads there, was competent evidence to go to the jury on the question as to what was the purpose of the work done at the time appellee was injured, but on all the evidence we do not think the verdict of the jury in favor of appellee is against the weight of the evidence on this subject, the rule being of course conceded, as stated by the court in its instruction, that the railroad company is not answerable to him if he was hurt while working there simply for the furtherance of Duckworth's prizing business, and not in getting the tobacco ready for shipment on the car then expected.

It is insisted that the court should have instructed the jury not to allow anything for the loss of appellee's earning capacity until he was twenty-one years of age. He was twenty years of age at the time he was injured, and was twenty-one a few months later. No question was made in the pleadings

on this subject. It does not appear from the pleadings that he had a father or mother, or that for any reason his time was not his own. It would seem from the proof that he was working for himself, and that after he was hurt he was taken to his mother's. It would also appear from the proof that his mother had some transaction with the attorney, who brought the suit for him, in regard to his fee, and the action is brought by Nannie Cox as his next friend. It is said in the brief that she is his mother, and if so, under the case of *C. & O. Ry. Co. v. Davis*, 22 Ky. Law Rep., 1156, the instruction asked was properly refused by the court. He was so nearly of age that, nothing else appearing, we think it may be assumed that his mother was not asserting her right to control his time, and we are unwilling to reverse for so slight a matter as this, which was not presented in any way in the pleadings, or called to the attention of the court by any proof heard on the trial.

When Dr. Combs was on the stand as a witness for appellee he was asked on cross-examination, in regard to certain matters, with a view to show his interest in the case. Appellee was then allowed on re-examination to go into the particulars of the conversations referred to, the court telling the jury that the matters were only to be considered by them for the purpose of illustrating the interest, if any, the witness had taken in the case. If it be conceded that the evidence was improperly admitted, we are unable to see that it was prejudicial to appellant, or that for this cause a new trial should be had. The matters testified to all took place long after the injury, and had no relation to the merits of the case. By the court's instructions these things were substantially eliminated from the consideration of the jury, and the real issue was fairly presented to them.

Judgment affirmed.

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#### TAYLOR v. KING, &c.

(Filed March 4, 1903—Not to be reported.)

Fraudulent conveyances—Facts—This is an appeal from the judgment of a chancellor refusing to set aside a deed from father to son as fraudulent. Held—That the finding of facts by the chancellor will not be disturbed, as it is in accordance with the evidence. The rule in an equity suit is that if the evidence leaves the mind of this court in doubt as to whether the judgment of the lower court is correct, then this court will give some weight to finding of the chancellor on the question of fact.

W. A. Lee for appellant.

Lindsay & Botts for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Paynter.

This is a suit in equity. The appellant sought to set aside as fraudulent a deed which the appellee made to his son, Walter, for a lot in Balls Landing, Owen county, Kentucky. The question involved is one of fact.

The rule in equity is not, as supposed by counsel for appellee, that a judgment will not be reversed unless flagrantly against the evidence. That rule applies alone to common law actions with respect to verdicts of juries, etc.

If the evidence in an equity suit leaves the mind of this court in doubt as to whether the judgment of the lower court is correct, then this court gives some weight to the finding of the chancellor on the question of fact. Without detailing the facts as they appear from the testimony, it is sufficient to say that we are of the opinion that the judgment of the court below is in accordance with the evidence.

Judgment is affirmed.

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DIERIG v. SOUTH COVINGTON AND CINCINNATI STREET RAILWAY CO.

(Filed March 4, 1903—Not to be reported.)

Street railways—Contracts—Pleading—Malicious prosecution—Appellant brought this action, alleging that the appellee was a corporation authorized by law to carry passengers from Fountain Square, in Cincinnati, O., to Dayton, in Campbell county, Kentucky, and had bound itself to carry a passenger a trip between these points for one 5 cents fare, and that he took passage on one of its cars at Fountain Square, and that the conductor refused to accept said 5 cents fare offered him by plaintiff, and that when the car arrived in Newport appellee caused him to be arrested, and he suffered mental and physical suffering and anguish and was damaged in the sum of \$5,000. The lower court ruled that plaintiff had stated two causes of action, and required him to paragraph his petition, which he did, and the court afterwards sustained, a demurrer to the petition and dismissed it. The first paragraph did not allege that appellee refused to carry appellant as a passenger to Dayton for one fare, and put him off the car because he did not pay more, and was, therefore, defective. The second paragraph was also insufficient, as there was no averment that the procurement of his arrest was done maliciously and without probable cause. The court properly dismissed the petition.

Gelser & Lockhart for appellant.

L. J. Crawford for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Paynter.

The petition in this case reads as follows: "The plaintiff says that the South Covington and Cincinnati Street Railway Co. is a corporation, incorporated under the laws of the State of Kentucky for the purpose of maintaining and operating street railways and for the carrying of passengers upon said street railway, having the capacity to sue and to be sued. Plaintiff says that by contract made and entered into by and between the cities of Bellevue and Dayton, in the county of Campbell, Kentucky, with the defendant herein, in the year 1892, the defendant, among other things, bound itself to transport passengers on one continuous ride from Bellevue and Dayton, in Campbell county, Kentucky, to Fountain Square, in the city of Cincinnati, O., and from said Fountain Square, or any intermediate point, to the cities of Bellevue and Dayton, Ky., for one 5 cent fare and no more. Plaintiff says that on the — day of ———, 1901, he entered a Bellevue and Dayton car of the defendant, in the city of Cincinnati, O., as a passenger for the purpose of being carried from said city of Cincinnati to the

city of Dayton, Campbell county, Kentucky. Plaintiff says that he offered to pay to the conductor of said car 5 cents for a continuous ride from the said city of Cincinnati to the said city of Dayton. Plaintiff says that the conductor refused to accept said 5 cent fare offered him by the plaintiff for said continuous ride as aforesaid, but plaintiff says that the defendant, in disregard and in violation of its contract as herein stated, did, upon the arrival of the plaintiff on the car of the said defendant in Newport, Ky., by its agent, to wit, an inspector of the cars of said defendant corporation, call upon the police of the city of Newport, Ky., to arrest him, the plaintiff, and that at the instance and by the procurement of the said defendant the said police did violently lay hands upon the said plaintiff and did wrongfully and illegally put him under arrest and take him from said car and compel him to go with them to the office of the police of the city of Newport, where he, the plaintiff, was held wrongfully and illegally and against his will as a prisoner for trial, and that at said trial the plaintiff was dismissed. Plaintiff says that by said act or acts of the defendant, and in violation of its contract hereinbefore cited, he was caused by the aforesaid acts of the defendant great mental and physical suffering and anguish; that he was thereby greatly damaged, and ought to recover damages in the sum of \$5,000."

On motion the court below ruled that the plaintiff had stated, or attempted to state, two causes of action, and, therefore, required him to paragraph his petition, which he accordingly did. The plaintiff paragraphed his petition so that the first paragraph would consist of the averments of the petition which preceded and included the language in the petition, to wit, "refused to accept said 5 cent fare offered him by the plaintiff for said continuous ride aforesaid." The balance of the petition after the word "but," following the above quotation, was designated as the second paragraph of the petition, to which the court sustained a demurrer. The plaintiff failing to plead further, the court dismissed the petition.

Neither the petition nor either of its paragraphs states a cause of action. As to the first paragraph there is no averment that the appellee refused to carry the appellant as a passenger on a Bellevue and Dayton car from Cincinnati to Dayton, Ky. It is averred that he tendered the conductor a 5 cent fare for the continuous ride, but the conductor refused to receive same. From the averments of the petition the court is unable to tell whether the conductor wanted him to pay more for the continuous ride or that he desired to carry him free.

In the second paragraph it is averred that the agent of the appellee called upon the police of the city of Newport to arrest the appellant, and that upon his procurement he was wrongfully and illegally arrested and taken from the car to the office of the police of the city of Newport, and there wrongfully and illegally detained, and that he was tried and dismissed. It is not averred in this paragraph of the petition for what reason he was arrested or upon what charge. It is not averred that it was done maliciously and without probable cause.

If the second paragraph of the petition stated a cause of action in other respects, it failed to do so, because there was no averment that the procurement of his arrest was done maliciously and without probable cause. It is unnecessary to cite authorities upon this question, because the necessity of

such averments is so universally recognized as being essential. If the averments of the first paragraph were added to those of the second paragraph, then the second paragraph would not state a cause of action for false arrest and imprisonment. Neither would the addition of the averments in the second paragraph to those of the first paragraph constitute the essential averments of a cause of action. If the plaintiff was endeavoring to recover upon the grounds that the company refused to carry him from Cincinnati to Dayton for one fare and put him off the car because he did not pay more, he should have made the necessary averments. If he was endeavoring to recover because he was wrongfully arrested on some charge, then he should have made the necessary averments to enable him to maintain an action. If he was endeavoring to recover for violation of a contract, and also for illegal arrest, then they were separate and distinct causes of action.

The judgment is affirmed.

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LENZ v. SOUTH COVINGTON AND CINCINNATI STREET  
RAILWAY CO.

(Filed March 4, 1903—Not to be reported.)

Geisler & Lockhart for appellant.

L. J. Crawford for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Paynter.

The facts in this case are substantially the same as in the case of *Herman Dierig v. South Covington and Cincinnati Street Railway Co.*, ante, 1625, this day decided, and our conclusions are the same in this as in that case.

Judgment is affirmed.

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HAYS, &c. v. McLIN, &c.

(Filed March 4, 1903.)

Contracts—Sale of timber—Title—This appeal involves the right of appellants to cut and remove timber from a designated tract of land under a deed from H., conveying to them "all the merchantable yellow poplar, ash and cucumber trees or logs" on the designated tract of land, to be removed by a fixed time. Appellees deny the right of H. to make the sale of the timber as he did not own the land. On the trial appellant proved that his vendor held under a deed, with possession, for more than thirty years. Held—That said title was sufficient to authorize a sale of the timber or land. It is insisted that the trees are not described so as to identify them and pass title to same. Held—That when one sells "all" of the merchantable timber on the land no additional designation is necessary, and appellants were vested with title to the trees.

W. S. Hall and David Hays for appellant.

S. B. Dishman and D. D. Field for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Paynter.



This action was instituted by the appellants, David Hays and Jonathan L. Holcombe, against appellees for cutting and removing timber from a certain tract of land in Letcher county, Kentucky. The timber which they cut and removed was part of the timber which John Holcombe sold and conveyed to the appellants by deed dated 7th day of October, 1890. The timber sold to the appellants is described as follows: "All the merchantable yellow poplar, ash and cucumber trees or logs owned by us on the south side of Linsfork creek and on the north side of Pine mountain in Letcher county, Kentucky."

It is recited in the deed "that the timber is sold with the expectation of immediate removal, and said second parties are to have until December, 1900, to complete the removal thereof."

The appellees denied that the title to the timber was in the plaintiffs. On the trial of the case the plaintiffs introduced testimony which tended to show that their vendor entered upon the land before the late civil war and began to claim it under his father; that in 1866 the father of the plaintiffs' vendor executed and delivered to him a deed for the land upon which the timber in controversy grew, and that he had lived within the boundary and claimed it adversely to the extent of the boundary described in the deed until the trial of the case. The proof tended to show that it was a well-defined and marked boundary. Upon this showing the court gave a peremptory instruction to find for the defendants. If the evidence of the plaintiffs is true, their vendor had a perfect title to the land, and he had a right to sell the timber standing upon it. From the argument of the counsel for appellee we presume that the court below proceeded upon the idea that under the deed from Holcombe the appellants did not acquire title to the timber, and, therefore, had no right to maintain the action. To sustain the action of the court the case of *Moss v. Mechew, &c.*, 8 Bush, 190, is cited. In that case it appeared that the owner entered into a contract by which he sold timber trees upon the land in number sufficient to make forty thousand staves, and the court held that the sale did not pass title to any particular trees, nor had the purchaser the right to enter and cut the timber without the consent of the vendor.

In this case the vendor sold "all of the merchantable" timber of certain kinds on the tract, and we are of the opinion that title to them passed to the appellants, although in *Moss v. Mechew, &c.*, there was an expression of opinion on a question not before the court, which would appear to be in conflict with this conclusion.

The contract recited that immediate removal of the timber was contemplated, yet time was given until December, 1900, in which to remove it. If a party sold one hundred poplar trees upon a boundary of land and did not mark them, then it would not vest the vendee with title to them, but when one sells all of the merchantable timber on the land, it seems to us no additional designation is necessary. There is no marking to take place in that case as in a case where only a certain number of trees are sold on a boundary of land. In *Dils v. Hatcher*, 24 Ky. Law Rep., 826, the court recognized a sale as valid which included all of the timber on land of certain dimensions.

The judgment is reversed for proceedings consistent with this opinion.

## STUART v. HARMON, &amp;c.

(Filed March 4, 1903—Not to be reported.)

1. Partnership—Bills and notes—Offset—Appellee B. sued appellant on a note for \$378, secured by a mortgage on land executed by appellant, and which had been assigned to him by appellee H. As an offset thereto appellant pleaded one-half of his profits received and not accounted for by H. in a partnership venture in the purchase and sale of nearly 500,000 acres of land in Eastern Kentucky, and for the balance of his alleged profits he prayed judgment against H. The lower court rejected appellant's claim of set-off and rendered judgment on the note, from which this appeal is prosecuted. H. denies that a partnership existed between him and appellant because he says that appellant was to furnish one-half of the money to pay for the land, and to pay the necessary expenses in holding and selling it, and that as appellant failed to do so he was not a partner in the transaction and not entitled to participate in the profits thereof. Held—That the proof shows that H. recognized appellant as a partner in the venture, and appellant rendered valuable services in promoting the enterprise, appellant is entitled to share the profits that were realized, although he furnished no part of the money necessary to carry out the venture. The case should be referred to the commissioner to settle the partnership accounts and ascertain what profits, if any, were realized.

2. Pleading—H. contends that appellant can not maintain his cross petition against him under section 96, Civil Code of Practice. Held—That if said section prohibited appellant from prosecuting his cross petition, H. waived this objection by filing his answer and counterclaim.

3. Estoppel—Stale claim—H. insists that appellant can not prosecute his claim as it is stale, and should not for that reason be recognized. Held—That H. can not raise this objection as appellant made frequent demands for a settlement of the partnership affairs, such demand having been made within four years before the institution of the suit, and H. having failed to keep any partnership accounts with appellees. It is insisted that appellant promised to pay the note and is now estopped to claim an offset thereto. Held—That the proof shows that appellant had no notice that B. held the note in any other way than for collection, and that B. had notice of appellant's claim for profits against H., and, therefore, the right to set-off profits against the note still existed.

Nelson & Pendleton and Hazelrigg & Chenault for appellant.

J. M. Benton for appellees.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, Beckner, sued the appellant on a note amounting to \$378, dated March 8, 1895, secured by a mortgage on land, which note had been assigned to him by appellee Harmon. As an offset thereto the appellant pleaded one-half of his profits received and not accounted for by Harmon in a partnership venture in the purchase and sale of nearly 500,000 acres of Eastern Kentucky lands, and for the balance of his alleged profits he prayed judgment against Harmon.

The questions to be determined are:

1st. Did the alleged partnership exist?

2d. Did Harmon receive from the sale of the land any profits above cost and expenses of the partnership?

3d. Is the appellant estopped to plead his share of the profits, if any, as a set-off against the note in the suit?

There is another question in the case, but from our point of view it is unnecessary to consider it. In the spring of 1884 Harmon and Stuart entered into an arrangement by which they were to purchase 500,000 acres of land from the State of Kentucky, which had been sold for taxes and purchased by the State. Harmon claims that Stuart was to furnish one-half of the money to pay for the land, and to pay the necessary expenses in holding and selling it, and that as Stuart failed to do so he was not a partner in the transaction, and not entitled to participate in the profits thereof. On the other hand, Stuart states that he made the discovery of the land and suggested the possibility of large profits in its purchase and sale, and that as he did not have the money to buy it and place it upon the market, Harmon agreed to do so and, after paying expenses, divide the profits with him. Stuart's testimony is supported by that of others that he was to be a partner in the transaction. He admits that he did not furnish any of the \$1,500 or \$1,600, the amount paid the State for the land. After the land was purchased Harmon recognized Stuart as a partner in the venture. In July, 1884, Harmon recognized Stuart as a partner, because he and Stuart entered into a written contract with others in regard to the land, and there was no occasion for Stuart's signing the contract unless he was a partner. In the fall of that year Harmon had Stuart go to Philadelphia, where he was endeavoring to negotiate a sale of it to Knight & Co., and thus recognizing Stuart as a partner. Besides, in 1886 he wrote Stuart a letter, in which he said: "Our agreement is that I am to take the money advanced by father and I out of the first money received and divide the net profits with you. So far I have not received anything of consequence. \* \* \* When this deal is closed, if ever done, I can show the whole thing up through the Union Trust Co. of Philadelphia. They have, as you have repeatedly been told, held the whole thing in trust for two years."

This is a distinct recognition of the partnership. In the fall of 1884 there was either a conditional or absolute sale made of the property, and this was before the letter from which we have quoted, recognizing Stuart's right to participate in the profits of the transaction, was written. Thus we find that Harmon recognized Stuart as a partner after the land had been sold. There were other facts developed in the testimony which go to support Stuart's claim that he was a partner and that Harmon recognized him as such. Although Stuart may have agreed to furnish the money to help pay for the land and pay the necessary expenses in holding and selling it, still if Harmon continued to recognize him as a partner until the land was sold and the partnership venture in a measure completed, he could not then deprive him of his right to participate in the profits because he had not furnished the money which he agreed to furnish.

Our conclusion from this record is that the understanding of the parties was that Harmon was to furnish the money necessary to pay the expenses of the partnership for the purchase, holding and sale of the land. To hold that the partnership did not exist we would be compelled to close our eyes to the facts as they appear in this record. It is contended that the appellant can not maintain his cross petition against Harmon, under section 96 of the

Civil Code of Practice, as interpreted in *Wills v. Boyd*, 1 Duvall, —. It is a sufficient answer to this to say that Harmon filed his answer to the cross petition of Stuart and made it a counterclaim against him, and prayed for a recovery of about \$10,000 against him. If the objection was available, it was waived by the filing of the answer and the counterclaim.

It is urged that Stuart's claim is stale, and for that reason an action can not be maintained. Stuart was urging upon Harmon the settlement of the matter, but Harmon put him off upon the claim that the deal had not been finally settled. As late as 1888 Stuart was demanding of Harmon a settlement, and the payment of whatever might be due him on account of the profits of the transaction. This suit was filed four years later, and in this Stuart asserted his claim. The delay was not the fault of Stuart, but that of Harmon in refusing to make his partner a statement of the money which he had received and the expenditures which he had incurred. The doctrine of stale claim has no application to the facts in this case.

Harmon paid such expenses as were paid in the purchase, holding and sale of the land, and he received all of the money arising from it. It was his business to keep a correct account of the transaction. He should, therefore, make an itemized account of the expenditures made by him, including the item of \$6,800 which he claims was expended before the — of July, 1884. He should account not only for the money which he received from Knight & Co., but that which he received from persons holding under the Swan claim, because he admits he received more from that source than from Knight & Co. The appellee, Beckner, claims that Harmon assigned him the note in the suit as collateral to secure a debt which Harmon owed him. He admits that he told Stuart that he held it for collection, but claims that while he so held it Stuart promised to pay it.

The appellee, Beckner, testifies that in 1890, whilst he and Harmon were standing on the street in Winchester, appellant passed and Harmon called him, and asked him to pay the note as it had been running a good while, and he owed him (Beckner) and wanted to pay him out of the proceeds of that note, and that after Stuart had left Harmon induced him to take the note. Harmon testified that he assigned the note to Beckner in appellant's presence, and the appellant then promised to pay it. Stuart says that he did not make the promise. From Beckner's statement the promise was in effect a promise to Harmon to pay the debt to him. Stuart was not aware that Beckner held the note other than for collection, and in that he is supported by Beckner's testimony. He was not advised that Beckner held it as collateral, nor was he advised that Beckner had any intention of acting upon any statement which he made. The promise which he made to Harmon, if at all, could not estop Stuart's right to plead it as an offset against the note in the hands of Harmon's assignee. Beckner was aware that Stuart asserted the claim against Harmon growing out of this partnership venture. He, therefore, knew that if anything was coming to Stuart from Harmon he had a right to plead it as an offset against the note.

From the facts in this record we reach the conclusion that appellant did not induce Beckner to purchase the note, and he is not estopped to plead as an offset against it any sum which may be ascertained in this action to be due him growing out of the partnership between him and Harmon. The

court is urged to settle the partnership upon the facts as they appear in this record. We are of the opinion that the case should go to a commissioner for that purpose.

Judgment is reversed for proceedings consistent with this opinion.

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STEPHENS v. WILSON, &c.

(Filed March 4, 1903.)

1. False imprisonment under illegal order of fiscal court—Liability of sheriff and deputies—Damages—Appellant was a member of the fiscal court of Bath county, and brought this action against appellees, a justice of the peace, charging that he advised and procured his arrest under an illegal writ issued by the clerk of the county court; also against the sheriff and his deputy for the false arrest made by the deputy. The first paragraph of the answer traverses the allegations of the petition, and the second paragraph of the answer alleges that there being a vacancy in the office of county treasurer, three of the justices requested the county judge to call a special session of the fiscal court to fill the vacancy, but the county judge refused to do so, whereupon three of said justices, being a majority of the justices in commission, had the county clerk to issue a summons calling the justices to assemble in special session, but appellant refused to attend, whereupon the clerk issued an order of arrest for appellant, which was executed by the deputy sheriff by placing him under arrest until he was released by writ of *habeas corpus*. The court overruled a demurrer to the answer, and appellant declining to plead further, dismissed the petition, from which this appeal is prosecuted. Held—That under section 1883, Kentucky Statutes, the justices of the peace had no authority to call a meeting of the court when the county judge refuses to act, and the act of three justices essaying to act as a fiscal court were without authority to issue the process under which appellant was arrested. It was void, and all the justices acting as the court are responsible for its issuance. As the officer to whose hands the void process came was bound to know, and did know, from the face of the writ in this instance, that the court issuing it lacked jurisdiction, it afforded him no protection, and he is also liable. The sheriff is liable under the allegation that he advised, requested and caused the illegal arrest of appellant, and also because as principal, he is liable for the acts of his deputy done under color of his office. A writ issued by a court without jurisdiction affords no protection to an officer executing it.

2. Pleading—An answer which groups the allegations of the petition, and does not deny them separately, is insufficient, but this fact was immaterial as the court evidently based its action on the merits of the defense set up in the second paragraph of the answer.

Alex. Conner and C. W. Goodpastor for appellant.

R. Gudgell & Son for appellees.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted in the Bath Circuit Court by the appellant, W. R. Stephens, to recover damages of the appellees, Charles Wilson, J. M. Atchison and S. C. Bascom, Jr., for false imprisonment. The petition states that "on the 4th day of December, 1901, the defendants, Charles Wil-

son and J. M. Atchison, in Bath county, Kentucky, wrongfully, and without authority of law, and against his will and consent, advised, requested and caused their co-defendant, S. C. Bascom, Jr., to assault and forcibly arrest and take into custody and imprison the plaintiff (appellant), W. R. Stephens, and that said S. C. Bascom, Jr., did, on said day, in the town of Salt Lick, Bath county, Kentucky, against appellant's will and consent, wrongfully, and without authority of law, assault and forcibly arrest and take the plaintiff (appellant) into his custody, and imprisoned him, and forcibly, and against his will and consent, took him from the town of Salt Lick to the town of Owingsville, Bath county, Kentucky, a distance of some nine miles, and there detained and kept him in his custody, and imprisoned him for the period of about five hours, until appellant was finally released from imprisonment upon a writ of habeas corpus."

For this injury appellant prayed judgment against the defendants in the sum of \$5,000. A general demurrer to the petition having been overruled, appellees, Charles Wilson and J. M. Atchison, filed a joint answer, intended to be a traverse, but which, we think, is in conflict with that provision of the Code requiring that each material allegation which it is proposed to controvert shall be specifically denied. The answer merely groups the allegations of the petition together, and denies them as a whole.

S. C. Bascom, Jr., filed a separate answer, the first paragraph of which is, practically, a counterpart of the answer of his co-defendants, Wilson and Atchison, and bad for the same reason. The second paragraph undertakes to justify the arrest of appellant by stating, in substance, that he was the deputy sheriff of Bath county, and there came to his hands, as such officer, a warrant of arrest for the plaintiff (appellant), W. R. Stephens, issued by the clerk of the Bath County Fiscal Court, dated December 3, 1901, directed to the sheriff of Bath county, and commanding him to arrest appellant and have him at the courthouse in Owingsville, Ky., at 10 a. m., December 4, 1901, to attend a session of the Bath Fiscal Court (appellant being a member of the court), as well as answer for contempt in not obeying the summons served upon him to attend the session held on the 3d day of December, 1901; that under this warrant he arrested appellant, who refused to give bail, requesting to be put in jail, which was not done, he being afterwards released on a writ of habeas corpus; that all of the acts done by appellee under this warrant were done by him in good faith, and in his official capacity as deputy sheriff.

A demurrer to this paragraph having been overruled, appellant excepted. Afterwards the appellees, Wilson and Atchison, filed an amended answer, in which they state, in substance, there being a vacancy in the office of county treasurer for Bath county, appellee, Charles Wilson, and two other justices of the peace of Bath county requested the county judge, John A. Daugherty, to call a special session of the fiscal court to fill it; this being refused, Charles Wilson and the two other justices of the peace, who constituted three of the five justices holding office in Bath county, met, elected one of their number chairman, served notice on appellant, who was also a justice of the peace of Bath county, requiring him to attend the meeting thus instituted; appellant having failed to do so, these three caused the clerk of the county court to issue a warrant of arrest against appellant, directed to the

sheriff of Bath county, requiring that officer to arrest and bring him before the court on the 4th day of December, 1901, in order to make a quorum of the fiscal court of Bath county.

This warrant of arrest thus issued came to the hands of S. C. Bascom, Jr., deputy sheriff for appellee, J. M. Atchison, the sheriff of Bath county. In pursuance of the warrant the officer took appellant into his custody and brought him to Owingsville, where he was released on a writ of habeas corpus.

Appellant's demurrers to the second paragraphs of the answers having been overruled, he declined to plead further, whereupon the court dismissed his petition, and he has prayed an appeal to this court.

Appellees contend that this case should be affirmed because the first paragraphs of the answers traverse the material allegations of the petition, and, therefore, it was incumbent upon appellant, who was the plaintiff below, to introduce evidence in support of its allegations; that he having failed to do so, the judgment of dismissal should be affirmed. This contention may be disposed of by repeating what we have already said, that the first paragraphs of the answers are bad, for the reasons stated, and made no issue between appellees and appellant; moreover, the court rendered judgment on the pleadings, and if appellees' contention, that there were issues of fact raised by the first paragraphs of the answers be sound, no opportunity was afforded appellant to introduce his evidence in support of his petition, the court evidently believing that the merits of the case turned upon the facts alleged in the second paragraphs of the answers, and that these constituted a valid defense to appellant's cause of action.

The pleadings show there are five justices of the peace of Bath county; these, together with the county judge, constitute the fiscal court. The following sections of the Kentucky Statutes are material to the solution of the questions before us:

"Section 1833. Each county in the Commonwealth of Kentucky shall have a fiscal court, which shall consist of the judge of the county court and the justices of the peace of said county, and their successors in office, in which court the judge of the county court shall preside if present. If said judge is not present, and can not preside, then a majority of the justices of the peace shall elect one of their number to preside; said justice so elected to act as judge of said court during the absence or inability of the county judge to preside. \* \* \*

"Section 1834. Unless otherwise provided by law the corporate powers of the several counties of this State shall be exercised by the fiscal courts thereof respectively.

"Section 1836. The county judge shall be the presiding judge of the fiscal court, preserve order, and may fine and imprison for contempt of court, the same as when presiding as judge of the county court; and in the absence of the county judge, or when he can not preside, the justice elected in his stead while sitting shall have the same powers as the judge of the county court when presiding as a member of the fiscal court.

"Section 1837. Not less than a majority of the members of the fiscal court shall constitute a quorum for the transaction of business, and no proposi-

tion shall be adopted unless by a concurrence of at least a majority of the court present."

"Section 1838. The fiscal court shall be a court of record, and shall hold two regular terms in each year, commencing on the first Tuesday of April and October, and continue until the business of the court is disposed of. But the county court of any county may, by an order of record, fix a different date for the commencement of said terms: Provided, That one of said terms shall be held in October. The county judge shall have the power to call a special term of said court for the transaction of any business of which the court has jurisdiction. Whenever the necessity exists for a special session, and when the county judge is unable to act, the special session may be called by a majority of the court."

This court, in the case of Bath County, By, &c. v. Daugherty, Com'r, &c., 24 Ky. Law Rep., 350, held that the fiscal court of Bath county consisted of six members, and that three did not constitute a quorum for the transaction of business. The case cited had under consideration the same meeting of the fiscal court of Bath county which is now under discussion, it having come up upon another question growing out of the acts of the minority.

The legality or illegality of the issuance of the warrant of arrest for appellant, and his arrest thereunder, turns upon the powers of the three justices who essayed to hold the term of the fiscal court of Bath county. The statute creating fiscal courts nowhere authorizes them, even when properly organized, to issue warrants of arrest for absent members, to enforce their attendance. It is urged, however, that appellees were authorized to issue the warrant of arrest in question under the provisions of article 17, chapter 28 of the General Statutes, relating to county courts. The pertinent parts of this statute are as follows:

"Section 1. The county judge in each county shall hold the county court on the days prescribed by law; but at the court of claims, which shall be held once in each year, the justices of the peace of the county shall be associated with him and constitute the court, a majority of whom shall constitute a quorum for the transaction of business, which shall be confined to laying the county levy, appropriating money, and transacting other financial business of the county.

"Section 8. The justices of the peace may be summoned by the county judge to attend at any term of the court, and as many as attend upon such summons, or at the regular court of claims, and assist in transacting business in court shall be allowed \$3 each per day, to be paid out of the county levy. If a majority of the justices fail to attend the court of claims, or any other court for which they have been summoned, the court may be adjourned from day to day until a quorum is attained, for which purpose attachments may be issued against those delinquent."

It does not require any argument to show that the provision for enforcing the attendance of the justices by attachment on sessions of the court of claims has no application to the fiscal court, which is created by a different statute, although the powers of the fiscal court are largely the same as those of the court of claims, which it superseded. The court of claims could only be called in special session by the county judge, and there was no provision



for this to be done by the justices, in default of action in this regard, by the county judge.

We conclude, then, that the three justices who undertook to hold, or enforce the holding, of a special session of the fiscal court of Bath county were without jurisdiction to issue the warrant for the arrest of appellant, and that the appellee, Charles Wilson, who constituted a part of the minority essaying to act, is liable for the illegal issuance of the void process.

This court in the case of *Revill, Stribling, Foster and Martin v. Pettit, & Metcalfe*, 814, said: "The general principle which exempts judicial officers of all grades from answering in a private action for any judgment given in the due course of the administration of justice is well settled. This court has frequently decided that no action can be supported against any person acting judicially within the limit of his jurisdiction, although he should act illegally or erroneously, unless he has acted from impure or corrupt motives. There are then two distinct classes of cases to which this principle of judicial protection does not apply: First, where a person having a special or limited judicial authority does any act beyond the scope of his authority; and, secondly, where, although acting within the limit of his jurisdiction, he is actuated by malicious or corrupt motives. In either case the judge or magistrate renders himself liable as a trespasser to the party injured."

Again, the court, in the case cited, said: "If, as said in the case of *Cable v. Cooper*, 15 Johnson Rep., 157, 'every tribunal proceeding under special and limited powers decides at its peril,' it must necessarily follow that any person aiding, advising or procuring the tribunal to transcend its jurisdiction and exercise powers not conferred by law, acts also at his peril. The privileges of a judicial officer do not exempt him from liability for any injurious act done beyond the limit of his authority."

It is claimed for appellee, S. C. Bascom, Jr., that although the warrant of arrest may have been issued without authority it protects him, inasmuch as it was apparently valid, and he acted in good faith in its execution. This contention can not be upheld. An officer is only protected by process apparently valid when it is issued from a court having jurisdiction to issue it. Where the court issuing the invalid process is without jurisdiction of the cause, then the process affords the officer who executes it no protection, no matter with what good faith he may act in the premises.

In the case of the *State v. Shacklett*, 37 Mo., 280, the rule is laid down thus: "Now where the court has no jurisdiction of the cause, there the officer is not obliged to obey, and if he does, it is at his peril, though he do it by virtue of an execution, or other process directed to him, a void authority being the same as none at all. And a sheriff is bound to inquire into the authority of a court that issues a writ, and he is liable for its execution when it is issued by a court having no jurisdiction. (*Brown v. Henderson*, 1 Mo., 184; case of the *Marshalsea*, 10 Coke, 160; *Brown v. Compton*, 8 T. R., 494; *Mayer v. Morgan*, 7 Martin, N. S., 2; 8 Bac. Abr., 691.) The officer is bound to know the law, and if he executes process which is void, emanating from a court, or officer, having no jurisdiction, he acts at his peril, and will not be protected."

In *Cooley on Torts*, page 1772, it is said: "Excepting the cases already named, and a few more which will be referred to further on, whoever would

Justify an arrest must have legal process duly emanating from some judicial authority. This process must be pleaded, and it must have certain requisites in order to render it available as a defense. Speaking generally, these requisites are the following: "It must have been issued by a court or officer having authority of law to issue such process, and there must be nothing on the face of the process apprising the officer to whom it is delivered for service that in the particular cause there was no authority for issuing it. When the process will bear this test the officer is protected in obeying its commands."

In the case of *Kilbourn v. Thompson*, 103 U. S., 168, the plaintiff had been imprisoned by the sergeant-at-arms of the house of representatives at Washington, under a warrant issued by the speaker of the house. It being shown, however, that the warrant was wrongfully issued, in excess of the jurisdiction of the house, the sergeant-at-arms was held liable for false imprisonment.

In the *American and English Encyclopedia of Law* (2d edition, volume 12, title, "False Imprisonment," pages 762-3), it is said: "If an officer executes a warrant of arrest, invalid on its face, he is liable in damages for false imprisonment. Where, therefore, it appears on the face of the process that the magistrate issuing it has not jurisdiction of the person of the plaintiff, or the subject-matter of the suit, the officer executing it is a trespasser, and is liable in action for damages for false imprisonment. It has been said, indeed, that an officer is bound, or will be presumed, to know the jurisdiction of the court whose officer he is, and that if he acts in obedience to a precept which the court has no jurisdiction to issue, he will not be protected in false imprisonment. (Also the authority cited in the notes in support of the foregoing text.)"

In the case of *Savacool v. Boughton*, 21 *American Decisions*, 181, in which the authorities are exhaustively reviewed, the court adduced the following rule: "Where an inferior court has not jurisdiction of the subject-matter, or having it, has not jurisdiction of the person of the defendant, all its proceedings are absolutely void. Neither the members of the court nor the plaintiff (if he procured or assented to the proceedings) can derive any protection from them when prosecuted by a party aggrieved thereby. If a mere ministerial officer executes any process, upon the face of which it appears that the court which issued it had not jurisdiction of the subject-matter, or of the person against whom it is directed, such process will afford him no protection for acts done under it."

As the three justices essaying to act as a fiscal court of Bath county were without authority to issue the process under which appellant was arrested, it was void, and all the justices acting as the court are responsible for its issuance. As the officer to whose hands the void process came was bound to know, and did know, from the face of the writ, in this instance, that the court issuing it lacked jurisdiction, it affords him no protection, and he is also liable. Appellee, J. M. Atchison, is liable under the allegation that he advised, requested and caused the illegal arrest of appellant. (*Revill, & Co. v. Pettit*, before cited.) And also because, as principal, he is liable for the acts of his deputy done under color of his office.

Wherefore, the case is reversed for proceedings consistent with this opinion.

## WRIGHT v. COMMONWEALTH.

(Filed March 4, 1903—Not to be reported.)

1. Criminal law—Insanity—Evidence—Appellant was indicted and convicted of the murder of B. The defense was that the accused was insane at the time he committed the act. The proof showed that the difficulty arose in a saloon over a game of cards, and that appellant shot and killed B. while he was sitting down at the table. Errors in the admission and rejection of evidence prejudicial to appellant are relied on for reversal. This court will not disturb the action of the lower court in admitting testimony as to hereditary taint or as to the propriety of giving an instruction on insanity. A witness was asked if there was any evidence in the room of any ill-feeling or hostility between B. and appellant; again, a witness was asked if, so far as he could understand at the time, there was any cause apparent for any of these difficulties of which you have spoken. This question followed the testimony tending to show that appellant had had previous difficulties. These witnesses were introduced not as experts, but to prove facts. When witnesses detailed the facts with reference to the acts, it was the province of the jury to determine whether or not there was any cause therefor, and it was quite as competent to do so as were the witnesses who detailed the facts. It was not error to refuse to permit a witness who had been teacher of appellant when a small boy to testify as to the cause for the violent conduct of appellant toward his playmates, which had been detailed. It was for the jury to determine from the facts whether there was any cause for such conduct. It was not error to permit witnesses who were acquainted with appellant to give their opinion as to his mental condition. The court properly refused to permit to be read in evidence the diagram of appellant's family tree in so far as the writing thereon in red ink indicated members of the family who were tainted with insanity. Such facts were proved by competent evidence. The court properly refused to allow an expert witness to answer the question as to what would be the likelihood of one with such heredity, the probability of one with such heredity being injured by the excessive use of liquor over one with an ordinary heredity. It having been proven by witnesses that appellant had been careless in using and keeping his money, it was competent in rebuttal to prove by a banker that he maintained business habits and kept his cash in bank. It was not error to refuse to allow appellant to prove by tradition the insanity of an ancestor. Such testimony is hearsay.

2. Instructions—The lower court properly instructed the jury that if they should believe from the evidence that the appellant's lack of reason to know right from wrong, or such insufficient will power to govern his actions or to control his impulses, arose alone from voluntary drunkenness, but not from unsoundness of mind, they should not acquit on the ground of insanity. The court properly told the jury in an instruction that before they could convict appellant they should believe that each and every element to constitute guilt as set out in the instructions had been proven beyond a reasonable doubt; and while insanity was a defense, it was incumbent on the defense to prove its existence to the satisfaction of the jury, and if on the whole case its existence was proven, it was their duty to acquit. It was not error to refuse to give an instruction which would authorize the jury to acquit on the ground of insanity if the defendant proved its probable existence. The instructions given were correct.

Breakinridge & Shelby, N. C. Fisher and E. M. Dickson for appellant.

C. J. Bronston for appellee.

Appeal from Bourbon Circuit Court. \*

Opinion of the court by Judge Paynter.

Appellant was indicted and convicted of the murder of Thos. Butler. The defense was that the accused was insane at the time he committed the act. It is a remarkable case, in that the testimony showed so much hereditary insanity and so many persons of feeble or diseased minds in his family. In that respect it is probably the most remarkable case ever brought to the attention of this court.

As to whether the appellant was insane at the time he committed the act was a question for the jury, and its verdict must be accepted as conclusive on the question unless some error occurred at the trial which prejudiced his substantial rights. It is only where such error exists that this court is authorized to reverse a case.

The appellant was a farmer, living near the city of Paris. In the same neighborhood lived the deceased. By invitation the deceased engaged in a game of cards with the appellant and others. During the progress of the game the appellant accused the deceased of "renigging," and claimed the right to count two points against him for that reason. The deceased denied that he had "renigged," and questioned the appellant's right to count two against him. Thereupon the appellant, while arising from the table, drew his pistol and told the deceased that he was a liar, and that he would show him whether he would count two against him. While the deceased was still sitting in his chair appellant fired, and as he was endeavoring to get up from his chair the appellant shot him twice in the back, from which he shortly thereafter died. It occurred in the back room of a saloon, and when the owner of it accosted the appellant, saying, "you have ruined me and yourself, too," he replied, "I shot in self-defense." He was taken into custody, and again claimed that he had shot in self-defense, and continued to make that claim. One witness was introduced, who testified that the appellant had threatened to kill some of the Butler family, of which deceased was a member.

The testimony tended to show that the appellant had been drinking and was under the influence of liquor, but not to such an extent as to make him stagger or render him unable to walk or talk with distinctness. It also conduces to show that he had been addicted, more or less, to the use of liquor for a great many years, and had had quite a number of difficulties; that in his early school days he had had trouble with his playmates at school, etc.

A reversal of the case is sought on the ground that the court erred in admitting improper testimony and in rejecting competent evidence, and because the court did not give the jury the law of the case. It was urged by the Commonwealth that no testimony as to hereditary taint, or as to the effect which the previous habits of the appellant had in producing mental aberration, should have been permitted to go to the jury, and that no instruction on insanity should have been given. As to this question, without discussing it, we assume the court acted properly, and we will consider the alleged errors upon that assumption.

The killing took place in the back room of the saloon, and a witness was asked the following question: "Was there any evidence in that back room

or in the front room of any ill-feeling or hostility between Butler and Wright?"

Again, a witness was asked: "So far as you could see or understand at the time, was there any cause apparent to you for any of these difficulties of which you have spoken?"

This question followed the testimony tending to show that the appellant had had previous difficulties. These witnesses were introduced, not as experts, but to prove facts. When witnesses detailed the facts with reference to the acts it was the province of the jury to determine whether or not there was any cause therefor, and it was quite as competent to do so as were the witnesses who detailed the facts.

McClure, who was the teacher of the appellant when quite a small boy, but who does not seem to have known him since that time, was not permitted to express an opinion as to whether there was any cause for the violent conduct of the appellant towards his playmates at school, he having testified to such conduct. It is insisted that he should have been permitted to testify as to whether there was any cause for such conduct. It was the province of the jury to determine from the facts detailed by the witness whether there was any cause for such conduct.

Woodward and some others were introduced as nonexperts, and gave their opinion as to the insanity of the appellant. It is claimed that these certain witnesses did not show themselves sufficiently well acquainted with the appellant to entitle them to give their opinions. When witnesses are acquainted with an accused they are entitled to give their opinion as to his mental condition. (*Brown v. Commonwealth*, 14 Bush, —.) In our opinion the witnesses were qualified to express their opinions. When they gave the facts with reference to their acquaintanceship the jury could judge as to the quality and value of their testimony. The appellant complains of the refusal of the court to allow the use of a diagram or family tree of his family, upon which were written in red ink statements of what members of the family had been of unsound mind, and who of them had been sent to the asylum, etc. The court refused to admit the diagram as evidence with the statements on it in red ink. With the omission of these statements, he admitted it as evidence. We are of the opinion that the court properly ruled upon this question. The defendant, in the proper way, proceeded to introduce proof as to the unsoundness of mind, etc., of the various members of the family, and all of the statements on the diagram were proven with elaboration.

The court refused to allow an expert witness to answer the following question: "What would be the likelihood of one with such heredity, the probability of one with such heredity, being injured by the excessive use of liquor over one with an ordinary heredity?"

Testimony had been admitted as to the effect of hereditary taint and likewise as to the effect of the excessive use of liquor and tobacco upon the mind of one so tainted and upon the minds of others. The jury had the full benefit of the testimony as to the effect of hereditary taint and the excessive use of whisky and tobacco upon the mind of one so tainted, and it seems to us it would have served no purpose to have allowed a comparison between the effect of such use of liquor upon the mind of one with such heredity and

upon one without it. Had the question been proper, the refusal to permit it to be answered under the circumstances would not have been prejudicial to the appellant, because of the previous testimony which had been admitted on the subject. We are of the opinion that Sid Stout's testimony was properly offered in rebuttal.

It was endeavored to be shown by the defense that appellant had been careless in using and keeping his money as an evidence of unsoundness of mind. The books of the bank where he kept his money were introduced to rebut that testimony by showing that he maintained business habits and kept his cash in the bank. For that purpose it was certainly competent. The appellant belonged to a branch of the family descended from Mrs. John Kennedy, and every branch of the family which descended from her had either idiots, lunatics or persons with defective intellect. The court refused to allow the appellant to show by tradition the insanity of Mrs. John Kennedy and her ancestors. In our opinion the court did not err in refusing to allow this testimony to be introduced. Insanity is a fact to be proven. Had the court admitted this testimony it would have allowed hearsay evidence to prove a collateral fact, hence such testimony was open to a double objection.

In *Walker v. State*, 102 Ind., 507, the defendant offered to prove hereditary insanity in his family by family tradition, and it was held that the evidence was not admissible, and was properly excluded by the trial court. To the same effect is *People v. Koerner*, 154 N. Y., 355. In *State v. Hoyt*, 47 Conn., 518, it was held that it was not allowable for defendant to prove that his father was reported in the neighborhood to be at times insane. This was rejected upon the ground that insanity is a fact which can not be proven by reputation.

It was held in *Choice v. State*, 81 Georgia, 424, that family and neighborhood reputation is not admissible to prove that accused was permanently injured in his mind by reason of a physical injury which he had received. If it were competent to prove insanity by reputation, it would be equally so to prove sanity in the same way. By such evidence a philosopher might be proven to be a fool, and a fool might be proven to be a man of genius.

Upon motion of the Commonwealth the following instruction (No. 6) was given: "Although the jury may believe from the evidence that the defendant at the time of the killing was without sufficient reason to know right from wrong, or that he had not sufficient power to govern his actions by reason of some impulse which he could not resist or control, yet if they further believe from the evidence that such lack of reason to know right from wrong, or such insufficient will power to govern his actions or to control his impulses, arose alone from voluntary drunkenness, but not from unsoundness of mind, they should not acquit the defendant on the ground of insanity."

This court has repeatedly held that voluntary drunkenness or temporary insanity, occasioned by the act of one getting drunk, is no excuse for the commission of homicide. (*Shannahan v. Commonwealth*, 8 Bush, 470; *Bishop v. Commonwealth*, 22 Ky. Law Rep., 1168.) The latter case reviews some of the opinions of this court upon the question. This instruction told the jury in substance that if a lack of reason upon the part of the appellant to

know right from wrong, or sufficient will power to govern his actions or to control his impulses, arose alone from voluntary drunkenness, and not from mental unsoundness, he was not excusable for that reason. This question has been so often decided by this court that we regard it as wholly unnecessary to discuss it further.

This court held in *Commonwealth v. Carpenter*, 92 Ky., 452, that the mere fact that the defendant was drunk at the time he committed the offense with which he was charged did not entitle him to an instruction as to insanity. It is complained that the court erred in defining "malice aforethought." The definition given in this case follows the rule enunciated in *Commonwealth v. Clark*, 23 Ky. Law Rep., 1040, and *Jolly v. Commonwealth*, 22 Ky. Law Rep., 1625. It is also complained that the instruction on the subject of insanity did not embody the law on that question. The court followed the instructions in *Abbott v. Commonwealth*, 21 Ky. Law Rep., 1572, and *Jolly v. Commonwealth*.

The jury was told in an instruction that before they could convict appellant they should believe that each and every element to constitute guilt as set out in the instructions had been proven beyond a reasonable doubt, and while insanity was a defense, it was incumbent upon the defense to prove its existence to the satisfaction of the jury, and if, on the whole case, its existence was proven, it was their duty to acquit.

The defendant offered an instruction, which reads as follows: "Before the jury can convict the defendant they ought to believe that each and every element necessary to constitute guilt as set out in these instructions has been proven beyond a reasonable doubt, and while insanity is a defense, it is only incumbent upon the defendant to prove its probable existence; and if, on the whole case, its existence is so proven, it is their duty to acquit."

This court in numerous cases has held that before a jury can acquit an accused on the ground of insanity it must be established to its satisfaction. (*Brown v. Commonwealth*, 14 Bush, 400; *Ball v. Commonwealth*, 81 Ky., 662; *Cottrell v. Commonwealth*, 13 Ky. Law Rep., 305.)

Should the court hold that the jury would be authorized to acquit on the ground of insanity if the defendant proved its probable existence, it would disregard many of its previous opinions. In our opinion no error occurred at the trial of this case prejudicial to the substantial rights of the appellant. Judgment is affirmed.

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SHOUSE v. TAYLOR, &c.

(Filed March 4, 1908.)

Action to quiet title—Bills and notes—Fraud—Mortgages—Jurisdiction—Appellant executed his notes to appellees, as trustees of a deposit company, at different times for \$5,000, \$3,000 and \$2,831.70, respectively, and in order to secure same executed a mortgage on a tract of land in Shelby county, containing 248 acres. He afterwards brought this suit in Shelby county, under section 11, Kentucky Statutes, alleging that said notes were without consideration and obtained by fraud and misrepresentation, and that same casts a cloud on his title. The process was served on appellees in Fayette county. The lower court sustained a demurrer to the petition and dismissed

it, from which this appeal is prosecuted. Held—That the lower court properly dismissed the petition as the notes and mortgages executed on the land were in no sense hostile to that of plaintiff, and not such a claim as casts a cloud on the title for which an action to remove may be brought under the statute. The only relief sought is relief for fraud and deceit practiced upon him by defendants, and which comes under the head of transitory actions, and must be brought in the county in which some of the defendants, who may be properly joined as such, reside or are summoned.

J. C. Beckham & Son and O'Neal & O'Neal for appellant.

Appeal from Shelby Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, E. L. Shouse, brought this suit in equity, under section 11 of the Kentucky Statutes, to quiet his title to a tract of land. The petition alleges that on the 28th day of November, 1900, he gave his promissory note to the defendants, A. P. Taylor and William Curran, trustees of the reserve fund of the International Mutual Deposit Co., of Lexington, Ky., for \$8,000, due twelve months after date, with interest at the rate of 6 per cent., and to secure the payment thereof executed a mortgage upon a tract of land on which he resided, and to which he held the legal title, containing two hundred and forty-eight acres, situated in Shelby county, Kentucky; and that on the 26th day of February, 1901, he gave an additional note for \$3,000, due twelve months after date, with interest payable quarterly, to the same parties, and executed a second mortgage upon the same tract of land to secure its payment; and that in addition to the mortgages and notes specified above that on the 9th day of May, 1901, he gave another note to the same parties for \$2,331.70. He alleges that each of these notes and mortgages made to secure the first two were executed in consideration of money which the defendants were to advance to him, to be used in the purchase of stock in the Mutual Deposit Co., of Lexington, Ky.; that the notes and mortgages were obtained from him by false and fraudulent representations made to him by Taylor and Curran, officers of the company; that the corporation was legally organized and solvent, and engaged in a lawful and prosperous business, and was earning for and paying to, and would continue to earn for and pay to, its certificate-holders, depositors and members, 60 per cent. on their investment, and that certificates would be issued therefor by the company redeemable in a short time; that the plan was approved by the best and most successful financiers of the country; that they would advance to and pay for plaintiff the sums evidenced by the various notes, and treat them as so much cash paid by him to the defendant company and issue certificates therefor, and that the earnings of the company would pay them off, and that he would under no circumstances be called upon to pay them; that these mortgages were a cloud upon the title of plaintiff, and interfered with the alienation and salable value of the land, and asked for a cancellation of the notes and mortgages.

The summons which issued on the petition was directed to, and was executed by, the sheriff of Fayette county upon Taylor and Curran in Fayette county, and the trial court sustained a special demurrer to the jurisdiction of the court, and the plaintiff has appealed to this court. The section of the statutes relied on to give the Shelby Circuit Court jurisdiction is as follows:



"It shall and may be lawful for any person, having both the legal title and possession of lands, to institute and prosecute suit, by petition in equity, in the circuit court of the county where the lands, or some part of them, may lie, against any other person setting up claims thereto; and if the plaintiff shall be able to establish, and does establish, his title to the land, the defendant shall be by the court ordered and decreed to release his claim thereto."

It is the contention of appellant that the placing on record of the mortgages sought to be cancelled was such a setting up of claim to the real estate owned by the plaintiff as to give the court jurisdiction. This statute was before this court for construction in the case of *Kinthead v. McGowan*, &c., 88 Ky., 91, and in *Campbell v. Disney*, 98 Ky., 41. In the latter case it was held that to maintain the action "it should appear that the claim of title or right was hostile to the title of the plaintiff; then the allegation that such claim of title clouded the plaintiff's title would be a substantive fact, which should be alleged. \* \* \* To illustrate, suppose the defendant's claim was a lease from the plaintiff, such lease would be a rightful claim, which might greatly lessen the market value of the property, yet no one would contend that an action of *quia timet* would lie in such case."

It is apparent from the averments of the petition that defendant's claim to the land is in no sense hostile to that of plaintiff. On the contrary, their claim arises under and by virtue of the mortgage executed to them by the plaintiff, which is merely an incident to the notes, and only creates a lien to secure their payment. When the notes are paid the mortgages have nothing on which to rest, and necessarily become extinct. The only relief sought is relief for fraud and deceit practiced upon him by the defendants, and which comes under the head of transitory actions, and must be brought in the county in which some of the defendants, who may be properly joined as such, reside or is summoned.

We perceive no conflict in the cases of *Campbell v. Disney*, 98 Ky., 41, and *Landrum v. Farmer*, 70 Ky., 67. In the latter case *Farmer* executed to *Landrum* a bond for an undivided interest in a tract of land in his possession in Marshall county. He subsequently brought suit for the cancellation of the title bond, and had the process served on *Landrum* in Graves county. The claim of *Landrum* in that case was a hostile claim of ownership, entirely different from a mortgage as in this case.

Perceiving no error in the judgment appealed from it is affirmed.

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COLUMBIA FINANCE AND TRUST CO., TRUSTEE, &c. v.  
MITCHELL'S ADM'R, &c.

(Filed March 4, 1908—Not to be reported.)

1. Bills and notes—Burden of proof—In an action on a note where a defendant alleges as a defense that he was surety on the note, and that he was released by a novation of the note, the burden is on defendant.

2. Release of surety—Estoppel—After reversal of this action an amended petition was filed claiming that the two credits on said note were entered by mistake, and appellant, therefore, contends that as the evidence shows that the account of the principal was overdrawn at the time the two credits were entered, that the surety was not released. Held—That this proof is not con-

clusive of the question. The amendment was filed seven years after the petition in which the credits are conceded the laches of appellant would prevent a recovery, and the jury having so decided, their finding will not be disturbed.

Ed. C. O'Rear and R. A. Mitchell for appellants.

H. M. Woodford, H. R. Prewitt and A. W. Young for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Hobson.

This is the second appeal of this case. For opinion on former appeal see *Young v. New Farmers Bank's Trustee*, 19 Ky. Law Rep., 1809, 102 Ky., 257.

The facts are set out in that opinion, and need not now be repeated. On the return of the case to the circuit court the plaintiff filed an amended petition, in which it was alleged that no interest had been paid on the note, and that the two credits of \$80 endorsed thereon were entered by mistake. The allegations of this pleading were traversed by the defendant and the case was again tried, resulting in a verdict and judgment for the defendant.

It is insisted that the court erred in giving the defendant the burden of proof and the concluding argument before the jury under the pleadings as they stood at the trial. We are unable to see that the burden of proof was changed by the amended petition. The defendant, Young, admitted signing the note, and a judgment for plaintiff must have been entered against him thereon unless he had by proper evidence overthrown the prima facie case which the note made out against him. To do this he had to show that he was a surety in the note and not the principal, and that a novation had been made by which he was released under the principles laid down in the former opinion. It is also insisted that the court erred in allowing the testimony of the defendant, Young, given on the former trial to be read on this trial (he being dead), so far as he stated transactions with William Mitchell, who had also died since the preceding trial. But the testimony of William Mitchell given on that trial was also read, and there was no conflict between his testimony and Young's as to what took place between them. The testimony of Mitchell was confirmed by other evidence, and there was no contrary evidence offered by appellant. The admission of Young's statements was not prejudicial; as they could not possibly have affected the result.

This brings us to the last and pivotal question in the case. It is urged that Mitchell, the principal in the note, did not in fact pay anything on it, and that there was in truth no novation. It was shown that at the time the two credits endorsed on the note were made Mitchell's account with the bank was simply charged with these sums, and that his account on these dates was overdrawn.

The account of Mitchell with the bank was not produced, but it would appear from the evidence that it was a large one. It ran on for many months, and until the bank closed. This charge of the money to Mitchell in that account was acquiesced in by the bank directors, at least there never appears to have been any complaint about it or any disaffirmance of the charge. The bank was credited in its interest account on its books by these amounts as collected on the interest on this note. Although Mitchell's account was overdrawn on the day the charge was made, the balance may have

been subsequently covered. There is no evidence to the contrary. And as money was deposited to the account it would be applied by operation of law to the older items of debt; and so, to show the money was not paid, it would be necessary to prove that the subsequent deposits were insufficient to cover the balance due on the account when the charge was made. This had not been done, and from the acquiescence of the bank in the charge it can not be presumed that it was not so covered. (Grant County Deposit Bank v. Points, 22 Ky. Law Rep., 105; 1 Morse on Banking, section 855.)

The two credits in controversy were conceded in the petition and were not controverted in any way until after the return of the case from this court the amended petition was filed on January 25, 1899, which was something like seven or eight years after the credits were given. The long delay in setting up this claim is potent evidence of the acquiescence of the bank, and the court should not disturb a matter of this sort after such great lapse of time without the clearest evidence. The circuit court on the trial followed the principles laid down by this court on the former appeal, and on the whole record we see no error to the prejudice of the substantial rights of the appellant.

The judgment complained of is, therefore, affirmed.

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LOUISVILLE & NASHVILLE R. R. CO. v. CHESTNUT & CO.

(Filed March 4, 1903.)

Common carriers—Contracts—Appellees shipped a car load of turkeys from Trenton, Todd county, to Chicago. The car was carried by the L. & N. R. R. Co. to Evansville, and there delivered to the Evansville & Terre Haute R. R. Co., which carried it to Evansville, and there delivered it to the Chicago & Eastern R. R. Co., which carried it to Chicago, but failed to take it from its yard to the unloading track, and that by reason of said delay several of the turkeys died and the others were in a damaged condition. In an action for damages the court peremptorily instructed the jury to find for the defendant, the Evansville & Terre Haute R. R. Co., and submitted the case to the jury as to the Louisville & Nashville R. R. Co. and the Chicago & Eastern R. R. Co. There was no evidence showing negligence on the part of the L. & N. R. R. Co., and, therefore, the only question in the case is whether it is liable under the contract as a through carrier for the negligence of its connecting line. Held—That under the contract of shipment the L. & N. R. R. Co. is to transport the car to its terminus, and there deliver it to the connecting line, and to be no further responsible for it. Under said contract the L. & N. R. R. Co. was not responsible beyond its own line.

2. Agents—Process—Jurisdiction—The Chicago & Eastern R. R. Co. had no officer in the State and the process for it was served on the president of the L. & N. R. R. Co., on the idea that the L. & N. R. R. Co. was its agent in the State in the making of the contract sued on, and, therefore, the process might be properly served on such agent. Held—That although the L. & N. R. R. Co. may have acted as the agent of the defendant in making the contract, it is not such an agent as the statute contemplates, and, therefore, the service of process upon it was invalid and should have been quashed, but on the return of the case to the circuit court no further process will be necessary as the appeal enters the defendant's appearance.

Perkins & Trimble, E. W. Hines and B. D. Warfield for appellant.

W. L. Reeves and B. B. Petrie for appellees.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Hobson.

Appellees, S. D. Chestnut & Bro., shipped a car load of turkeys from Trenton, Ky., to Chicago, Ill., on December 11, 1898. The car was carried by the Louisville & Nashville R. R. Co. to Evansville, Ind., and there delivered to the Evansville & Terre Haute R. R. Co., which took it to Terre Haute, and there delivered it to the Chicago & Eastern Illinois R. R. Co., which transported it to Chicago all right, but failed to take it from its yard to the unloading track at Chicago, and while the car was so delayed it turned very cold and a number of the turkeys were frozen. The car reached Chicago about 7 o'clock in the morning and should, in the ordinary course of business, have been unloaded in a few hours, but by reason of the delay the unloading of it was not finished until some time the next day. The proof by the defendants tended to show that the turkeys were not in good condition, and the loss on them was due in part to this fact, and in part to the delay of the consignee in unloading the car after it was placed on the proper track. The court peremptorily instructed the jury to find for the defendant, the Evansville & Terre Haute R. R. Co., and submitted the case to the jury as to the Louisville & Nashville R. R. Co. and the Chicago & Eastern Illinois R. R. Co. There was no evidence showing negligence on the part of the Louisville & Nashville Co., and, therefore, the only question in the case is whether it is liable under the contract as a through carrier for the negligence of its connecting line. The written contract, so far as is material, is in these words: "Received by the Louisville & Nashville R. R. Co. the following described live stock, to be transported in accordance with the terms and conditions of the contract entered into below:

Consignee, Destination &c.	Description of Stock	Car No.
S. D. Chestnut & Bro. Care of H. L. Brown & Son, Chicago, Ill. Charges \$22.00	Poultry Recd.	Tacoma 623

"Tariff rate on this shipment from Trenton to Evansville is \$62 per car.

#### "CONTRACT FOR TRANSPORTATION OF LIVE STOCK.

"Trenton, Ky., Station, December 11, 1898.

"This agreement made between the Louisville & Nashville R. R. Co. and its connecting lines of the first part and S. D. Chestnut & Bro. of the second part: Witnesseth, That whereas, the said Louisville & Nashville R. R. Co. and its connecting lines transport live stock only as per above tariff; but in consideration that the said party of the first part will transport for the said party of the second part one car of poultry from Trenton, Ky., to

Evansville, Ind., Station, at the rate of \$31 per car and a free passage to the owner or his agent on the train with the animals (if shipped in car load quantities), the same being a special rate, lower than the regular rate mentioned in the said tariff, the said party of the second part hereby releases said party of the first from all liability in the transportation of said animals, except as hereinafter agreed, and agrees that such liability shall be only that of a private carrier for hire; and it is further distinctly understood by the parties hereto that all liability of said Louisville & Nashville R. R. Co. as carrier of said animals shall cease at its destined station if on said company's railroad, or if destined to a point beyond said company's railroad, then at said company's station at its terminus, when ready to be delivered to the owner, consignee, or carrier, whose line may constitute a part of the route to destination. \* \* \*

"And it is further agreed that when necessary for said animals to be transported over the line or lines of any other carrier or carriers to the point of destination, delivery of the said animals may be made to such other carrier or carriers for transportation, upon such terms and conditions as the carrier may be willing to accept, provided that the terms and conditions of this bill of lading shall inure to such carrier or carriers unless they shall otherwise stipulate; but in no event shall one carrier be liable for the negligence of another."

The proof shows that appellees were charged \$22 for the poultry car Tacoma, \$31 for transporting it from Trenton to Evansville and \$54.40 as the freight from Evansville to Chicago, making in all \$107.40, which was paid by the consignees in Chicago. It is insisted for appellee that the written contract is an undertaking by the Louisville & Nashville R. R. and its connecting lines to carry the car Tacoma from Trenton to Chicago; that they are all parties of the first part, who received the car to be carried to its destination and are all bound alike by the stipulations of the contract to transport the car from Trenton to Evansville and from Evansville to its destination. It is also urged that the limitations of the contract are not limitations on the obligation of any of the lines, but only an attempt to limit their liability by reason of the obligation, and the case of *Ireland v. Mobile & Ohio R. R. Co.*, 105 Ky., 400, is relied on.

But it will be observed that while the writing is a receipt by the Louisville & Nashville R. R. Co. for the poultry car Tacoma, consigned to Chicago, Ill., it is stipulated that the party of the first part will transport the car from Trenton, Ky., to Evansville, Ind., and that all liability on the part of the Louisville & Nashville R. R. Co. for the car shall cease at its terminus, when ready to be delivered to the connecting line, and it is also agreed that the car may be transferred to such connecting lines as are necessary to reach its point of destination. Taking the contract as a whole, we think it means that the Louisville & Nashville R. R. Co. is to transport the car to its terminus and there deliver it to the connecting line, and to be no further responsible for it. The bill of lading in the case of *Mobile & Ohio R. R. Co.* read very differently. There the Mobile & Ohio R. R. Co. was the only contracting party, and the court reached the conclusion that the covenants of the paper could only refer to it. A bill of lading on substantially the same form as that above quoted was before this court in *L. & N. R. R. Co.*

v. Tarter, 19 Ky. Law Rep., 229, and it was held that the initial carrier was not liable beyond its line. The court said: "The general rule is that a carrier is not liable beyond its own line unless by contract to that effect, express or implied. (Elliott on Railroads, section 1438; Bryan v. Memphis, &c., R. R., 11 Bush, 597.) It is held in most of the courts that the mere acceptance of goods directed to a point off the carrier's line is not a sufficient basis for the implication of a contract for extra terminal liability, but whether so or not it has never been held that such liability existed in the face of a contract to the contrary. This is not a case of attempted limitation of liability for negligence, hence the cases cited by appellee's counsel do not apply."

The same rule was followed in *L. & N. R. R. Co. v. Cooper*, 19 Ky. Law Rep., 1152, on the same form of bill of lading. The soundness of these rulings was recognized in the *Ireland* case, where the court said: "It is urged that the clause is an attempted limitation of the carrier's common law liability, and is, therefore, void. We do not think so. At the common law, without a contract to the contrary, there was no liability beyond the carrier's own line." (105 Ky., 405.)

This was recently approved in *P., C., C. & St. L. R. R. Co. v. Viers*, &c., 24 Ky. Law Rep., 357. We, therefore, conclude that under the contract referred to the Louisville & Nashville R. R. Co. was not responsible beyond its own line.

As to the appellant, the Chicago & Eastern Illinois R. R. Co., a different question is presented. It had no office in the State, and the process for it was served on the president of the Louisville & Nashville R. R. Co. on the idea that the Louisville & Nashville R. R. Co. was its agent in the State in the making of the contract sued on, and, therefore, the process might be properly served on such agent. In *Nashville, &c., R. R. Co. v. Carrico*, 95 Ky., 489, under a bill of lading similar to that before us, it was held that as the contract was made in Marion county by the Louisville & Nashville R. R. Co., acting as agent for the appellant, the Nashville, &c., R. R. Co., the contract must, within the meaning of section 73 of the Civil Code, be regarded as made there by appellant itself, and as by that section an action against a common carrier upon a contract to carry property may be brought in the county in which the contract is made, the Marion Circuit Court properly had jurisdiction of the action. This case was followed in *P., C., C. & St. L. v. Viers, &c.*, 24 Ky. Law Rep., 357, but in both these cases the summons was served on an agent of the defendant in this State. By subsections 3 and 4, section 51 of the Civil Code, it is provided that if the defendant operate a railroad the summons "may be served upon the defendant's passenger or freight agent stationed at or nearest to county seat of the county in which the action is brought." The words "passenger or freight agent stationed at or nearest to the county seat of the county" must refer to a person who is in the service of the defendant, and is stationed by it at some point. The Louisville & Nashville R. R. Co., although it may have acted as the agent of the defendant in making the contract, is not such an agent as the statute contemplates, and, therefore, the service of process upon it was invalid, and should have been quashed. But on the return of the case

to the circuit court no further process will be necessary, as the appeal enters the defendant's appearance to the action. In 3 C. Y. C., 510, the rule on this subject is thus stated: "Taking an appeal or suing out a writ of error from an inferior court to an intermediate appellate court, which tries the same *de novo*, constitute a general appearance in the intermediate court and confers jurisdiction of the person on that court, whether the court from which the appeal was taken had acquired jurisdiction of the person or not. If the appeal is to a reviewing court, it is a general appearance in the sense that, on reversal and remand to the trial court, the defendant is in court for the purpose of further proceedings without any further steps to bring him into court, even though the judgment was reversed on the ground that the trial court had not acquired jurisdiction of the person of defendant."

This rule was laid down in the year 1809 by this court in *Grace v. Taylor*, 4 Ky., 480; it was followed in 1815 in *Graves v. Hughes*, 7 Ky., 84, and *Wharton v. Clay*, 7 Ky., 167; also in 1826, in *Hookady, & Co. v. Commonwealth and Adkins*, 20 Ky., 12. In a number of subsequent cases the rule is adhered to. (*Branford v. Gillespie*, 38 Ky., 67; *Chesapeake & Ohio and Southwestern R. R. Co. v. Heath's Adm'r*, 87 Ky., 651; *Thompson v. Moore*, 12 Ky. Law Rep., 664; *Lillard v. Brannin*, 91 Ky., 511.)

After its objection to the process was overruled the defendant filed answer to the merits, and there was a trial and judgment on the whole case. From this judgment the appeal before us is prosecuted. It will, therefore, be before the court on the merits when the action is returned to the lower court.

Judgment reversed and cause remanded for further proceedings consistent herewith.

#### HARTFORD FIRE INS. CO. V. BOURBON COUNTY COURT, & CO.

(Filed March 11, 1903.)

1. Insurance — Total Loss — Arbitration — Instructions — Evidence — The county courthouse of Bourbon county was insured against loss or damage by fire in the sum of \$50,000. Appellant was one of the insurers to the extent of \$1,000, and this action was brought to recover same, claiming that the loss was total. Appellant denied that the loss was total, and pleaded in abatement that appellee refused to submit the question of loss to appraisers, as provided by the policy, as a condition precedent to the institution of an action. A trial resulted in favor of appellee, from which this appeal is prosecuted. Held—That the lower court did not err in refusing to give a peremptory instruction on the theory that an arbitration was a condition precedent to the action. Under section 700, Kentucky Statutes, which provides for payment of the face value of the policy in case of total loss, a provision of the policy requiring an arbitration of the question of liability in event of disagreement is in direct conflict with the statute. This provision of the policy only applies where there is a dispute as to the amount due where it is not fixed by the policy. Parties can not by contract preclude themselves from resorting to the courts for relief, and the question asked to be submitted to arbitration was a question of law, or at least of law and fact, viz., when a loss is total under the statute. The court gave proper instructions defining total loss, and the verdict is not flagrantly against the evidence.

2. Evidence—The court properly refused to be read as immaterial evidence letter written by an adjuster of appellant to W., which was read to the county judge as same, had no bearing on the question whether or not there was a total loss. Appellant insists that the court erred in refusing to admit in evidence estimates of cost of replacing the building; also testimony as to the cost. Held—That while such testimony is ordinarily competent to prove the extent of the loss, yet under the statute such evidence would probably mislead the jury. The lower court properly permitted witnesses to minutely detail what was necessary to restore the building, and as to the per centage or proportion of it that was destroyed by fire, but properly excluded the question of cost.

Breckinridge & Shelby, R. W. Barger and John S. Smith for appellant.

McMillan & Talbott, E. M. Dickson, Dennis Dundon, T. Earl Ashbrook, Claude M. Thomas and J. H. Brent for appellees.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge O'Rear.

The county courthouse of Bourbon county was insured against loss or damage by fire in the sum of \$50,000. Appellant was one of the insurers to the extent of \$1,000.

This suit was to recover of appellant \$1,000, because it was alleged that the building, during the continuance of appellant's policy, had been totally destroyed by fire. The answer denied that the loss was total. It further pleaded that the loss was partial only; that it did not exceed in value \$33,918.27, and that for \$34,000 it could, by using the part not destroyed by fire, be replaced in as good or better condition than it was just immediately before the fire. It was also pleaded in the policy of insurance sued upon that there was a provision that the sum insured should not be payable, nor should suit be brought to recover it, till sixty days after the loss or damage had been ascertained and awarded by appraisers if arbitration had been required; that appellant had required appraisers; that appellee had refused and failed to name an appraiser, and that no such appraisal or award had been made.

The provision for arbitration pleaded and relied on is as follows: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or if they differ, then by appraisers, as herein-after provided; and the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by the company in accordance with the terms of this policy."

The prayer of the answer is: "Having answered, defendant prays to be hence dismissed, with its costs."

The failure and refusal of appellee to enter into the arbitration was not denied. The court overruled the demurrer to the paragraph of the answer pleading the matters in avoidance above set out. The issue made by these



pleadings, and the only issue, is, was the loss total? The other matter pleaded by defendant, while admitting the fact of a partial loss, or damage, pleaded the other facts in the nature of a plea in abatement. The court instructed the jury as follows:

"1st. The court instructs the jury that the law is for the defendant, and they should so find, unless they shall believe from the evidence either or both of the following propositions are true: First, that the fire of the 19th of October, 1901, destroyed the identity and specific character of plaintiff's building as a building; or, second, that the said fire, and the water used in the attempt to extinguish same, so injured and destroyed all parts of said building above ground as to render said building so unsafe and useless as a building as to require the walls, or whatever was left standing of the building, to be torn down and said building to be rebuilt throughout in order to be used as a building.

"2d. The court instructs the jury that if they believe from the evidence that either or both of the above-mentioned propositions are true, then the law is for the plaintiff, and the jury should so find.

"3d. If the jury find for the plaintiff they should assess their recovery against the defendant in the sum of \$1,000, with interest thereon from February 18, 1902.

"4th. The court instructs the jury that if they believe from the evidence that so much of the material of which the building was made has been destroyed by fire, or by reason of fire, as to leave what remained of no material value as a building, although it may have value as debris or salvage, there has been a total loss of that building within the contemplation of the statute, and the law is for the plaintiff.

"But if the remaining part of said building can by repairing it be restored to the former condition of the original just before the fire, then the loss in contemplation of the statute is a partial loss, and the law is for the defendant. But if instead of repairing the damaged part substantially, a reconstruction of the whole would be necessary to restore the building, then the loss is total."

A peremptory instruction was asked by appellant and refused. The jury's verdict was for the plaintiff (appellee). The only rulings complained of as errors are the court's refusal to give the peremptory instruction; its definition to the jury of the term "total loss," and the rejection of certain evidence offered by appellant. The peremptory instruction was asked upon the assumption that the policy provided for an arbitration to fix upon the fact and extent of the loss, in case of disagreement, and that such award was a condition precedent under the contract to a right of action on the policy. The argument is that the parties have by contract stipulated that the company shall not be liable to any payment until the amount of loss had been fixed, either by the agreement of parties, or, if they disagreed, by an appraisal and award by arbitrators provided for in the contract; that a disagreement did arise as to both the amount and extent of the loss, the insured claiming it was total, the insurer that it was partial. Counsel for appellant say: "We submit that whether the loss was partial or total was the very question which, under the statute, as written into the body of the contract, had been agreed to be submitted to appraisal."

The statute in question is section 700, Kentucky Statutes, as follows: "That insurance companies that take fire or storm risks on real property in this Commonwealth shall, on all policies issued after this act takes effect (in case of total loss thereof by fire or storm), be liable for the full estimated value of the property insured, as the value thereof is fixed in the face of the policy; and in cases of partial loss of the property insured, the liability of the company shall not exceed the actual loss of the party insured: Provided, That the estimated value of the property insured may be diminished to the extent of any depreciation in the value of the property occurring between the dates of the policy and the loss; And provided further, That the insured shall be liable for any fraud he may practice in fixing the value of the property, if the company be misled thereby."

The policy sued on was issued since the adoption of that statute. The provision of the policy for arbitration in event of disagreement is in direct conflict with the statute in several particulars. For example: The policy provides that "this company shall not be liable beyond the actual cash value of the property at the time of any loss." The statute fixes the liability of the company in event of total loss at the value of the property fixed in the face of the policy. The policy provides that the appraisal shall fix the cash value of loss or damage, "with proper deduction for depreciation, however caused." The statute says that only that depreciation in the value of the property occurring between the dates of the policy and the loss shall be deducted. Again, the policy reads: "(The loss or damage) shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality." So far as this clause refers to a total loss it requires the arbitrators to proceed on a basis of estimate entirely different from that fixed by the statute.

It can not be claimed, of course, that there was any legal duty upon appellee to submit its claim to arbitrators before suit, other than may be found in the clause of the contract quoted. Broadly speaking, one can not, by contract, bargain away his right to try his case before the courts (*Whitney v. National, & Co., Assoc.*, 52 Minn., 378; *Badenfield v. Mass. Mut. Acc. Assoc.*, 154 Mass., 77; *Gray v. Wilson*, 4 Watts, Pa., 39), although it is generally held that an agreement in a contract of insurance, that the amount of the loss or damage shall be first ascertained by arbitrators, is enforceable as a condition precedent to the right to sue on the policy. (*Hanover Fire Insurance Co. v. Lewis*, 28 Fla., 209; *Randall v. Am. Fire Ins. Co.*, 10 Mon., 340; *Mentz v. Armenia Fire Ins. Co.*, 79 Pa. St., 478, 21 Am. Rep., 80.)

But this is where there is a dispute as to the amount; where it is not fixed by the policy. If the amount is fixed, and the agreement is to submit the question of liability to arbitration, it is void. (*Tunnel Co. v. Segregated B. M. Co.*, 19 Nev., 121; *Seward v. Rochester*, 39 Hun., 44 (affirmed), 109 N. Y., 164; *Corbin v. Adams*, 76 Va., 53; *Alexander v. Campbell*, 41 L. J. Ch., 478; *Whitney v. National Masonic Acc. Assoc.*, 52 Minn., 378.)

While the law favors settlements, arbitrations, as a means of peaceful and expeditious settlement, are enforced only where they have been executed, or where the agreement to submit to arbitrators does not oust the courts of their jurisdiction. (*Hill v. Moore*, 40 Me., 515; *Contee v. Dawson*, 2 Bland, Md., 264; *White v. Middlesex R. Co.*, 135 Mass., 216, 15 Am. & Eng. R.

Cases, 181; *Randall v. Am. Fire Ins. Co.*, 10 Mon., 240, 24 Am. St. Rep., 80.)

Applying these principles to appellant's contention, it follows that if the contract provided, as seems to be contended, that the question of appellant's liability was to be submitted to arbitrators, the provision was void. The line of demarkation in the cases, wherein such provisions have been either upheld or rejected, is, if the thing to be submitted is the one of an undetermined and undisputed fact, as a condition precedent to an action upon a recognized legal liability, the agreement will be enforced. But if the fact is already fixed (e. g., the value of the property, or the amount to be paid), the agreement to submit the question of liability, the question of law, is invalid. In the case at bar the value or sum to be paid in event of total loss is conclusively fixed. It was proposed to submit to arbitrators whether for that sum or value liability had attached, or existed, a question purely of law, or at least of law and fact. The arbitrators could not have determined it without deciding the question of law involved, i. e., when is a loss total within the meaning of the statute? Appellant's position is that by the contract that question must first be settled by arbitrators selected by the parties, instead of by the courts created by the law, a proposition which, we think, is against principle and precedent. Numerous cases hold that under statutes similar to ours quoted herein, if the question is one of total loss, the arbitration clause of the policy can not be applied, for there is nothing to arbitrate that is the subject of arbitration. (*Relly v. Franklin Ins. Co.*, 43 Wis., 449, 28 Am. Rep., 552; *Merchants Ins. Co. v. Stephens*, 22 Ky. Law Rep., 999, and cases therein cited.)

Counsel insist that until the extent of the damage or loss was ascertained it could not be known whether the loss was total or partial only; that if it was but partial, then the arbitration feature of the contract clearly, and under all the authorities, applied; that the parties might have submitted the question of extent of damage or loss to arbitrators in this case we do not doubt. Their award, though, in our opinion, could have been used as a basis of the settlement only in event the loss was partial. If it was total, no matter what may have been the value of the building (in the absence of fraud mentioned in the statute) the liability of the insurer was fixed at the sum named in the face of the policy; and the agreement to submit that question to arbitration being without consideration, and being contrary to the policy of the law as embodied in section 700, statute supra, was not binding on the insured. The only one who took any risk by refusing the arbitration was the insured, for if the loss turned out to be only partial, then, without a fulfillment of the condition precedent (and it not being waived) appellee could have recovered nothing. Appellee took the burden and the risk of maintaining that the loss was total.

Furthermore, a careful inspection of the clause of the policy providing for the arbitration shows that it required the arbitrators, not to determine the amount of loss or damage in fact, and under the terms of the statute, but to find the extent of the loss, to be estimated upon an entirely different basis, the one pointed out above in this opinion. This was the only arbitration asked for by appellant, or provided for in the contract of insurance. The policy of the State has been to close this very question of value of property

totally destroyed. The reasons supporting this policy are well known and are not of recent promulgation. Appellant's effort seems to be to have the law so construed that the parties by their contract may bind themselves in advance to defeat this policy of the law, and return to the very conditions sought to be corrected by the legislative action. The circuit court properly decided that appellee's failure to submit its claim of total loss to arbitration was not available as a defense to that claim. The instructions given are based upon former decisions of this court. (*Caledonia Ins. Co. v. Cook*, 101 Ky., 412; 19 Ky. Law Rep., 651; *Palatine Ins. Co. v. Weiss*, 22 Ky. Law Rep., 994; *Æsna Ins. Co. v. Glasgow E. L. & P. Co.*, 107 Ky., 77, 21 Ky. Law Rep., 726; *Thuringia Ins. Co. v. Mallott*, 23 Ky. Law Rep., 1248; *Germania Ins. Co. v. Ashby*, 23 Ky. Law Rep., 1564.) We adhere to the principles announced in those cases.

One of the complaints on account of the trial court's rejecting evidence offered for appellant is that a letter written by appellant's adjuster to one White, whom it had selected as its representative in an effort to settle the loss, was not admitted. Mr. White had a conversation with county judge Smith, of Bourbon county, relative to the loss, and handed the letter to Judge Smith, who read it. Some parts of the conversation then ensuing between White and Smith were admitted. It is claimed that the letter formed a part of the colloquy. It does not appear that anything was said about this particular letter in that conversation. The letter itself does not appear to be relevant as aid in any way in determining whether the loss was total or partial. At best it is a testimonial of appellant's fair intentions in the matter, a fact not in issue. We are of opinion that the letter was immaterial.

Appellant introduced several architects and builders as expert witnesses, who testified that, in their opinion, the building was not totally destroyed; that, on the contrary, by far the most of it could be utilized with perfect safety in rebuilding or repairing. They went into detail in describing the parts fit for that purpose. They had made out estimates of the work and material necessary, according to their opinion, to restore the building. The estimates noted the cost of the labor and material. Appellant offered these estimates in evidence, which were rejected. We think properly so. Then appellant asked the witness, and offered to prove the cost. This was refused. Some courts have admitted this class of evidence as bearing on the question whether the loss was total or partial. Ordinarily it seems that that fact might be shown in part in that manner. But under the statute (section 700) above we are of opinion that such evidence would more probably mislead than aid the jury. To illustrate: If, as a matter of fact, the building could have been built new for \$40,000 that fact was entirely irrelevant and immaterial under the statute. Therefore, if one wall alone stood, all other parts being without doubt destroyed, still the building could be restored for \$40,000. Now would that evidence tend to prove that the building was not totally destroyed? We think not. The trial court allowed the witnesses to describe in minutest detail what was necessary to restore the building, and as to the percentage or proportion of it that was destroyed by the fire. The question of cost was alone excluded. In the rulings admitting and rejecting this evidence the trial court, in our opinion, was right.

The verdict was not flagrantly against the evidence. Indeed there was much evidence to sustain it. There was also evidence, respectable in character and considerable in extent, to the contrary. Photographs of the building taken during and after the fire are before us. They would seem to bear out appellant's theory that the building was not so injured as to be totally destroyed. However, this class of evidence must necessarily be inconclusive. To the eye it conveys an impression that the witnesses refute. Even some of appellant's witnesses admit that the condition of the walls was such that they must have been torn away down to the top of the first story, yet an examination of the photographs does not give the slightest intimation of that fact. The theory of appellee was, and that was the substance of its evidence, that the walls were sprung, cracked and so impaired by water and heat, that they were unsafe for use in rebuilding. True, appellant's witnesses contradict this. But the photographs are without much value on that issue, manifestly.

We perceive no reversible error in the record and the judgment is affirmed, with damages.

Whole court sitting.

#### STANDARD LIFE AND ACCIDENT INS. CO. v. HOLLOWAY.

(Filed March 11, 1908—Not to be reported.)

1. Insurance—Waiver of conditions by agent—Estoppel—Appellee obtained an accident certificate of insurance from an agent of appellant at Louisville, who was also ticket agent for a railroad company, and immediately after purchasing the certificate boarded a train, and within ten minutes the coach was derailed and appellee severely injured. He brought this action to recover damages, alleging that he was prevented from performing his labors as a farmer for twenty-six weeks, and recovered judgment for \$250, from which this appeal is prosecuted. Appellant urged as a defense that it was relieved from responsibility by reason of the fact that appellee was a cripple at the time he obtained the certificate, and it was expressly provided in the certificate that "it does not insure any maimed or cripple person." Appellee claimed that this provision was waived by the agent who solicited the insurance, knowing at the time that appellee had but one leg. Held—That appellant's agent had authority to waive this provision, and if he did so with knowledge of appellee's crippled condition, the company is estopped to deny the waiver.

2. Evidence—The court erred to the prejudice of appellant in permitting a witness to testify to statements made by appellant's agent after the certificate was issued as to his knowledge that appellee was crippled. Said statements were not a part of the *res gestæ*, and were incompetent. Said statements could only have been admitted in case the agent had been introduced as a witness for appellant and had been asked on cross-examination if he had made such statements, and denied making them, when the witness could have been introduced to contradict him. It would then have been competent only for the purpose of impeaching the testimony of the agent.

Yeaman & Yeaman for appellant.

M. Merritt for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted by appellee in the court below upon a policy of accident insurance No. 465, which contains a clause to the effect that "it does not insure any maimed or crippled person."

The record discloses the following state of facts, viz: That the policy in question was purchased by appellee at the price of 50 cents from appellant's agent, who was likewise the local ticket agent of the Louisville, Henderson & St. Louis Ry. Co. at Henderson, Ky.; that appellee was about to take the passenger train for Louisville, and when securing his railroad ticket he was solicited by the ticket agent to buy the accident policy, which he did; that after receiving it he very soon boarded the train for Louisville, and in less than ten minutes thereafter the passenger car in which he was riding was derailed, and he was greatly and permanently injured thereby in his arm and shoulder, and totally disabled from performing any of his duties in his business of farming for twenty-six weeks, and was confined to the house under constant treatment of a surgeon for thirteen weeks.

The policy was made a part of the petition, and by its terms appellant agreed to pay appellee at the rate of \$25 per week, not exceeding twenty-six weeks, if he should sustain within two days from its date injuries in any railroad passenger car which should wholly and entirely disable him from performing or engaging in any and every kind of occupation, and remain within the house and be subject to the personal and continuous attention of a surgeon in good standing, or \$5 per week if such injury only prevented him from performing some one or more of his daily duties. It is averred in the petition that appellee, by reason of the injuries he received from the derailling of the passenger car, was damaged in the sum of \$650, and this sum he sued to recover of appellant.

Appellant, by answer, controverted the averments of the petition, and in addition alleged in substance that appellee, at the time of his purchase of the policy sued on, was a cripple, that is, he had but one leg, the other having been amputated some years before, and that the clause in the policy which provides that "it does not insure any maimed or crippled person" was known to appellee, for which reason he is not entitled to recover the indemnity claimed by him.

The reply, as amended, traversed the material allegations of the answer, and avers that the agent of appellant knew when the policy was issued of appellee's lameness, and this averment of knowledge on the part of the agent is denied by the rejoinder. Upon the issues thus joined the case went to trial, and the jury returned a verdict in appellee's favor for \$250. Thereafter appellant filed grounds and entered motion for a new trial, which the lower court refused, hence this appeal. It is contended by counsel for appellant that parol evidence was inadmissible to establish a waiver of the provision of the contract that "it does not insure any maimed or crippled person," and that as appellee is a cripple, the jury should have been instructed peremptorily to find for appellant. We are unwilling to accept this view of the case, for it seems to be the more recent policy of the courts in most of the States to hold that where an insurance agent has general powers, and not only solicits, but is the sole judge as to whether he will take the risk, his knowledge in respect to the nature, condition or extent of the risk

is that of the company which he represents. And it has even been held that such an agent may waive the stipulations in a policy issued by him, and the company will be bound thereby. (*Hartford Insurance Co. v. Haas*, 87 Ky., 531; *Phoenix Ins. Co. v. Spiers & Thomas*, 87 Ky., 285; *Phoenix Ins. Co. v. Phillips*, 16 Ky. Law Rep., 122.)

In the case of the *Travelers Ins. Co., &c. v. Ebert*, 30 Ky. Law Rep., 1008, which was an action brought by a woman to recover on an accident policy for injuries received and loss of time resulting therefrom, it being expressed in the policy that recovery might be had by the person injured for loss of time occasioned by injuries resulting from accidental means, except in the case of females, whom it insured against death only, this court upon the evidence furnished by the record, that the agent of the company had, notwithstanding the provisions of the policy, contracted to insure the appellee, Ebert, against loss of time, said: "It is insisted by appellant that the agent, Pemberton, had no authority to make such a contract as the one claimed by appellee, and further, that as the contract contained the exception mentioned, she must be bound thereby. It is evident that the agent was authorized to issue accident policies of some kind, and it nowhere appears that appellee had any notice or information to the effect that his power in that respect was limited, hence we are of the opinion that appellant is bound by the representations and contract in respect to insurance made by any agent authorized to make any contract for insurance. \* \* \* The face of the receipt clearly shows that the agent knew the insured was a female, and he specifically insured her against loss of time, and it will be a harsh and unreasonable rule that would require her or her son, who acted to some extent for her, to examine the ticket fully to see whether it was a palpable contradiction of the contract entered into verbally, and also reduced to writing. No such diligence should be required of a person in the hurry of travel." \* \* \*

So in view of the authorities referred to, we are constrained to hold that if Rogers, appellant's agent, at the time he delivered to appellee the policy sued on, knew that he was maimed or a cripple, the provision in the policy intended to exclude cripples was waived in his case, and we think that appellant is estopped to deny the waiver. It was for the jury to determine from the evidence presented whether the agent had such knowledge or not, and though he denied having any knowledge thereof, appellee testified that he walked in before him with his usual limp, and that upon reaching the ticket office window he laid his cane on the base or shelf thereof in plain view of the agent. From these facts the jury doubtless found that the agent saw, and had opportunity to know, of appellee's crippled condition; and, upon the other hand, that the latter did not know, and had no means of learning, of the provision of the policy intended to exclude persons of his class from its benefits, as he took the passenger train immediately after receiving it for the purpose of going to Louisville.

We are of opinion, however, that the lower court erred in permitting the witness, Stone, to testify as to the conversation that occurred between himself and appellant's agent, Rogers, after the delivery of the policy to appellee, and after his injury, in which he says Rogers informed him that "he knew when he sold the ticket that Holloway was lame, that it was because he

had so many accidents, and been so unfortunate, that he asked him if he did not want an accident ticket; that a man who had had so many accidents ought to have accident insurance." This evidence was clearly incompetent, and necessarily prejudicial to appellant.

In commenting on the declarations of agents and the extent to which they may bind the principal, Mr. Meachem, in his very excellent work on Agency, says: "So the statements, representations or admissions must have been made in reference to the subject-matter of his agency; the mere idle, desultory or careless talk of the agent, having no legitimate reference or bearing upon the business of his principal, can not be binding upon the latter; and the statements, representations or admissions must have been made by the agent at the time of the transaction, and even while he was actually engaged in the performance, or so soon after as to be in reality a part of the transaction; or, to use the common expression, they must have been a part of the *res gestæ*. If, on the other hand, they were made before the performance was undertaken, or after it was completed, or while the agent was not engaged in the performance, or after his authority had expired, they are not admissible.

In such a case they amount to a mere narrative of the past transaction, and do not bind the principal. The reason is that while the agent was authorized to act or speak at the time, or within the scope of his authority, he is not authorized at a subsequent time to narrate what he had done, or how he did it." (Meachem on Agency, section 714; Greenleaf Ev., sections 113-114.)

In *Davis v. Whitesides*, 1 Dana, 177, it is said: "The circuit court erred in instructing the jury that if Miller was either the partner or agent of the plaintiff, his (Miller's) statement as proved by another was competent evidence against the plaintiff; an acknowledgment of an agent is not admissible as proof against his constituent unless it formed a part of the *res gestæ*."

But a more recent decision in point is to be found in *Hartford, &c. v. Hayden's Adm'r*, 90 Ky., 441, wherein it is said: "The appellees were improperly allowed to prove some statements of Pursley relative to insuring the deceased made after it had been affected. The acknowledgments of an agent made subsequent to the transaction in which he acted as agent can not be proven against the principal; they are not a part of the *res gestæ*."  
\* \* \*

We can conceive of no state of case that would have justified the lower court in admitting proof of these statements of the agent unless the agent had been introduced as a witness by appellant, to testify as to what occurred when the contract of insurance was made with appellee, in which event, upon cross-examination, counsel for appellee might have asked him whether he made to Stone the statements testified to by the latter, and upon his denial thereof Stone might have been introduced by appellee to contradict him, but even then it would have been the duty of the court to instruct the jury that the testimony could be considered by them only for the purpose of affecting the credibility of the agent as a witness.

We find no error in the giving or refusing of instructions by the lower court, but for the error committed in admitting proof of the conversation



between the witness, Stone, and appellant's agent, Rogers, the judgment is reversed and cause remanded, with directions to the lower court to set aside the verdict of the jury, and grant appellant a new trial, and for such other proceedings as may not be inconsistent with the opinion herein.

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BLEWETT v. SPRAGUE.

(Filed March 4, 1908—Not to be reported.)

**Liens—Attachments—Mortgages**—Appellant sued appellee for \$2,000 damages for maliciously cutting him with a knife. A few days thereafter appellant filed an amended petition, and alleged that appellee was about to sell and dispose of his property with the fraudulent intent to cheat, hinder and delay his creditors, and especially the appellant, which was levied on his land. On the following day he executed a mortgage on the same land to B. and H. for \$800 to secure them in fees. The damage suit terminated in a judgment for \$250 for plaintiff. In the meantime the Commonwealth indicted appellee for the same offense, which resulted in a conviction and fine of \$500. After this appellee executed to the same parties a second mortgage on the same land to secure them as securities upon an appeal bond, superseding said \$500 judgment. This judgment was affirmed, and the Commonwealth instituted this action, asking to be subrogated to the mortgage lien of B. and H. on said land. B. and H. were made parties to this action, and joined in the prayer of the Commonwealth. Appellant was made a party defendant and he answered, setting up his lien under the attachment as a superior lien. A trial of the action was had and the court adjudged B. and H. liens on the land, but dismissed the attachment of appellant, from which he prosecutes this appeal. Held—That the proof clearly shows that appellee was attempting to sell and dispose of his property with intent to defraud appellant. The attachment should have been sustained, and appellant should have been adjudged a lien on all the land subject to execution prior to the lien of the Commonwealth, or of B. and H.

Greer & Reed and Reed, Greer & Oliver & Reed for appellant.

Appeal from Marshall Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 22d day of July, 1899, the appellant, Vernon H. Blewett, sued the appellee, J. A. Sprague, in the Marshall Circuit Court for \$2,000 damages for maliciously cutting him with a knife. On the 2d day of August an attachment issued on the amended petition of the plaintiff against the property of the defendant on the ground that he was about to sell and dispose of his property with the fraudulent intent to cheat, hinder and delay his creditors, and especially the appellant, which was on the same day levied by the sheriff of Marshall county upon a tract of land belonging to the defendant. This suit was terminated in a judgment in favor of the plaintiff for \$250. The grand jury of Marshall county in the meantime indicated the defendant, Sprague, for maliciously cutting and wounding the plaintiff with intent to kill him. This prosecution resulted in a verdict and judgment against the defendant for \$500. On the 3d day of August, 1899, Sprague and wife executed a mortgage to W. S. Bishop and John K. Hendrick upon the same tract of land to secure the payment to them of fees amounting to

\$300; and on the 20th day of March, 1900, they executed to the same parties a second mortgage upon the same tract of land to protect them as his securities upon an appeal bond superseding the \$500 judgment assessed against him in the Commonwealth proceeding, with interest and cost. The judgment in the Commonwealth case was affirmed by this court on the 1st day of September, 1900. (22 Ky. Law Rep., 519.)

After the mandate of this court was filed in the Marshall Circuit Court a suit was instituted in the name of the Commonwealth against the appellant, Sprague and wife, and W. S. Bishop and John K. Hendrick, setting out the facts recited above, and asking that it be subrogated to the rights and interest of Bishop and Hendrick in the mortgage made to them and for a sale of enough of the land to pay their judgment. The defendants, Bishop and Hendrick, filed an answer in which they concur in the prayer of the petition, and ask that the land be sold to pay not only the debt due the Commonwealth, but also their fees of \$300. In this proceeding the appellant, Blewett, also set up his judgment in the damage suit and claimed a prior lien upon the land by reason of the levy of his attachment.

Upon the trial of these actions the Commonwealth and the assignee of Bishop and Hendrick were adjudged liens on the land, and a judgment entered for its sale. But the trial court discharged the attachment of the appellant, Blewett, and held that he had no lien by virtue thereof, and Blewett appeals. The only question involved upon the appeal is the judgment of the circuit court discharging appellant's attachment. Upon the trial of this question L. W. Craig testified that on July 28, the appellee Sprague, came to his house and told him that he had gotten into trouble, and he wanted to sell out and leave the country, and promised him that if he would find a purchaser for his land and crops he would pay him well for it; and that on the 2d day of August, 1899, he tried to sell the land and crops to various parties under this employment. And N. E. Williams testified that on the 2d day of August, 1899, the same day on which the attachment was sued out, Craig proposed to sell him the land and all the crops belonging to the appellee for \$2,200, representing that he could sell the farm for \$2,000, and the crops were worth \$500, and that they would divide the profits. Substantially the same facts were testified to by Walters and Palmer, and the defendant, Sprague, admits that if he could have sold his land and got the money for it he would not have paid the plaintiff anything unless he had been compelled to at the end of the law, as he did not consider his claim a just one. In our opinion this testimony clearly shows that appellant had determined to sell and dispose of his property, and was endeavoring to do so prior to the issuing of the attachment, for the express purpose of defeating any judgment which might be recovered against him in the suit which had been instituted by the appellant. The mortgages to Bishop and Hendrick were made subsequent to his attachment, and to the extent that they covered property liable to execution were subordinate to appellant's lien acquired by virtue of the levy of his attachment. The mortgage to Bishop and Hendrick covered the homestead, and appellant acquired no lien upon it by the levy of his attachment, and was not, therefore, prejudiced by the judgment in so far as the State was adjudged a lien thereon; but had a prior lien upon the land levied on in excess of the homestead.

1862 J. I. CASE THRESHING MAC. CO. V. LYONS, & CO.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

J. I. CASE THRESHING MACHINE CO. v. LYONS, & CO. 233

(Filed March 4, 1903—Not to be reported.)

Contracts—Warranty of personal property—Appellant sold to appellees a threshing machine and straw stacker for \$580, evidenced by three notes signed by appellants, due respectively September 1, 1901; September 1, 1902, and September 1, 1903, and the contract of sale specified that in case of failure to pay any note at maturity the appellant could treat them all as due. To secure these notes appellants executed a mortgage on said machines; also on a second-hand Aultman engine. Pending the negotiations for the purchase of the threshing machine and stacker, appellees expressed a desire to purchase a second-hand engine so as to have a complete outfit for threshing grain. Appellant's agent informed appellees where they could purchase such engine, and appellees finally made a purchase of an engine from H. The contract of sale of the thresher and stacker contained a warranty as to satisfactory work. After the failure of appellees to pay the first note for the thresher and stacker appellant brought suit on it, and also notified appellees that they would consider the other notes as due, and sought to enforce its mortgage lien. In their answer appellees admit that there was no defect in the thresher and stacker, but allege that the engine was worthless, and that appellant's warranty extended to the engine, as well as the other machinery, and this is the question involved on this appeal. Held—That appellees can not set up any damages that may have resulted to them from the defective condition of the engine as appellant's did not sell the engine to them or make any warranty of same.

Jonson & Wickliffe for appellant.

E. B. Drake for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Barker.

In the year 1891 the appellees, who lived in Logan county, Kentucky, entered into negotiations for the purchase of a "threshing outfit," with J. S. Depoyster and O. E. Matlock, who were agents of the appellant for the purpose of selling its threshing machines in that part of the State of Kentucky wherein appellee resided. These negotiations culminated in the sale by appellant to appellees of one J. I. Case Threshing Machine Co.'s 24x42 Separator, No. 33,295, and one Case Wind-straw Stacker, No. 3,598. This machinery was sold by appellant under a contract, in writing, which set forth, at great length, the terms and conditions of the sale; it also contains the warranty of appellant as to the machinery sold by it to appellees.

For the purchase price of the machinery so sold appellees executed and delivered their three promissory notes for the aggregate sum of \$580: The first was for \$150, due September 1, 1901; the second was for \$215, due September 1, 1902, and the third for \$215, due September 1, 1903, the payment of all being secured by first mortgage on the machinery sold, and also on one ten horse-power Aultman engine, the property of appellees. It appears that at the time of these negotiations with appellant's agents appellees were

desirous of going into the business of threshing grain for profit, and to do this it was necessary that they purchase an engine to run the thresher.

In the negotiations between them and O. E. Matlock, appellant's agent, they stated to him that they were contemplating the purchase of a second-hand engine; that they could purchase a suitable one in connection with another, and rival, threshing machine; whereupon Matlock stated to them that he knew of a second-hand engine which he thought would in every way suit their purpose; that this engine belonged to one J. W. Hays, of Bowling Green, Ky. Matlock, in company with appellees, A. Lyons and J. B. Logan, visited Bowling Green, inspected the engine, and negotiated for its purchase for the sum of \$200 in cash and note for \$100, due September 1, 1901. The contract of purchase is as follows:

"Bowling Green, Ky., February 19, 1901.

"The following repairing to be done on the J. W. Hays' C. Aultman engine, now the property of J. W. Hays, and when repaired to become the property of A. Lyons, J. B. Logan and L. G. Baugh when they pay cash on delivery \$200, note for \$100, due September 1, 1901; engine to be inspected in Bowling Green, Ky., and if found to comply with the following repairing, to be received by said parties: Right-hand drive wheel placed in order. Replace the fly if the one Mr. J. W. Hays has can be made to fit; if not, repair the one on the engine; new leak in the boiler under crank shaft on right-hand side of engine stopped; new smoke stack; cock on cylinder repaired; damper fixed; repair platform; stop holes in heater except one; place drain cocks in this one; fit wrist pin, brass boxing; also brass box on connecting rod and adjust governors, and furnish new link for guide chain.

(Signed) "A. LYONS,

"J. B. LOGAN."

The engine was shipped from Bowling Green to appellees by J. W. Hays, the owner, and the threshing machine and stacker were duly shipped to them by appellant, and the entire threshing outfit was in their possession prior to the beginning of the wheat season of 1901. In January, 1902, the first of the notes executed and delivered by appellee for the purchase price of the threshing machine and stacker having matured, and not being paid, the appellant instituted an action in the Logan Circuit Court for judgment for the principal and interest of the note in question, and also electing to declare the other two notes due and payable, under a provision in the mortgage securing the payment of the notes authorizing such election and declaration.

Appellees filed an answer, in which they in substance claimed that the purchase by them of the thresher, stacker and engine was one transaction, for which they were to pay \$880; that they stated to the agents of appellant at the time of the contract that they desired to purchase one complete threshing outfit from one party, and that they would not purchase this thresher and stacker unless they could purchase from appellant also a second-hand traction engine; that thereupon the agents of appellant agreed to procure such an engine for them, and agreed that it should be embraced in the contract for the sale of the thresher and stacker, and included in the warranty to be made by appellant concerning the new machinery; that appellant's agents, Depoyster and Matlock, agreed to procure such an engine,

and sell them the threshing outfit, including the engine, as a whole; that in pursuance of said contract appellant's agents procured the engine from J. W. Hays of Bowling Green and delivered it to appellees, together with the thresher and stacker; that said agents fraudulently failed to include the engine in question in the bill of sale from appellant to them, in violation of their contract that the same should be done; that the engine sold and delivered to them was entirely worthless and appellees were unable to make it operate the thresher and stacker; and that by reason of its worthlessness the whole outfit purchased by them of appellant was useless, and they prayed for a rescission of their contract with appellant, and a judgment against it for the sum of \$200 paid in cash, and the cancellation of all the notes executed by them, together with the mortgage securing their payment.

The reply of appellant put in issue the material allegations of the answer, and the issues were properly made up. The first question which meets us in the discussion of this case is whether appellees purchased the engine from appellant, or from J. W. Hays. It is not contended that the thresher and stacker, in any way, failed to come up to the warranty contained in the contract of sale between appellant and appellees. The defects complained of existed only in the engine, and appellees' defense to appellant's cause of action is based entirely upon their claim that the engine was purchased of appellant, through its agent, O. E. Matlock, and that by reason of the defects of the engine the threshing outfit, as a whole, was useless to them.

It is not denied by appellees that at least two of them went with Matlock to Bowling Green, and inspected the engine in question; that the terms of purchase, and the repairs to be done upon the engine, so as to make it serviceable, were agreed on between them and Hays, the owner. The contract of sale for the engine was reduced to writing, and signed by two of the appellees. An inspection of this contract shows that it was made with Hays by appellees; that it stipulated that the engine then belonged to J. W. Hays, and that when repaired, as set forth in the contract, it was to become the property of A. Lyons, J. B. Logan and L. G. Baugh, when they paid cash on delivery \$200 and note of \$100, due September 1, 1901; the engine to be inspected in Bowling Green, Ky., and if found to comply with the stipulation in regard to repairs, to be received by appellees.

The inspection of the engine did not take place in Bowling Green, but by request of appellees it was shipped to them at Dunmore, where they received it. This contract of sale, signed by the parties thereto, shows that it contained no such warranty as is now claimed by the appellees; it shows conclusively that appellees dealt with Hays in the purchase, and not with appellant. The mortgage which appellees executed to appellant, securing the notes for the purchase price of the thresher and stacker, in describing the property subject to the mortgage, contains the following description of the engine in question: "And one 10 H. P. C. Aultman (Star engine), No. 4203, it being the engine purchased by A. Lyons, & Co., of J. W. Hays, Hays, Ky."

This mortgage was signed and formally acknowledged by appellees before the county clerk of Muhlenberg county, and was by him recorded. The bill of sale from appellant to appellees which warrants the thresher and stacker was in writing, and made out in duplicate, a copy of which was delivered to

appellees. This bill of sale shows conclusively that the warranty of appellant was only as to the thrasher and stacker, and that it contains no warranty of the engine. This paper was in the possession of appellees all of the time from the delivery of the machinery until the institution of this action, and is signed by all of them. It contains, among other things, this provision: "Agents have no authority to waive, alter or enlarge this contract or to make any new or substituted or different contract or warranty."

The oral evidence upon the disputed points is conflicting and irreconcilable. Depoyster and Matlock, the agents of appellant, flatly contradict appellees as to the purchase of the engine from appellant, and they disclaim any authority to have made the purchase of the second-hand engine for the appellant, or to give any warrant in reference thereto, and there is no evidence in this record to establish any such authority in them. On the other hand, the appellees all depose in such a manner as to fully uphold the allegations of their pleadings. But it seems to us that all the written evidence bearing upon the question of the purchase of the engine indisputably shows that it was purchased of J. W. Hays and not from appellant. Assuming, for the sake of argument, that appellees' contention in regard to the engine having been sold by appellant, and the agreement to include it in the warranty contained in the bill of sale for the thrasher and stacker, to be established, still their claim for rescission can not be maintained.

The warranty contained in the bill of sale is as follows: "It (the machinery) is warranted to be made of good material, and durable, with good care; to do as good work as any made in the United States if properly operated by competent persons, and the printed rules and directions of the manufacturers intelligently followed. If purchasers, by so doing, after trial of ten days, are unable to make the same operate well, written notice shall at once be given to J. I. Case Threshing Machine Co., at Racine, Wis., and also the agent from whom purchased, stating wherein it fails to fulfill the warranty, and reasonable time shall be given to said company to send a competent person to remedy the difficulty, the purchaser rendering the necessary and friendly assistance, said company reserving the right to replace any defective part or parts, and if then the machinery can not be made to fulfill the warranty, the part that fails is to be returned by the purchaser free of charge to the place where received, and another substituted therefor, that shall fill the warranty, or the notes and money for such part immediately returned, and no further claim made on the company. Failure so to make such trial or to give such notices, in any respect, shall be conclusive evidence of due fulfillment of warranty on the part of said company, and that the machinery is satisfactory to the purchasers, and any assistance rendered by the company, its agents or servants, in operating or in remedying any actual or alleged defect, either before or after the ten days' trial, shall in no case be deemed any waiver of, or excuse for any failure, of the purchaser to fully keep and perform the conditions of this warranty."

It is admitted by the appellees that they did not give the notice mentioned in the foregoing contract to the J. I. Case Threshing Machine Co., at Racine, Wis. They do claim to have made complaint to the agent, Depoyster, but this can in no wise excuse them from their obligation to also give notice to appellant at Racine, Wis. This very question arose in the case of Frick Co.

v. Morgan & Co., &c., 24 Ky. Law Rep., 836. In that case, in speaking of a warranty on a threshing machine similar to the one in the case at bar, the court said: "The warranty in this case is materially different from that recited in the case of the Keystone Mfg. Co. v. Yager, 21 Ky. Law Rep., 1542. In that case the contract required that the vendee should give notice, either to the company or to the agent, of any defect in the machine in two days. In this it requires the notice to be given both to the agent and to the company. And the law is well settled that where the purchaser of the machine agreed that if it proved defective he would give notice thereof to the vendor, that he was not entitled either to return the machine because of a defect of which he did not give notice nor resist the payment of the purchase price because of such defect. (Citing *Osborne v. Taylor*, 8 Ky. Law Rep., 359; *American and English Ency. of Law*, volume 28, page 112; *Benjamin on Sales*, section 703.)"

The rule is well settled that the vendee of property, who desires a rescission of the contract of sale for defects, or the failure of the property to come up to the terms of sale, must, within a reasonable time after discovery of the defects or failure, offer to restore the property, and place the vendor in statu quo, in regard thereto, as far as practicable.

In the case of *Bailey, &c. v. Nichols, Sheppard & Co.*, 8 Ky. Law Rep., 64, it is said: "The purchaser of a traction engine is not entitled to a rescission of the contract of sale because of a breach of warranty, having failed to return, or offer to return, the engine within a reasonable time after he ascertained that it would not perform the work it was warranted to perform, and having continued its use after he ascertained that fact."

In the case of *Colyer v. Thompson & Johnson*, 2 T. B. Monroe, 18, the court said: "Nor will a court of equity, in every case, set aside a contract on the ground of fraud. Where the injured party within a reasonable time after he has discovered the fraud makes his election to disaffirm the contract, and offers to restore the property, a court of equity will, at his instance, interpose and set it aside. But if, after discovering the fraud, he still retains the property and uses it as his own, and makes no offer to restore it, or does not otherwise evince a determination to avoid the contract, a court of equity will not set it aside, but permit him to seek redress in an action at law. (*Hardwick v. Forbes' Adm'r*, 1 Bibb, 212; *Robinson v. Galbreath*, 4 Bibb., 183.)"

In the case at bar the appellees received the engine, together with the thresher and stacker, and, according to their own statement, discovered almost immediately the defects of the engine. They state that they were unable to make it work at all, and yet, with this knowledge, they kept the property through the whole wheat-threshing season, without any notice to appellant at Racine, Wis., and finally left the thresher and stacker out in an open field, subject to be ruined by the weather. So far as this record shows they made no tender back of either the engine, or thresher, or stacker, during the whole season. Under these circumstances it seems to us inequitable to allow them a rescission of the contract, even if it had been of a tenor comporting with their claim; but we are satisfied from the evidence that the purchase of the engine was made from J. W. Hays, and not from appellant.

Wherefore, the case is reversed, with directions to enter a judgment in favor of appellant for their debt as shown in the pleadings and for other proceedings consistent with this opinion.

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## NEW YORK LIFE INSURANCE CO. v. JOHNSON'S ADM'R.

(Filed March 4, 1903—Not to be reported.)

**Insurance—Cancellation of policy—Evidence—Appellee's intestate became the local soliciting agent of appellant company in Garrard county. A policy on the life of said agent for \$50,000 was issued by the company, and in due course of business was sent to N., the general agent at Louisville. It is claimed by appellant that it was placed in the hands of the agent, with other policies, to go into force when the premium was paid, or an acceptable note given for it. Appellee claims that such a note was delivered and accepted, whilst appellant claims it was tendered, but returned. Thus the matter stood until about the 1st of September, 1896, when the policy was returned to the appellant. About the 1st of October, 1896, the appellant rejected the application for the insurance and cancelled the policy. It is claimed in this action, brought to recover \$50,000, that the policy was actually delivered and wrongfully cancelled, and nothing else was done until the death of the insured. A recovery was had, from which this appeal is prosecuted. Errors in the admission of evidence are relied on for reversal. Held—That a pocket memorandum book of the agent, stating that a note for \$1,572, the amount of a policy, had been sent to the company, was incompetent, as the premium due on this policy was \$1,595. The widow of the agent was improperly permitted to testify to a communication between her and her husband, as it was incompetent under section 606, Civil Code of Practice. An attorney was improperly permitted to testify as to what the agent told him was the transaction with the company as to said policy. Said testimony was hearsay, as no one representing the company was present at said conversation. N., the general agent of the company, was introduced as a witness for appellant. He stated that appellant was a mutual company, and that he was a stockholder to the extent that he was a policy holder. His testimony was refused on account of interest. Held—That said witness was competent. Previous to the enactment of subsection 2, section 606, Civil Code of Practice, N. would have been a competent witness in the case. The disqualifying interest must be direct and certain, one that would charge the witness with a liability or exempt him from one, but a mere uncertain, remote or contingent interest would not disqualify one from being a witness. The testimony of B., to the effect that the intestate was in possession of the policy and claiming it during the time stated by him, was competent, but his testimony as to what he said that N. and other agents said, with reference to dividing the policy into smaller ones, was incompetent.**

Humphrey, Barnett & Humphrey for appellant.

Harris & Marshall, O'Neal & O'Neal and W. McC. Johnson for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Paynter.

In June, 1896, M. W. Johnson became the local soliciting agent of the appellant in Garrard county, Kentucky. Soon thereafter he applied to the



appellant for a policy on his life in the sum of \$50,000. Two policies were issued, one for \$10,000 and the other for \$40,000. He never paid the premium on either. Soon after they were issued he applied to the appellant for a \$50,000 policy, to be issued in lieu of the two mentioned, which was accordingly done on the 14th day of July, 1896. The policy was payable to Johnson's estate. In due course of business it was sent to General Agent W. R. Noble at Louisville, Ky. It is claimed by the appellant that it was placed in the hands of Johnson (he being treated as the soliciting agent with reference thereto as with other policies), to go into force when the premium was paid, or an acceptable note given for it. The appellee claims that such a note was delivered and accepted, whilst the appellant claims it was tendered, but returned. Thus the matter stood until about the 1st of September, 1896, when the policy was returned to the appellant. About the 1st of October the appellant rejected the application for the insurance and cancelled the policy.

It is claimed on behalf of the appellee that the policy was actually delivered and wrongfully cancelled. It appears that nothing further was done with reference to it until about the middle of December, 1896, when Johnson died. This suit was instituted by Johnson's administrator on the policy to recover the \$50,000. It is unnecessary to make a fuller statement of the facts for the purpose of this opinion; it is likewise unnecessary to comment upon the letters which were used in the evidence upon the trial of the case. The questions to be determined on this appeal are upon the admission of certain testimony over the objection of the appellant and the refusal to admit certain testimony in its behalf.

On the trial of the case a pocket memorandum book of Johnson was offered in evidence. It contained a heading and entry as follows: "Insurance written by M. W. Johnson for the New York Life Insurance, June 28, '96. M. W. Johnson \$50,000." On another page of the book it contains the following: "Notes taken in payment of insurance wrote in the New York Insurance Co. by M. W. Johnson, of Paint Lick, Ky., June 28, M. W. Johnson, 4 months, \$1,572."

It is conceded that the premium on the \$50,000 policy was \$1,595, so the amount of the note mentioned in the book does not correspond with the amount of the premium which Johnson should have paid. It seems to us for that reason, if for no other, it was error to admit the book as evidence, as no evidence was offered to show that any \$1,572 note was ever seen or delivered to the appellant. The widow of Johnson was allowed, over appellant's objection, to testify as to communications between her and her husband. This was error. (Section 606, Civil Code.)

Mr. R. H. Tomlinson, a lawyer of Lancaster, Ky., was introduced as a witness upon behalf of the appellee. He was asked: "Were you employed by Mr. Johnson at any time before his death to bring any suit against the New York Life Insurance Co. in respect to a policy for \$50,000 in that company?" He answered that he had been, and then proceeded to detail a conversation with Johnson, wherein Johnson stated the transaction from his point of view which he had with the appellant in reference to the policy in question. This testimony was offered with a view of showing that the policy had been delivered to Johnson, and that Johnson had not acquiesced in the rejection of

the application by the company and the cancellation of the policy. No one representing the New York Life Insurance Co. was present when that conversation took place; it was hearsay evidence.

If a cause of action could be made out by statements which the plaintiff had made to others as to the transaction (not in the presence of the party against whom it is asserted), then to follow such rule it would be quite an easy thing for any one to establish a cause of action against one who was under no liability whatever to the party making such a claim.

In *Dickson v. Labry*, 16 Ky. Law Rep., 522, it appeared that one party claimed the property by a gift from his grandfather, and the other party claimed that he had acquired title to it by a subsequent purchase from the grandfather. The court held that it was incompetent to prove the statements of the grandfather, not in the presence of the plaintiff, to the effect that he had not given the property to the grandson.

In *Lowry v. Erskan*, 118 N. Y., —, it was held, where it was claimed that an uncle took notes in the name of his niece, that it was not admissible in the suit of his personal representatives against the niece to prove that the uncle had said that he took the notes in the name of his niece to avoid the payment of taxes.

It was held in *Penn v. Flightmaster*, 17 S. W. Rep., 334, that statements made by an ancestor, not in the presence of the party to be affected thereby, were not admissible on behalf of the plaintiff.

The court held in *Bryan v. Buford*, 7 J. J. Marshall, 335, that an endorsement on a note of a payment by the plaintiff was not evidence for him of the fact of the payment.

On the trial of this case the appellant introduced W. R. Noble, who was the agent of the company, and conducted its business at Louisville, Ky. He was familiar with the facts in relation to the policy in question. He was asked the following questions, and made the following answers, to wit:

"Q. Is the New York Insurance Co. a mutual company?"

"A. Yes, sir."

"Q. Are you a stockholder?"

"A. To the extent of being a policy holder."

"Q. Do you participate in the profits of the company?"

"A. Yes, sir."

The court ruled that he was incompetent as a witness because he was an interested party. This is upon the idea that he was a policy holder in the New York Life Insurance Co., which is a mutual company. The court was of the opinion that by reason of being a policy holder he, therefore, had such interest as disqualified him as a witness.

Section 605, Civil Code, reads as follows: "Subject to the exceptions and modifications contained in section 606, every person is competent to testify for himself or another." \* \* \*

Subsection 2, section 606, Civil Code, reads as follows: "No person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done, or omitted to be done, by \* \* \* one who is dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living, and who, when over fifteen years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted."

The purpose of the enactment of the sections of the Code was not to disqualify witnesses who were qualified before its enactment, but to qualify witnesses who previous to the time had been disqualified. It is in the nature of an enabling and not a disabling statute. The Supreme Court of Florida had under consideration this question, in the case of *Adams v. Board of Trustees*, 37 Florida, Col., 266, wherein it said: "The purpose of the statute was to remove this common law disability arising from interest in the event of the litigation, except in cases where one of the parties to any transaction or communication was, at the time of the examination, dead or insane. In the latter cases the disabilities arising from interest in the event that were imposed by common law are by this statute retained; but in such cases the statute disqualifies those only who were disqualified by the general rule of the common law. Any exception from the disqualification that is recognized by the rules of the common law forms a like exception to the cases intended to be excluded by the proviso to our statute. Where, then, a witness is objected to under the proviso of this statute as being disqualified because of interest in the event of the suit, the test of his competency is by a resort to the common law. If he was competent by the common law, he is competent under the proviso of this statute, and vice versa."

If Noble, as a policy holder, can participate in any profits of the company, it is not only small, but extremely uncertain, contingent and very remote. In discussing the interest of a witness, Mr. Greenleaf, volume 1, section 390, says: "The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest and not an interest uncertain, remote or contingent, \* \* \* and if the interest is of a doubtful nature, the objection goes to the credit of the witness and not to his competency, for, being always presumed to be competent, the burden of proof is on the objecting party to sustain his exception to the competency, and if he fails satisfactorily to establish it, the witness is to be sworn."

Previous to the enactment of the section of the Code in question Noble would have been a competent witness to have testified in this case. As we understand the rule, the disqualifying interest must be direct and certain, one that would charge the witness with a liability or exempt him from one, but a mere uncertain, remote or contingent interest would not disqualify one from being a witness.

So far as this record shows a recovery of the judgment would not have any perceptible effect upon the rights of the policy holder. It is not certain that it would remotely affect his rights to the extent of one cent. Some decisions of this court have been cited to show that a person may have an interest in the result of litigation which disqualifies him from being a witness, although he is not a party to the action. We recognize this to be true, but we have failed to find the disqualifying interest. The testimony of Bernard, to the effect that Johnson was in possession of the policy and claiming it during the time stated by him, was competent, but his testimony with reference to what Johnson said that Noble or other agents of the company had said with reference to dividing the policy into smaller ones was incompetent.

Noble was not present when Johnson made the statement to the witness. It was no part of the *res gestæ*. The transaction between Johnson and Bernard was entirely independent of, and disconnected with, the transaction which resulted in issuing the policy for \$50,000.

Judgment is reversed for proceedings consistent with this opinion.

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HAYNER & CO. v. MCKEE, &c.

(Filed March 4, 1903—Not to be reported.)

Husband and wife—Fraudulent conveyances—A judgment having been rendered against M., and a return of no property found, this suit was instituted under section 439, Civil Code of Practice, to subject to said debt a grocery store, saloon, notes and accounts, shares of stock in a tobacco company, storage house and dwelling house held in the name of his wife, to the payment of said debt. Held—That as the proof shows that the wife received a devise of about \$3,500, and invested \$2,000 in a store and purchased a home with other funds belonging to her, worth about \$1,500, and he was only clerk for her in charge of her business, and although she owned considerable property, the chancellor will not subject it to her husband's debts on account of large incumbrances resting on the property and the uncertain value of same, which does not satisfy the mind that value has been added to said property by his labor.

Hunter Wood & Son and W. L. Reeves for appellants.

James Breathitt, Downer & Russell and T. L. Edelen for appellees.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Hobson.

On October 14, 1896, appellants recovered judgment in the Christian Circuit Court against appellee, L. H. McKee, for the sum of \$6,936.56, with interest from that date, on notes executed by him to them in the year 1882. Execution was issued on the judgment, and returned no property found. Appellees then instituted this action under section 439 of the Code of Practice to subject to their debt the following property standing in the name of his wife, Nannie L. McKee:

Grocery store, saloon and fixtures, worth as alleged .....	\$8,000
Notes and accounts, worth as alleged .....	5,000
Sixty-one shares in Hopkinsville Tobacco Co., worth as alleged .....	3,000
Cold storage house, worth as alleged .....	700
improvements put on storehouse, worth as alleged .....	1,000
Dairy business and cattle, worth as alleged .....	2,000
Horses, worth as alleged .....	400
Dwelling house, less lien, worth as alleged .....	2,100
Acme Mill stock, worth as alleged .....	300
Total .....	<u>\$22,500</u>

The wife claimed the property as her own, and on final hearing the court dismissed the petition.

The proof shows that L. H. McKee was a member of the firm of Cowan,

Huggins & McKee in the year 1882, and that the firm failed, McKee losing all that he had in the failure, although he seems not to have been to blame for it. Before he went into that firm he had been a merchant at Casky, Ky., and while in that firm he conducted the grocery business, and the other members of the firm attended to its grain and implement business. McKee, it seems, was a good business man and understood the grocery business. The failure of his firm was due to losses in the other business which he had nothing to do with. After that failure a firm was formed of McKee & Pool, which conducted for about two years a grocery business. The McKee of this firm was Charles McKee, the father of L. H. McKee. L. H. McKee stayed in this store as a clerk at a salary of about \$50 a month. In May, 1883, he married Nannie L. Ellis, who had about \$1,500 in the hands of her brother, being money derived from insurance on the life of her father, who had died several years before. She knew her husband's financial condition, and it was agreed between them that her money should be kept separate and held as her separate estate. In November, 1883, her brother, who held the money for his sister, paid it over to her husband. He deposited it in bank in the name of L. H. McKee, agent, and in the following January and February checked it out to McKee & Pool, except some of it used by his wife, and the bank account was closed. A year or more after this Pool withdrew from the firm and the firm of McKee & Pool was succeeded by Charles McKee & Sons, the sons being two brothers of L. H. McKee. L. H. McKee stayed with this firm as with its predecessor. One of his brothers died, and in the year 1889 L. H. McKee's wife received from the estate of this brother nearly \$300. She then bought the home where they now live for \$1,500; the property was deeded to her and the money received from the estate referred to was paid on the property. In 1890 Charles McKee died, and by a proceeding in the Christian Circuit Court Nannie McKee was made a feme sole. She then bought the grocery store of Charles McKee & Sons, and her husband continued in charge of it, running it in her name, and has continued to run it to the present time, increasing the business from year to year, and adding a saloon to the grocery. His wife stayed at home and he ran the business, but it was run in her name. Out of the profits of the business the family were supported, the annual cost of this being about \$1,500. The dwelling house was improved, \$300 of the unpaid purchase money was paid and the interest on the remainder. The property is now worth, perhaps, \$2,500, and there is a lien on it for \$900. A store-room was bought for \$6,700 and \$1,000 spent in improving it, although the purchase money for the store was not paid. Sixty-one shares of the stock in the Hopkinsville Tobacco Co. were bought, five shares at \$100 a piece and the other fifty-six shares at 10 cents on the \$1 at a time of depression. The company is now doing well, and the stock is taken in bank as collateral security for a loan of \$2,500. The husband also bought in the name of his wife, and out of the profits of the business conducted by him, three shares of Acme Mill stock, valued at \$300, a cold storage house, which rents for \$130 a year, but which was bought at auction for something over \$200, although it cost \$700. In addition to this, in the name of his wife, he went into the dairy business, putting into it something over \$2,000, and is now running the dairy. He also began some farming operations in partnership with

Thomas H. Carlos, but no money seems to have been made either in the dairy or in the farming operations. The proof is conflicting as to the present value of the store, ranging on the stock of goods from \$4,000 to \$8,000, and on the accounts and notes from \$3,500 to \$5,000, fixtures, etc., \$1,000. It is impossible to read the record without reaching the conclusion that L. H. McKee is a business man of more than ordinary capacity, and that starting with small capital, by reason of his capacity and attention, the business conducted by him has grown from small beginnings to its present size, besides supporting his family.

It is earnestly insisted for appellant that the fund in the hands of the wife's brother vested in the husband on their marriage, and that, therefore, the increase of that fund and everything purchased with it was the property of the husband. We can not concur in this contention. The husband had the right to reduce his wife's choses in action to possession, but he was not required to do so. He might let it remain as her property and impress upon it the character of her separate estate. The facts of the case warrant the chancellor's conclusion that the husband and wife, knowing of his involved condition, agreed that this fund should be the separate estate of the wife, and that it was held and controlled by her as her separate estate. The wife was entitled to an equitable settlement, and this small fund was no more than in equity might properly have been settled upon her.

It is also earnestly argued that the husband can not give his wife the profits arising from his own business sagacity, and that the profits of this business made by the husband, or a reasonable part of them, should be subjected to the payment of plaintiff's debt. (*Carter Bros. v. Martin*, 91 Ky., 294; *Brooks-Waterfield Co. v. Frisbie*, 99 Ky., 125.) There is much force in this, but in view of the evidence as to the amount of debts outstanding and the conflicting evidence as to the value of the property, the court concludes that we ought not to disturb the chancellor's finding on the facts. It is shown that the debts due for goods in the store amount to \$3,500; there is also a note in bank for \$2,000; a balance of \$900, with some interest, due on the dwelling house and \$6,700 due on the storehouse. It is also shown that about the year 1894 the wife received a devise of something like \$3,500, and \$2,000 was put into the store. The husband has been paid regularly a salary out of the store, which, according to the evidence, was as much as his services were worth. The court is, therefore, of opinion that the facts of this case do not bring it within the rule laid down in the cases referred to.

Wherefore, the whole court sitting, the judgment is affirmed.

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STEPHENSON v. STEPHENSON.

(Filed March 5, 1903—Not to be reported.)

Conveyances—Failure of consideration—Pleading—Appellant being the owner of an undivided one-half interest in adjoining tracts of land made a deed of conveyance of same to her son, the appellee, in consideration of \$500, which was recited in the deed as paid. Appellee, with his family, consisting of a wife and several children, moved to the land, into the house which had been occupied by the mother, he having built for her a small house near by, which she was expected to occupy. Unpleasantness soon arose between

appellant and appellee, his wife and children, which caused her to leave the place, and to institute this suit, in which she alleged that although the deed recited the payment of the \$500, the full consideration only, \$40 of the same was in fact paid, leaving due her \$460, for which she prays judgment, and for "all proper, general and equitable relief." The answer admits that \$500 was not the true consideration, but the consideration was love and affection, and the undertaking on the part of the son to care and provide for his mother during her life, and that he had performed his undertaking in part, and was willing to continue same. After appellee had taken some depositions appellant offered to file an amended petition, praying for a rescission and cancellation of the conveyance. The court refused to permit this amendment to be filed; and on the hearing of the case dismissed the petition, from which this appeal is prosecuted. Held—That the court should have permitted the amended petition to be filed to conform to the proof. The prayer of the petition as amended would have entitled appellant to a cancellation of the conveyance. The proof shows that if the consideration was \$500, it was unpaid, or if it was for care of the mother, appellee had failed to comply with his undertaking; but appellee was entitled to a return of the \$20 paid, and a lien on the land if same is not paid. Appellee is not entitled to anything for building the little house as the rent of the land would offset this.

O. H. Waddle for appellant.

J. W. Colyar and W. A. Morrow for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Polly Stephenson, widow of Jesse Stephenson, deceased, became by the death of a son, Riley Stephenson, the owner in fee simple of an undivided one half of several small and adjoining tracts of land in Pulaski county, the other half having descended to her husband, Jesse Stephenson, who was then living, but upon his death, which occurred at a later date, she became entitled to an estate for life in the whole of his undivided half of the lands mentioned as a homestead, the same being worth less than \$1,000. On October 6, 1900, she by deed conveyed the undivided one-half interest in the lands which had descended to her by the death of her son, Riley, to the appellee, W. M. Stephenson, also a son, for the recited consideration of \$500, the payment of which was acknowledged in the deed. Soon after the conveyance of the land to him the appellee with his family, consisting of a wife and several children, moved on the land and into the house which had been occupied by his mother, he having built for her another small house near by, which she was expected to occupy.

Unpleasantness soon arose between appellant and appellee, his wife and children, which caused her to leave the place, and thereafter to institute this suit in the Pulaski Circuit Court. It is alleged in the petition that although the deed acknowledged the payment of the entire consideration of \$500, only \$20 of the same had in fact been paid, leaving due her \$480, which appellant promised to pay, but failed to do so. It is also averred in the petition that appellant is entitled to a lien on the lands conveyed to secure the payment of the \$480. The petition closes with a prayer for judgment in her favor against appellee for the \$480 and interest; for the enforcement of her lien, and finally for "all proper, general and equitable relief."

The answer admits the execution of the deed, and that only \$20 of the \$500

consideration named therein has been paid, but denies that \$500 is the true consideration, and avers that the real consideration is the service he has performed, and is yet to perform, in caring for and supporting the appellant, who is admitted to be very old and feeble. The reply denies the material allegations of the answer. After some of appellee's depositions were taken appellant offered to file an amended petition, in which she asks the cancellation of the deed made to appellee and the restoration to her of the land, if the court should be of opinion that the averments of appellee's answer are true. The chancellor refused to permit the amendment to be filed, to which appellant excepted. The trial of the case resulted in a judgment dismissing the petition, hence this appeal. While the evidence in the case is conflicting, it shows that shortly after appellee and his family removed to his mother's house disagreements arose between her and his wife and children, so serious and violent as to render it impossible for her to remain with or near them, or for either appellant or appellee to carry out the contract which he claims was the true consideration for the conveyance of the land to him.

Appellant is shown to be eighty years old, and it is doubtless true that in her dotage and feebleness she was not altogether blameless in respect to the matters of disagreement that arose between her and the wife and children of the son; but it is shown by the evidence that much of the mistreatment accorded her by appellee's wife and children was cruel and wholly unjustifiable; and, besides, it is further disclosed by the proof that appellee has failed to comply with his undertaking to care for and support his mother. Upon the contrary, she has been neglected and abandoned by him and others of her own flesh and blood, whose duty it was, and is, independent of compensation or reward, to see that she is maintained in comfort during the few remaining days of her life. It must, therefore, be taken for granted that if the \$500 mentioned in the deed was the true consideration for the conveyance, \$480 of it has not been paid. Upon the other hand, if the true consideration was the appellee's undertaking to live with and support his mother during the remainder of her life, no part of this has been furnished or will be performed by him.

We are disposed to accept the theory that the true consideration for the conveyance was his agreement and undertaking to properly care for and support his mother, and we find from the evidence that he has not even in part complied with his undertaking; that there has been and is a failure of consideration, and the question to be determined is, what relief shall be allowed the appellant? We think the chancellor erred not only in dismissing the petition, but that he also erred in refusing to let the amended petition be filed which was tendered by appellant, as the effect of such filing would be to make her petition as amended conform to the proof, and we think it was proper for her to ask of the chancellor the relief therein claimed under the broad prayer of the original petition.

Section 90 of the Civil Code provides that "the petition must state facts which constitute a cause of action in favor of the plaintiff, and must demand the specific relief to which the plaintiff considers himself entitled, and may contain a general prayer for any other relief to which the plaintiff may appear to be entitled. If no defense be made the plaintiff can not have judgment for any relief not specifically demanded; but if defense be made, he may have judgment for other relief under a prayer therefor."



1876 DEPPEN, &C. V. GERMAN-AMERICAN T. CO., &C.

In *Lillard v. Brannin & Brand*, 91 Ky., 512, which was an action to enjoin Lillard from transferring certain stocks in his possession to others, the lower court, under plaintiff's prayer for general relief, rendered judgment in their behalf for the value of the stock in controversy, defendant declining to transfer it to them, and this court, in discussing that action of the circuit court, said: "The plaintiffs may pray for alternate relief if they desire; still we perceive no reason, where defense is made, why the prayer for general relief would not authorize a judgment for the value of the stock, if it belongs to the plaintiffs, and the defendant has disposed of it."

So in view of the provision of the Code and the doctrine announced in the case supra, we feel authorized to say that the averments of the petition, as they will appear after the filing of the amendment upon return of the cause to the lower court, will entitle the appellant, under the prayer for general and equitable relief, to a rescission of the contract made by appellee, and a cancellation of the deed conveying the land to him.

We are of opinion, however, that appellee should be repaid the \$20 which appellant admits receiving of him as a payment on the land, and upon her failing to return this sum he should be given a lien on the land in controversy for same. But no return should be made to him of the sum he expended in erecting the small house on appellant's land, as we are of the opinion that the cost of the house will not more than equal the rental value of the land during appellee's possession and use thereof, and the cost of the house may be regarded as set-off by the rent or use of the land.

For the reasons indicated the judgment of the lower court is reversed and cause remanded, with directions to permit the amended petition to be filed and for the entering of a judgment rescinding the land contract, and cancelling the deed from appellant to appellee.

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DEPPEN, &c. v. GERMAN-AMERICAN TITLE CO., &c.

(Filed March 6, 1908—Not to be reported.)

S. J. Boldrick and J. W. S. Clements for appellants.

Shackelford Miller, Barnett & Barnett and H. H. Herr for appellee Louisville Banking Co.

Ernest Macpherson, Arthur Peter and Geo. A. Brent for appellee Immohr.

H. M. Lane for appellee Hess.

D. I. Heyman for appellee Western Bank.

Appeal from Jefferson Circuit Court, Law and Equity division.

Judge Hobson delivered the following response to petition for rehearing:

It is not necessary for a decision of this case to determine whether the stock subscription may be rescinded or not. The only real question here is how far the notes and mortgage to secure them may be enforced. The parties most interested in the question of the rescission of the stock subscription are not before the court, and we do not deem it proper to determine that question on this record, for if the subscription is rescinded, the only person really affected will be the creditors of the title company proceeding against

its stockholders under the double liability statute, and they are not before the court. So much of the opinion as intimates any opinion on this question is withdrawn, the court now not committing itself in any way thereon. In other respects the opinion heretofore delivered is adhered to, as after a reconsideration of the questions discussed and the facts shown by the record we see no reason for departing from the conclusion then announced by the court.

Rehearing refused.

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HUFFMAN v. AHL.

(Filed March 5, 1903—Not to be reported.)

Contract—Want of consideration—Gratuitous service—Appellant brought this action against appellee, alleging that W. was a bridge contractor in Breckinridge county, and desired to borrow \$800 from plaintiff and agreed to give him an order for said amount on appellee, who was county judge. The order was given and appellee agreed to withhold the amount of it for the benefit of appellant when the bridge should be completed. Another order of \$275 was also given in the same way. Appellant alleges that when the bridge was completed appellee approved the claim of W. for \$868.05, and ordered it paid to W. Appellant sought to recover of appellee the amount of these orders on account of his failure to collect them for appellant. Held—That there is no liability on appellee for failure to perform a gratuitous act for appellant. His undertaking was without any consideration whatever. The law is well settled that a person is under no legal obligation to perform a gratuitous promise.

Barnes & Kincheloe and W. H. Julian for appellant.

David R. Murray for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Nunn.

The appellant sued appellee and made these allegations in his petition: "Plaintiff says that on the — day of August, 1901, one W. E. Washer sought to borrow from this plaintiff the sum of \$800, stating that he had a contract with the bridge commissioners of Breckinridge county, Kentucky, to repair a bridge in said county, which, when completed, would yield to him a sum of money in excess of the amount sought to be borrowed, and that the sum of money sought to be borrowed was to be used in carrying out his contract with said commissioners. Plaintiff informed Washer that he would furnish him the sum if, as security, he would give this plaintiff a written order on the defendant, the then county judge of Breckinridge county, directing him to hold out from the amount due said Washer, upon the completion of his contract, the sum of \$800, and pay same to plaintiff; and further conditioned that the defendant was to accept the order and agree to hold out the said sum from any amount due Washer upon his contract, when completed, and pay same to plaintiff. Whereupon Washer executed and delivered to plaintiff the order, which is filed herewith, and made part hereof, marked 'A,' that he sent a copy of the order, signed by Washer, to defendant at Hardinsburg, Ky.; that defendant acknowledged receipt of said order and agreed and promised in writing, which is filed herewith, marked 'B,' to hold out

the sum of \$300 from the amount to be due Washer upon the completion of his contract, and pay same to plaintiff; that relying on defendant's promise to deduct said sum from the amount to be due Washer upon the acceptance of his work by the bridge commissioners, and pay same to plaintiff, he did furnish said sum to Washer."

He made another paragraph in his petition, in which he stated that he and Washer have another sum of \$275 on exactly the same terms and like conditions as stated in the paragraph above quoted. He then proceeded with his petition as follows: "That on the — day of December, 1901, the bridge commissioners of Breckinridge county filed a report with the defendant, a copy of which is filed herewith, marked 'E,' accepting said work of Washer and further setting out that there was due him the sum of \$663.05, after deducting some small amounts already paid, and recommending the payment of the sum; that the defendant endorsed on the back thereof the words 'Approved December 16, 1901. (Signed) Wm. Ahl, J. B. C. C.' And the wholly disregarding his agreements and promises to deduct from the amount due Washer the amounts due this plaintiff, and which he had agreed to do, the defendant ordered and directed the bridge commissioners to pay to Washer the amount due him, to wit, \$663.05, an amount more than sufficient to pay this plaintiff's demands; that the commissioners did pay to Washer the said sum of \$663.05; that Washer has not paid this plaintiff all or any part of his indebtedness to him, but took the said sum and has gone to parts unknown to this plaintiff. Plaintiff further says that Washer is insolvent and was known to be so to this plaintiff at the time hereinbefore set out; that he would not have loaned him these funds or any sum of money, except upon the conditions hereinbefore set out. But that relying implicitly upon the defendant's acceptance of the orders and his promise to pay same, he did furnish Washer the sums of money set out in his petition; that defendant negligently and carelessly failed to carry out his promises and agreements to pay said sums of money to plaintiff; that unless defendant be compelled to pay same this plaintiff will lose his debt; that demand has been made upon defendant that he pay said sums and he refused and still refuses; that said sums are just, due and unpaid."

The lower court sustained a demurrer to and dismissed this petition, and appellant has appealed from that judgment. The only question to be determined is whether the allegations of the petition stated a cause of action. The appellant alleges that Washer was insolvent, and he agreed to let him have \$575 to aid in his work on the bridge, provided he would give him a written order on appellee, the then county judge of Breckinridge county, to hold out for him this sum from the amount that would become due Washer on his bridge contract. We can not find any allegation in the petition that appellee knew, or had any information, that Washer was insolvent, or that appellant loaned Washer any sum of money, or what the consideration was for the orders, or that appellant would not have loaned Washer the money except upon the conditions set out in his petition, or that there were any conditions with reference thereto. The petition is defective with reference to these matters, and fatally defective in not stating any consideration for the promises of appellee to hold out the money for him.

It is a fundamental principle of law that to make a contract or promise

inding there must be some consideration to uphold it. There is not a statement in the petition indicating that appellee had received, or was to receive, anything in consideration of his holding out the money for appellant. The effect of the statements in the petition with reference to this matter is that appellee, without any consideration whatever and as a gratuity, promised to collect appellant's money, and failed. This doctrine is supported by J. J. M., 455, and 12 B. M., 253, and many other authorities to the same effect, showing that a person is under no legal obligation to perform a gratuitous promise.

Wherefore, the judgment of the lower court is affirmed.

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JACOBS' ADM'R v. CHESAPEAKE & OHIO RY. CO.

(Filed March 4, 1903.)

Railroads—Negligence—The railroad company is not responsible for the death of appellant's intestate caused by a train colliding with a tricycle on which the intestate was riding. The company owed no duty to him, and is not guilty of negligence in not discovering his presence on the track at a remote point on the road.

V. T. Cole, A. E. Cole & Son and J. B. Bennett for appellant.

V. H. Wadsworth for appellee.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Hobson.

Appellant's intestate, while riding on a tricycle on appellee's road in company with Crit Dillas, was instantly killed by a collision with one of its passenger trains running on its regular schedule time. The facts of the case are set out in the opinion filed at this term in the case of Crit Dillas' Adm'r Chesapeake & Ohio Ry. Co., ante, 1847, and for the reasons given in that opinion the judgment herein must be affirmed. If it be conceded that the intestate was in the service of appellee in its shops at Russell, and was using the tricycle with the consent of the foreman for the purpose of going from his home to his place of work, the merits of the case are not affected; for in so using the track it was incumbent on him to keep out of the way of the train, the trainmen were not required to be on the lookout for him at the remote point on the track where the collision occurred. There is nothing in the evidence to indicate that any precaution could have averted the catastrophe or his perilous position was discovered. He knew the time of the train, knew that it was due, and in running on its time through dense fog, in either he did not or could not maintain proper lookout ahead for the approaching train, he was guilty of gross negligence, which was the proximate cause of his death.

Judgment affirmed.

Judge Paynter not sitting.

the sum of \$300 from the amount to be due Washer upon the completion of his contract, and pay same to plaintiff; that relying on defendant's promise to deduct said sum from the amount to be due Washer upon the acceptance of his work by the bridge commissioners, and pay same to plaintiff, he did furnish said sum to Washer."

He made another paragraph in his petition, in which he stated that he let Washer have another sum of \$275 on exactly the same terms and like conditions as stated in the paragraph above quoted. He then proceeded with his petition as follows: "That on the — day of December, 1901, the bridge commissioners of Breckinridge county filed a report with the defendant, a copy of which is filed herewith, marked 'E,' accepting said work of Washer, and further setting out that there was due him the sum of \$663.05, after deducting some small amounts already paid, and recommending the payment of the sum; that the defendant endorsed on the back thereof the words, 'Approved December 16, 1901. (Signed) Wm. Ahl, J. B. C. C.' And that wholly disregarding his agreements and promises to deduct from the amount due Washer the amounts due this plaintiff, and which he had agreed and promised to do, the defendant ordered and directed the bridge commissioners to pay to Washer the amount due him, to wit, \$663.05, an amount more than sufficient to pay this plaintiff's demands; that the commissioners did pay to Washer the said sum of \$663.05; that Washer has not paid this plaintiff all or any part of his indebtedness to him, but took the said sum and has gone to parts unknown to this plaintiff. Plaintiff further says that Washer is insolvent and was known to be so to this plaintiff at the time hereinbefore set out; that he would not have loaned him these funds, or any sum of money, except upon the conditions hereinbefore set out. But that relying implicitly upon the defendant's acceptance of the orders and his promise to pay same, he did furnish Washer the sums of money set out in his petition; that defendant negligently and carelessly failed to carry out his promises and agreements to pay said sums of money to plaintiff, and that unless defendant be compelled to pay same this plaintiff will lose his debt; that demand has been made upon defendant that he pay said sums, and he refused and still refuses; that said sums are just, due and unpaid."

The lower court sustained a demurrer to and dismissed this petition, and appellant has appealed from that judgment. The only question to be determined is whether the allegations of the petition stated a cause of action. The appellant alleges that Washer was insolvent, and he agreed to let him have \$575 to aid in his work on the bridge, provided he would give him a written order on appellee, the then county judge of Breckinridge county, to hold out for him this sum from the amount that would become due Washer on his bridge contract. We can not find any allegation in the petition that appellee knew, or had any information, that Washer was insolvent, or that appellant loaned Washer any sum of money, or what the consideration was for the orders, or that appellant would not have loaned Washer the money except upon the conditions set out in his petition, or that there were any conditions with reference thereto. The petition is defective with reference to these matters, and fatally defective in not stating any consideration for the promises of appellee to hold out the money for him.

It is a fundamental principle of law that to make a contract or promise

binding there must be some consideration to uphold it. There is not a statement in the petition indicating that appellee had received, or was to receive, anything in consideration of his holding out the money for appellant. The effect of the statements in the petition with reference to this matter is that appellee, without any consideration whatever and as a gratuity, promised to collect appellant's money, and failed. This doctrine is supported by 6 J. J. M., 455, and 18 B. M., 253, and many other authorities to the same effect, showing that a person is under no legal obligation to perform a gratuitous promise.

Wherefore, the judgment of the lower court is affirmed.

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JACOBS' ADM'R v. CHESAPEAKE & OHIO RY. CO.

(Filed March 4, 1903.)

Railroads—Negligence—The railroad company is not responsible for the death of appellant's intestate caused by a train colliding with a tricycle on which the intestate was riding. The company owed no duty to him, and was not guilty of negligence in not discovering his presence on the track at a remote point on the road.

W. T. Cole, A. E. Cole & Son and J. B. Bennett for appellant.

W. H. Wadsworth for appellee.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Hobson.

Appellant's intestate, while riding on a tricycle on appellee's road in company with Crit Dillas, was instantly killed by a collision with one of its passenger trains running on its regular schedule time. The facts of the case are set out in the opinion filed at this term in the case of Crit Dillas' Adm'r v. Chesapeake & Ohio Ry. Co., ante, 1847, and for the reasons given in that opinion the judgment herein must be affirmed. If it be conceded that the intestate was in the service of appellee in its shops at Russell, and was using the tricycle with the consent of the foreman for the purpose of going from his home to his place of work, the merits of the case are not affected; for in so using the track it was incumbent on him to keep out of the way of the train, and the trainmen were not required to be on the lookout for him at the remote point on the track where the collision occurred. There is nothing in the evidence to indicate that any precaution could have averted the catastrophe after his perilous position was discovered. He knew the time of the train and knew that it was due, and in running on its time through dense fog, when either he did not or could not maintain proper lookout ahead for the approaching train, he was guilty of gross negligence, which was the proximate cause of his death.

Judgment affirmed.

Judge Paynter not sitting.

## COMMONWEALTH v. CHESAPEAKE &amp; OHIO RY. CO.

(Filed March 5, 1908—Not to be reported.)

Criminal law—Operating a railway under a lease without recording lease in the proper offices—This indictment was found under sections 791 and 793, Kentucky Statutes, against appellee for operating a railway in Kentucky under a lease without recording the lease in the proper offices. A demurrer was sustained to the indictment because it was held to be not a sufficient compliance with subsection 2 of section 124, Criminal Code of Practice, that the indictment must be certain as regards the offense charged. Held—That this offense is created by statute and has no distinguishing name. The indictment was sufficient as the charge is so certainly stated that the accused was fairly apprised of its nature. The descriptive part of the indictment stated the facts showing jurisdiction in the Bracken Circuit Court, under section 793.

Clifton J. Pratt, M. R. Todd and Ed. Daum for appellant.

W. H. Wadsworth for appellee.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge O'Rear.

The appellee was indicted by the grand jury of Bracken county for the offense of operating a railway in this State under a lease without recording the lease in the proper offices.

The descriptive part of the indictment is admittedly ample. In the accusatory part this language is used: "The offense of operating a railway in Kentucky under a lease without having the same recorded in the office of the secretary of state, and in the county clerk's office of Bracken county."

The indictment was found under sections 791 and 793, Kentucky Statutes, which are:

"Section 791. Every person now operating, or that may hereafter operate, a railroad in this State under a contract or lease, shall have the same recorded in the office of the secretary of state, and in the county clerk's office of every county in which said road, or any part thereof, lies, within thirty days after the contract or lease is executed; or, if heretofore made, within thirty days after this law goes into effect.

"Section 793. Any company failing to comply with or violating, or permitting any of its employes or agents to violate, any of the provisions of sections 772, 773, 774, 775, 777, 778, 780, 781, 782, 786, 787 and 791 of this article shall, in addition to subjecting itself to any damages that may be caused by such failure or violation, be guilty of a misdemeanor, and be fined for each failure or violation not less than \$100 nor more than \$500, to be recovered by indictment in the circuit court of any county through which the company in default operates a line of road, or in the Franklin Circuit Court."

A demurrer was sustained to the indictment because it was held to be not a sufficient compliance with subsection 2 of section 124 of the Criminal Code, that the indictment must be certain as regards the offense charged. This offense is created by the statute, and has no distinguishing name. While it is true that both the offense charged and its particular circumstances must be directly and certainly stated in the indictment, it is not required that the same thing must be repeated in full in both parts of the

indictment. The law does not require a vain thing. Inasmuch as the same combination of acts may constitute two or more punishable offenses, it is proper that the Commonwealth should be required to clearly announce the name of the offense, that is, the charge, upon which the accused will be arraigned. But in a case such as is at bar, if the charge is so certainly stated that the accused may be fairly apprised of its nature, it will be held sufficient.

In this case the charge may be said to be the act of operating a railroad in this State under a lease without having recorded it in the proper offices. Then the acts constituting that offense, the descriptive part of the indictment, must be directly and clearly set forth. The accusatory part of the indictment need not, and generally does not, set out jurisdictional facts. It is true that appellant was not guilty of an offense under this statute for operating a railroad under a lease in this State, although it failed to record the lease in Bracken county, unless it operated the road in Bracken county. Its offense was not for operating the road in Bracken county, nor for operating a road in Bracken county or in this State under a lease, but was for failing to record the lease. The descriptive part of the indictment stated the facts showing jurisdiction in the Bracken Circuit Court, under section 793. (Commonwealth v. C. & O. Ry. Co., 101 Ky., 329.)

We are of opinion that the indictment was sufficiently explicit, and that the court erred in sustaining the demurrer.

Judgment reversed and cause remanded for further proceedings not inconsistent herewith.

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COMMONWEALTH v. JENKINS.

(Filed March 5, 1903.)

Criminal law—Changing name of accused in indictment—Jeff Jenkins was accused of the crime of mayhem and the grand jury, by mistake, returned an indictment, giving the name of the accused as Albert Jenkins. A bench warrant was issued, and Albert Jenkins arrested under it. At the succeeding term of the court the attorney for the Commonwealth having discovered the mistake, released Albert Jenkins, and entered an order reciting that the true name of defendant is Jeff Jenkins, and not Albert Jenkins. A bench warrant was issued for Jeff Jenkins, who was arrested, and gave bond for his appearance at the next term of court. On the calling of the case the court quashed the bench warrant and discharged Jeff Jenkins from custody, on the ground that the order which substituted the name of Jeff Jenkins for that of Albert Jenkins was improper and in violation of law. On appeal, Held—That the lower court erred in its action. The change was made by express authority of section 124, Criminal Code of Practice. The change did not affect the substantial rights of the accused.

Clifton J. Pratt and M. R. Todd for appellant.

T. R. Brown for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Settle.

It appears from the record in this case that one Jeff Jenkins, of Boyd county, was accused of the crime of mayhem, and at the May term, 1902, of



the circuit court of that county the grand jury, intending doubtless to indict the Jenkins accused of the crime in question, found and returned an indictment, in which the name of the defendant and person accused was given as Albert Jenkins. Thereupon a bench warrant was issued upon the indictment for the arrest of Albert Jenkins, with bail endorsed.

There seems to have been an Albert Jenkins in the county, who was arrested under the bench warrant, and he gave bond for his appearance in court, and to answer the charge in the indictment, but at the next term of the court after his arrest the Commonwealth's attorney having made the discovery that Jeff Jenkins, not Albert, was the person guilty of the crime, caused the following order to be entered by the court: "It appearing to the satisfaction of the court that the true name of the defendant is Jeff Jenkins, not Albert, the name he was indicted in, on motion of the attorney for the Commonwealth the style of this prosecution is changed from Albert Jenkins to Jeff Jenkins. The return and bond on bench warrant as to Albert Jenkins is quashed, and ordered that a bench warrant issue for Jeff Jenkins, allowing him bail in the sum of \$500."

Thereafter Jeff Jenkins was arrested on the bench warrant ordered to issue against him, and he gave bond for his appearance, to answer the charge in the indictment.

At the term of the court following Jeff's arrest the case against him was continued upon his motion. At the next term of the court, without pleading to the indictment, he entered motion to quash the bench warrant under which he had been arrested, the return thereon, and bond given for his appearance, which motion was sustained by the court, and the defendant discharged from custody, on the ground that the order which substituted the name of Jeff Jenkins for that of Albert Jenkins was improper and in violation of law. We are unable to admit the conclusion reached by the circuit judge. It must be presumed that the grand jury intended to indict the Jenkins guilty of the crime named in the indictment, hence if Jeff Jenkins is in fact the person supposed to be guilty, it was merely a mistake to name him Albert Jenkins in the indictment, and when the attention of the Commonwealth's attorney was called to the mistake it was his duty to have it corrected, which he did by substituting the christian name Jeff on the record for that of Albert.

The change was made by express authority given by section 124, Criminal Code, which provides that "an error in the name of a defendant shall not vitiate an indictment or proceedings thereon, and if his true name is discovered at any time before execution, an entry shall be made on the minutes of the court of his true name, referring to the fact of his having been indicted by the name mentioned in the indictment." \* \* \*

The section of the Code supra was construed by this court in *Commonwealth v. Kelcher*, a woman, 3 Met., 485, in the following language: "If the erroneous statement of the whole name of the defendant would not vitiate the indictment, certainly the omission to set out the Christian name of the defendant could not, and the objection to the indictment on that account must be regarded as unavailing; \* \* \* now if the appellee was not the person intended to be indicted, or if some one else having her surname was the person who had committed the offense charged, the omission of the

christian name in the indictment would not deprive her of the privilege of showing the facts, nor could she thereby be deprived of any substantial rights upon the merits."

In *Commonwealth v. Ford*, 12 Ky. Law Rep., 507, the Superior Court held that "the failure of the indictment to state the surname, christian name, or the name in full of the defendant, will not vitiate the indictment, and it is not a ground for a demurrer."

It often occurs that the wrong man is arrested by reason of mistakes in the name, hence the section of the Code which allows the name to be changed provides a rule which the trial courts can safely follow. The indictment in this case was not vitiated in any way by the error in giving the christian name of Jeff, nor did the error in any way affect his substantial rights. Section 129, Criminal Code, provides that "no indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits."

If the christian name of Jeff Jenkins had been given in the indictment as John, it would not be contended that the substitution of Jeff for John on the record would have been improper, or that Jeff Jenkins' substantial rights would have been prejudiced thereby; then can the change on the record from Albert to Jeff be improper merely because there happens to be a person living in the county of the name of Albert Jenkins? Surely such a proposition needs no argument to demonstrate its fallacy.

The judgment of the lower court is reversed and cause remanded, with directions to set aside the judgment quashing the bench warrant and return and discharging appellee from custody, and for such further proceedings as may be consistent with the opinion herein.

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COMMONWEALTH v. CHESAPEAKE & OHIO RY. CO.

(Filed March 5, 1903.)

Railroads—Criminal law—Violation of "long and short haul statute"—Appellee was indicted for a violation of the long and short haul statute, (section 820, Kentucky Statutes.) It being alleged that defendant unlawfully charged and received from M. 24 cents per barrel on flour for transporting same from Catlettsburg, Ky., to White House, Johnson county, Kentucky, and at the same time charge, collect and receive from P. 15 cents per barrel on flour (being the same class and kind of property delivered to said M. at 24 cents per barrel for railroad haul) as railroad charges for transporting flour from Catlettsburg to Paintsville, but it does not state the words used in the statute, viz., "over the same line." Held—That those words are necessary to constitute the offense denounced by the statute.

Clifton J. Pratt and M. R. Todd for appellant.

Wadsworth & Cochran for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee was indicted by the grand jury of Johnson county for a violation of the "long and short haul statute" (section 820, Kentucky Statutes).

That offense is thus described in the indictment: "The said defendant \* \* \* did unlawfully charge and receive from James N. Meek 24 cents per barrel on flour as railroad charges for transporting flour from Catlettsburg, Boyd county, Kentucky, to White House, Johnson county, Kentucky, and at the same time charge, collect and receive from Frank Preston 15 cents per barrel on flour (being same class and kind of property delivered to said Meek at 24 cents per barrel for the railroad haul aforesaid) as railroad charges for transporting flour from Catlettsburg, Boyd county, Kentucky, to Paintsville, Johnson county, Kentucky, which last mentioned haul is a longer distance than first-mentioned haul, and in same direction, and the first-mentioned haul from Catlettsburg, Boyd county, Kentucky, to White House, Johnson county, Kentucky, is included in the said longer haul from Catlettsburg, Boyd county, Kentucky, to Paintsville, Johnson county, Kentucky. Said property was transported and delivered to said James N. Meek and said Frank Preston under substantially same or similar circumstances and conditions, and which railway company operates, and did at said time operate, a line of railway in the State of Kentucky, which line runs into Johnson county, Kentucky, as aforesaid, at said time not having been authorized by the railroad commission of this Commonwealth to charge less for a longer than for a shorter distance for the transportation of flour."

It is not averred, nor do we understand it to be a fact, that appellee then operated a line of railroad from Catlettsburg, Ky., to Paintsville, Ky., but that its southern terminus of that line then was at White House, some ten or twelve miles north of Paintsville on the Big Sandy river, a stream navigable by steamboats.

The statute under which this indictment was returned is (in part): "If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall for each offense be guilty of a misdemeanor, and fines, etc."

It is to be noticed that to constitute the offense prescribed by the statute the carrier must have carried, first, property of like kind; second, under similar circumstances and conditions; third, must have charged more for the shorter than the longer distance; fourth, the carrying must have been over the same line; fifth, in the same direction; and, sixth, the shorter must have been included within the longer distance. If any one of these conditions is lacking no offense against this statute is committed. The indictment fails to say that the two shipments were over the same line. Doubtless the reason of the failure was because it could not have been truthfully alleged. The railroad company by joint traffic arrangement with another common carrier, a steamboatman, for example, Frank Preston, might have agreed to carry flour from Catlettsburg, Ky., to Paintsville, Ky., using the railway to White House and steamboats to Paintsville, at a rate different and less than was charged by the railway alone for shipping flour from Catlettsburg to White House, and no further. Is that a violation of the statute?

Among the earliest efforts to regulate this question of "long and short haul" discriminations by legislation was the interstate commerce act of February 4, 1887. Since then many States have applied its provisions, so far as applicable, to similar transactions within the several States. Congress could have legislated only with regard to traffic and shipments between the States; it could not, and did not, attempt to regulate shipments of freight beginning and ending in the same State. To supplement, and to make this provision effective as a comprehensive scheme, most or all of the State legislatures have adopted substantially, if not literally, the provisions of the Federal act on this subject. The interstate commerce act contained this clause: "That it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance."

Whether a joint traffic rate adopted by two carriers, by which they agreed to carry a certain class of freight over their two lines for less than either charged for the same class of freight over a part of its own line, the shorter being included in the longer distance, was a violation of the section just quoted, came on to be considered for the first time, so far as we know, in the case of *Chicago & N. W. Ry. Co. v. Osborne*, 52 Fed. Rep., 912, before Mr. Justice Brewer and Judges Caldwell and Sanborne, sitting as the Circuit Court of Appeals for the 8th circuit, October 17, 1892. Mr. Justice Brewer delivered the opinion of the court (8 C. C. A. Rep., 347). In the course of the opinion the learned justice said: "Where two companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its lines. If, therefore, the two companies, by agreement, make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the unreasonableness of the local tariff of either line is determined."

And again (page 350, *Ib.*): "The use of the word 'line' is significant. Two carriers may use the same road, but each has its separate line. The defendant may lease trackage rights to any other railroad company, but the joint use of the same track does not create the 'same line,' so as to compel either company to graduate its tariff by that of the other."

Our statute on this subject, which follows the Federal act so closely as to be almost a literal copy, was enacted April 5, 1893. It must be presumed that the language of the Federal act was adopted by the legislature with knowledge of the construction put upon it by the Federal courts; and that, therefore, a similar meaning was to be ascribed to the same language under substantially the same circumstances. The common carriers in fixing their traffic rates under the law may well have relied on the fact that the same language, used in connection with this same subject, and under circumstances so nearly alike, would be construed uniformly by all courts, as it ought to be. (*Parsons v. C. & N. W. Ry. Co.*, 11 C. C. A., 489, followed

Chicago & N. W. Ry. Co. v. Osborne, supra.) Its facts grew out of the same tariff rates and arrangements discussed and decided in Osborne's case. The Parsons case was carried to the Supreme Court, and was there affirmed. (Parsons v. Chi. & N. W. Ry. Co., 167 U. S., 447.) The opinion of the court was delivered by Mr. Justice Brewer, the case of Osborne, supra, being cited and expressly approved.

In the case at bar appellee could not have delivered the goods at Paintsville, Ky., by shipping over its railroad line alone, for the reason that its railroad line did not reach to Paintsville by some ten or twelve miles. It was necessary that some other line, by some other carrier, and under some joint traffic arrangement, should be employed, else appellee could not in fact have delivered the goods as charged. This brings us right up to the question whether the words omitted from the indictment, and used in the statute, viz., "over the same line," are essential to constitute the offense denounced by the statute; and whether a traffic arrangement between two carriers owning or operating different lines so that the freight in question passes in part over each, is included in the expression "over the same line," when used to regulate one of the carrier's traffic over its own line.

We hold that the omitted words are essential to make a good indictment; and that where the freight passes over two or more lines of different carriers, it is not embraced by the terms of the statute when regarded in connection with other carriers' shipments locally over its own line alone.

The judgment of the circuit court sustaining the demurrer to the indictment and dismissing it is affirmed.

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COMMONWEALTH (No. 2) v. CHESAPEAKE & OHIO RY. CO.

(Filed March 5, 1903—Not to be reported.)

Criminal law—Discrimination in freight rates—An indictment against a railroad company for discriminating between persons in the transportation of freight is defective if it fails to state that the freight was transported "upon the same conditions."

Clifton J. Pratt and M. R. Todd for appellant.

Wadsworth & Cochran for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee was indicted for an alleged violation of section 215, Kentucky Constitution, which section reads thus: "All railway, transfer, belt lines or railway bridge companies shall receive, load, unload, transport, haul, deliver and handle freight of the same class for all persons, associations or corporations from and to the same points and upon the same conditions, in the same manner and for the same charges, and for the same method of payment."

The indictment thus describes the acts which it is charged constitute a violation of this section: "The said defendant, Chesapeake & Ohio Ry. Co., on the 1st day of October, 1898, in the county and circuit aforesaid, did unlawfully, willfully and knowingly charge, collect and receive from Hiram

Roberts 21 cents per 100 pounds for hauling eggs for him from White House, Johnson county, Kentucky, to Catlettsburg, Boyd county, Kentucky, while at same time defendant charged, collected and received from Isaac Ward 7½ cents per 100 pounds for hauling eggs for him from said White House, Ky., to said Catlettsburg, Ky.; said freight hauled by defendant for said Roberts and Ward was of same class, and hauled from and to same points by defendant as a common carrier aforesaid, against the peace and dignity of the Commonwealth of Kentucky."

The circuit court sustained a demurrer to the indictment and dismissed it. It will be observed that it is not charged, nor is it anywhere intimated in the indictment, that the service rendered to Ward and Roberts by the carrier, and for which it charged a discriminative rate, was made "upon the same conditions." The section of the Constitution recognizes the propriety, and, therefore, admits the right of the carrier to charge more for one service than for another similar service if the conditions under which the service is rendered are not the same. This question was fully considered by the court in an elaborate opinion by Chief Justice Hazelrigg, in *L. & N. R. R. Co. v. Commonwealth*, 22 Ky Law Rep., 328.

The indictment was fatally defective, and the judgment must be affirmed.

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COMMONWEALTH v. CHESAPEAKE & OHIO RY. CO.

(Filed March 5, 1903—Not to be reported.)

Criminal law—Violation of Constitution against discrimination—Indictment—The indictment charges a violation of section 215 of Constitution by charging A. a greater rate for shipment of molasses than to B. between the same points, but omits the words "upon the same conditions." Held—That this omission was fatal, as it was required under section 124, Criminal Code of Practice.

Clifton J. Pratt and M. R. Todd for appellant.

Wadsworth & Cochran for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee, a common carrier operating a railroad between Catlettsburg, Ky., and White House, Ky., and other points, was indicted by the grand jury of Johnson county for unlawful discrimination between shippers of freight of the same class from and to the same points and on same conditions. The indictment was for a violation of section 215 of the State Constitution. While the indictment charges the offense, it fails to describe the circumstances constituting the offense. The descriptive part of the indictment is as follows: "The said defendant, Chesapeake & Ohio Ry. Co., on the 1st day of October, 1898, in the county and circuit aforesaid, did unlawfully, willfully and knowingly charge, collect, receive from John R. Mollet \$1.40 per barrel of sorghum for hauling sorghum, for him from White House, Johnson county, Kentucky, to Cincinnati, O., while at the same time said defendant charged, collected and received from John Ward \$1 per barrel of sorghum for hauling sorghum for him from said White

House, Ky., to said Cincinnati, O. The said freight hauled by defendant for said Mollett and Ward, as aforesaid, was of same class, and hauled for them by defendant from and to same points and as a common carrier, as aforesaid. Against the peace, etc."

The omission of the words from this part of the indictment, viz., "upon the same conditions," is a fatal one. (See case this day decided, Commonwealth v. C. & O. Ry. Co., ante, 1882; also L. & N. R. R. Co. v. Commonwealth, 22 Ky. Law Rep., 328.) It is argued for the Commonwealth that as the words are in the accusative part of the indictment, it is unnecessary to repeat them in the descriptive part. Section 124, Criminal Code, is: "The indictment must be direct and certain as regards:

"1st. The party charged.

"2d. The offense charged.

"3d. The county in which the offense was committed.

"4th. The particular circumstances of the offense charged if they be necessary to constitute a complete offense."

The offense for which appellee was indicted in this case is known as a "statutory offense," and in the charging part of the indictment it is sufficient to follow the language of the statute near enough that the accused may certainly be put upon notice of the crime for which he is called upon to answer. When that is done, however perfectly done, it does not dispense with a good description also of the facts upon which the pleader relies as constituting the offense. The Code is equally imperative as to each of these requirements. The indictment must fully satisfy each. Touching this subject this court, in *White v. Commonwealth*, 9 Bush 180, said: "There is perhaps no principle in criminal pleading better established and supported by the common law authorities than that it is not only necessary that the nature and degree of the offense should be specified on the face of the indictment, but that the particular facts and circumstances which render the defendant guilty must also be alleged, it being a general rule that all indictments ought to charge a man with a particular offense by properly specifying the facts constituting it, to enable him to prepare for his defense, and for other important reasons." (*Ward v. Commonwealth*, 14 Bush, 233; *Brooks v. Commonwealth*, 98 Ky., 148.)

The court is of opinion that this indictment was fatally defective in omitting an averment, the existence of which in this case was essential to constitute any offense against appellee under the charge laid in the indictment.

The judgment is affirmed.

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COMMONWEALTH (Nos. 3, 4, 5) v. CHESAPEAKE & OHIO RY. CO.

(Filed March 5, 1903—Not to be reported.)

Clifton J. Pratt and M. R. Todd for appellant.

Wadsworth & Cochran for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee, a common carrier, was indicted in these three cases for a violation

of section 215 of the Constitution of this State. In the descriptive part of the indictments there is the same omission discussed in other cases this day decided, ante, 1882, from the same court against this appellee. But these three indictments contain this curious variation from the others discussed: "The accusative part of the indictment charges appellee with 'the offense of unlawfully, willfully and knowingly hauling freight of same class from and to same points for different persons for different charges, and on different conditions.' "

The judgment of the circuit court sustaining a demurrer to the indictment and dismissing it because it fails to charge a public offense is affirmed.

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REED, &c. v. SCHMIDT, &c.

(Filed March 5, 1903.)

Corporations—Partners—Appellants were holders of nine bonds for \$1,000 each in a railroad company, and P., their brother, owned twenty-six and one-half of said bonds. Protracted litigation concerning the settlement of the rights of creditors of said road followed, and the bondholders were often required to advance money to the trustee to enable him to press the litigation to a successful termination. Pending the sale of the road it was agreed by the bondholders that they would raise a fund sufficient to enable them to buy in the road for their benefit. Each bondholder was to advance \$20 on each \$1,000 bond held by him. Appellants authorized N. to subscribe for them in this enterprise and to pay in the agreed assessment, amounting to \$180. P., who was on unfriendly terms with his brothers, the appellants, was opposed to their having any part in the enterprise, and finally induced N. to erase the subscription of appellants from the enterprise. P. bought in the road for \$25,001, and appellants, before confirmation, intervened and offered to pay their share of the expenses, and demanded that they share the benefits of the purchase. Their petition was dismissed and the sale confirmed, from which they prosecute this appeal. Held—That under the authority given to N. by appellants by his subscription he became entitled to share in the enterprise, and they were illegally excluded from participating in the sale. This follows, not only from the contract between the bondholders, but also from section 771, Kentucky Statutes. The rights of the parties should not be settled upon the basis of personal feeling, but according to legal rights. Appellants are entitled to an accounting for the benefits derived from the purchase of the road and their equitable shares allotted to them, after paying the proportionate shares of the expenses.

W. W. Thum, J. D. Reed and J. C. Beckham & Son for appellant.

Willis & Willis for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge O'Rear.

The Cumberland & Ohio R. R. Co. (Northern Division) issued bonds in 1879 to the amount of \$250,000, and executed a mortgage on its railroad and franchises, etc., to Joshua F. Speed, trustee, to secure their payment and interest. After the death of Speed appellee, A. L. Schmidt, was substituted under the provisions of the mortgage as trustee for the bondholders. The Cumberland & Ohio R. R. Co. (N. D.), contemporaneously with the execu-



tion of the mortgage named, entered into a contract with the Louisville, Cincinnati & Lexington R. R. Co., by which the latter leased the properties of the former for a term of thirty years, agreeing to provide out of the rentals and otherwise a sinking fund for the payment of the mortgage debt and interest. This lease and contract were assigned by the L., C. & L. R. R. Co. to the Louisville & Nashville R. R. Co. Default was made for several years in the payment of interest coupons by the Cumberland & Ohio R. R. Co. (N. D.), and a suit was brought in the circuit court of Shelby county by certain bondholders to enforce the mortgage lien. The result was a decree for the sale of the railroad property and franchises free of all liens. This sale came to be made by the court's commissioner on the 12th day of March, 1900.

The trustee, under the provisions of the mortgage, A. L. Schmidt, had been engaged in numerous and extensive litigations for about twelve years on behalf of the bondholders against the Louisville & Nashville R. R. Co. and others. It appeared at times as if the lessor road was bankrupt, and that it could pay little or nothing on its bonded indebtedness. This was so evident that the bonds depreciated in market value till they had become practically unsaleable. During that time the trustee had called upon bondholders for funds to enable him to prosecute and defend the various suits affecting their lien. Certain ones, including Mrs. Jane M. Reed, Miss E. T. Reed and those whose names appeared upon the reorganization pool contract hereinafter named, contributed as called upon, enabling the trustee to make the contests leading up to, if not bringing about, the condition of the decretal sale on March 12, 1900. Before that time, however, both Mrs. Jane M. Reed and Miss Reed had died, and the bonds previously owned by them had been distributed to their devisees and heirs, and had been sold at executor's sales, so that on and before March 10, 1900, appellants, W. D. Reed, J. D. Reed and S. S. Reed (who were sons of Mrs. Jane M. Reed, and brothers of Miss E. T. Reed) became the owners each three of those bonds, of the denomination of \$1,000 each.

That for which the bondholders had been waging a wearisome fight for and against for many years was come to its final test. Upon its issue depended whether they would receive anything, and if anything, what amount to reimburse them for their original and subsequent investments. It was understood among those who had been conducting and backing this matter that the only tangible method of protecting their interests finally was to form a purchasing syndicate of bondholders who could and would, by co-operation and conjoint effort, either buy in the road at the sale, and by its operation and resale make themselves whole on their investments, or by their bidding force another to pay for it such a price that the bondholders would receive upon their debts against the road its full value at the time of the sale. In view of the character of the property it was not probable that any one of the bondholders could, or would, feel justified in alone buying the property, or that he could even become an acceptable bidder thereon. It is customary, and indeed it may be said that it is nearly always necessary, that some such arrangement be made and allowed, or the sales of such properties at auction would be impracticable. The parties, A. L. Schmidt and others, agreed to organize such a buying pool in this instance. P.

Booker Reed, a brother of appellants, appears to have been one of the prime movers in this enterprise. He was a bondholder to the extent of twenty-six and one-half bonds. An agreement was prepared upon the following form, and industriously circulated among the bondholders for their agreement to its terms, and for their signatures: "This writing witnesseth, that, whereas, the Cumberland & Ohio R. R. (Northern Division), with all its property, rights, etc., is about to be sold under decree of the Shelby Circuit Court, in action of Germania Safety Vault and Trust Co., assignee, etc., against said railroad company enforcing the lien under a mortgage made for the benefit of the holders of bonds of said road. Now, in order to protect our interests in the premises, we, the undersigned holders of the bonds of said road, do hereby constitute and appoint ----- as our agent, and as such do hereby authorize and empower them at any sale of said railroad, under aforesaid decree, to bid on said railroad and property, and buy it in for us at a price not exceeding ----- dollars, and each of us to be bound only for our pro rata of the price, to be ascertained by our proportion of the bonds held by the undersigned, and we will also pay a like pro rata of like costs or expenses of said agents incurred in perfecting this transaction; and as the terms of sale require a cash deposit of \$2,500 by the purchaser, each of us agree to put into the hands of said agent \$20 per bond held by us, to be applied for that purpose, or so much thereof as may be necessary."

P. Booker Reed and A. L. Schmidt were the principal actors in soliciting these subscriptions. Appellants received notice through Schmidt of the plan to form the syndicate. They at once took steps to avail themselves of the privilege, and say that they applied to Schmidt to be permitted to sign the paper, and were by him told to leave their bonds with J. W. Nichols of the Southern National Bank; that he could sign for them. Appellants accordingly left their nine bonds with Nichols, and paid to him \$180 (\$20 a share upon each bond), as required by the pooling agreement. Nichols then, on the following day, March 10, 1900, signed the agreement thus: "J. W. Nichols and F. N. Lewis, 12," meaning that Nichols and Lewis represented and subscribed twelve of the bonds of the issue to form the pool. As a matter of fact Nichols and Lewis owned but three of the bonds, the other nine being owned by appellants. It is claimed that the paper was signed in this manner at the instance of A. L. Schmidt, because P. Booker Reed had violently opposed appellants being admitted into the syndicate; that appellants authorized an adequate subscription by Nichols and paid the assessment required by the pooling contract is not denied, nor is it that Nichols intended to subscribe for them and on their behalf to the extent of nine bonds in making the subscription that he did.

On Sunday evening, March 11, 1900, P. Booker Reed learned that Nichols' subscription represented appellants' bonds. He at once became violently angry and indignant, and in a most dictatorial manner required of Nichols that appellants' subscription should be revoked or "scratched off," under threat that he would withdraw from the syndicate and form another. All of this was because of a family quarrel between P. Booker Reed and his brothers, the appellants, and entirely disconnected, it seems, from the merits of this suit. Nichols thereupon, late that Sunday evening, informed appellants that he would, on the following morning, because of their

brother's violent hostility and threats, cancel the subscription made by him. Appellants promptly and emphatically forbade his doing, or attempting to do, anything of the kind, expressly informing him that the extent of his agency for them in the matter was to subscribe for them to the proposition, and not to revoke a subscription which they had authorized. They followed this up with formal written notices to the same effect to P. Booker Reed, and other principal promoters of the purchasing syndicate, including Nichols, which were delivered late Sunday night. The sale was the following day at about 11 o'clock a. m. at Shelbyville, some twenty-five miles from Louisville. Schmidt and the Reeds, and the most numerous of the others signing the agreement, resided at Louisville when the occurrence first stated had taken place. To get to Shelbyville in time for the sale it was necessary to leave Louisville about 7 o'clock in the morning. At about 7.45 o'clock of Monday morning, March 12, 1900, Nichols, at the instance of P. Booker Reed, and in the presence of appellee Schmidt, and with the concurrence of others of appellees (but not in the presence of appellants), erased the word "twelve" from his subscription and wrote "three" in its stead, and received from P. Booker Reed his check covering the payment of \$180, above alluded to, and which was on the next day tendered to appellants, but rejected. At the sale P. Booker Reed, as agent for the syndicate of bondholders, parties to the agreement, bought in the railroad property for \$25,001. At once appellants begun steps to have themselves recognized as members of the syndicate by intervening in the foreclosure suit. The sale was approved, and the report confirmed. Appellants offered to pay into court any further assessment necessary under the pooling arrangement to finish paying for the property, and expenses incident to the purchase, etc. All of this was bitterly resisted by P. Booker Reed on behalf of the syndicate. On final hearing the circuit court dismissed appellants' intervening petition, hence this appeal.

Appellees seem to stake their case upon the proposition that one has the right to select his partners; and at any rate that a court of equity will not compel one to enter into an unwilling copartnership with others in whom he has not confidence, and with whom his personal relations are such as to make their co-operation impossible. It is not necessary to gainsay either proposition, if it could be done. But it seems to us that the situation of these parties is far beyond the point assumed by appellees. Have they not already embarked into a joint enterprise, in one sense in the nature of a partnership, by which the rights of appellants have attached, and can not now be ignored or destroyed by the others? This is true, in our opinion, whether we come to the conclusion that appellants became parties to the pooling arrangement by the act of Nichols, their agent, or whether it be rested upon an earlier right of possible equal dignity, that is, their rights as members of a class of bondholders, having equal equities against the property, and against whose interest the trustee and a majority of the bondholders of the same class had no right to discriminate.

It seems to be assumed that P. Booker Reed, as one of the moving spirits of this scheme, had the legal right to control the matter of whom should be let into it; and that if his personal dislike or hostility was sufficient cause for him, or even if without cause, he might reject any applicant for membership into the syndicate, no matter what his equities. But this is an

erroneous assumption. It undertakes to settle these property questions upon the basis of personal feeling, instead of legal rights. These bonds for years helped to bear the burden of the common fight for the benefit of all. Their owners contributed from time to time certainly with the clearly implied, if not the expressed, understanding that they were to share, or at least be offered an opportunity to share, in the result.

When the pooling agreement was signed by Nichols as agent for appellants, with the assent of Schmidt, they became members in fact. P. Booker Reed had not the right to require their names to be withdrawn, nor had Nichols the right to withdraw them.

Independent of their contract right as members of the syndicate, appellants, as holders of a part of these bonds, were beneficiaries of all reasonable efforts by their trustee to realize the very best results. Appellee Schmidt, known by all his associates to be trustee for all the bondholders under the mortgage, could not create a pool for buying in the mortgaged property at the least possible price for the exclusive benefit of a favored and chosen number of the bondholders, himself included. All should have been afforded a fair opportunity to share on equal terms. A purposeful failure to offer or denial of such privilege was a fraud upon the excluded bondholders. (Cook on Corp., section 888; Jackson v. Ludelling, 21 Wall., U. S., 616; Wetmore v. R. R., 1 McCrary, 467; Cox v. Stokes, 51 N. E., 320.)

From the enormities of the properties involved, and of the sums necessary to buy them in at decretal or foreclosure sales, the courts have favored combinations of those interested in the property as bondholders or stockholders, organized to buy in the properties, for the reason that by this means only are bidders assured, and the best interests of those having claims upon the property protected. (Turbell v. Lee, 40 Fed., 40; Carey v. Hudson, 45 Fed., 438; Cook on Corp., section 886, and authorities there cited.)

But the courts have borne in mind all the time the rights and interests of all who are so interested; and they have not allowed some to use this privilege of the law to oppress the weaker of those holding equal equities. (Jenkins v. Frink, 30 Cal., 594; Cox v. Stokes, supra.)

This has given rise to legislative cognizance of the subject. In this State, since 1896, a somewhat elaborate and careful plan for the re-organization of insolvent railroad companies, sold out under foreclosure or insolvency proceedings, has been provided by section 771, Kentucky Statutes, and its various subsections. Unless a re-organization plan is first submitted to and approved by the court decreeing the sale of the corporate properties, it is provided: "At any such sale, or at any sale which shall be hereafter made, of any railroad or bridge under any decree of sale, the purchaser or purchasers shall be required to pay the amount of the bid in cash: Provided, however, That if the property shall be purchased by or in behalf of holders of any class of securities issued by the said company, the purchaser or purchasers shall be required to pay in money or securities, immediately, such amount only as the court may deem sufficient to provide against a non-compliance with the bid; and the purchaser or purchasers shall thereafter be entitled, within such time as may be fixed by the court, to pay the amount of the bid by the payment of such money as may be necessary, and by the surrender of securities in proportion as such securities shall be en-

titled to receive the purchase money; and all holders of the same class of securities shall be entitled to have and enjoy equal rights in any such purchases with other holders of the same class."

We are of opinion that under this section, even without a previous agreement with the members of the pool, appellants, if offering within a reasonable time to bear their proportion of the expenses and assessments necessary to carry the sale into effect, were entitled to join in the purchase, and to share the profits. Having made such offer before the confirmation of the sale, and repeated it before the property was conveyed to the corporation formed by the syndicate, appellants should have been admitted. It is suggested in the record that the property has since been sold and passed into the hands of independent owners. If appellants had been admitted as members of the syndicate it would necessarily have been upon terms that they abide the judgment of the authorities of the corporation organized by the membership to own and operate the property. And if this corporation has in fact and in good faith sold the property and conveyed it, appellants are entitled to an accounting after deducting what they would have been compelled to pay into the pool, on the basis charged other members, and interest thereon from the time same should have been paid, and those necessary costs and expenses incurred in perfecting the enterprise and making the sale. The net proceeds should be then distributed upon the basis of the total number of shares of stock in the pool, including appellants'.

Judgment reversed and cause remanded for judgment and proceedings consistent with this opinion.

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BUSH, TRUSTEE v. WEBSTER, & CO.

(Filed March 5, 1905—Not to be reported.)

Trusts—New trial—Appellant in 1872 was appointed trustee for appellees and made settlements from time to time in the circuit court, which were confirmed. In 1897 appellant made a final settlement of the trust of which the beneficiary had ample notice, which lay over for exceptions, and none having been filed, the settlement was confirmed. Later in the term the beneficiary appeared and filed exceptions, which were overruled. This suit was brought after that term of court to obtain a new trial of the action in which the settlements and the final settlement had been made. The ground was an alleged fraudulent arrangement between appellant and appellee's attorney in that suit by which it was charged that appellant was suffered to have his settlement approved and confirmed by the court, and a judgment thereon entered in his behalf without the presentation of appellees' objections and exceptions to the settlement. Held—That there is a failure of proof to sustain the ground. Besides, the petition for a new trial is lacking in specific averments as to the nature of appellees' exceptions. The only ground that was specifically set forth was that appellant, the trustee, had compromised a claim against the trust estate for \$1,658 by the payment of \$1,350, and that the profit thereof belonged to the appellees. Held—That the debt paid by the trustee was not connected with the trust in any way, and the rule prohibiting the settlement for the benefit of the trustee does not apply, and no new trial should have been granted.

J. P. O'Meara for appellant.

R. L. Stith for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge O'Rear.

Prior to 1872 appellant had qualified as trustee for appellee, E. R. Webster. The trust estate seems to have been a certain estate devised by Mrs. Webster's father, consisting of real estate, bonds and other property. Directly after his qualification appellant instituted an equitable action in the Hardin Circuit Court, concerning settlements of his accounts from time to time in which he made biennial settlements. Sometimes upon exceptions and sometimes without exceptions, it seems that these settlements were approved.

In 1897 the trustee was discharged and the trust estate was adjudged to be delivered to Mrs. Webster. The trustee thereupon appeared in court in that action and made a final settlement of his account with the master commissioner. Appellee had timely notice of this settlement. The settlement was reported to the court, and ordered to lay over for exceptions, and none having been taken or filed, the report was confirmed. Later in the term Mrs. Webster and her husband, through their counsel, filed exceptions, which were overruled by the court. This suit was brought after that term of the court to obtain a new trial of the action, in which the settlements and the final settlement above named had been made.

The ground was an alleged fraudulent arrangement between appellant and the appellees' attorney in that suit, by which it was charged that appellant was suffered to have his settlement approved and confirmed by the court and a judgment thereon entered in his behalf without the presentation at the trial of appellees' objections and exceptions to the settlement. We are of opinion that there is a total failure of proof to sustain the ground. Besides, the petition for a new trial is lacking in specific averments as to the nature of appellees' exceptions, their grounds and the nature of the various items to which they were taken, so that the court might determine whether appellees had a valid defense in that action. It was essential that not only should these grounds be specifically set forth, but that they should be sufficient of themselves to have justified a different judgment from that rendered: and furthermore, they should have been sustained by sufficient and competent proof before a new trial could be granted. (Section 521, Civil Code.)

The only ground that was specifically set forth was that appellant, the trustee, had compromised a claim against the trust estate for \$1,658 by the payment of \$1,350, and that the profit in this transaction, under familiar principles of equity, should have been adjudged to the cestui que trust. The facts are that appellee owed about \$1,608 to her attorney, which was an obligation not at all payable by the trustee, nor was it a matter with which he had any legal connection. Appellee gave an order on appellant for the amount of the claim, the \$1,608, and the attorney for his own convenience, and upon a sufficient consideration, sold it to or settled it with appellant for \$1,350. We recognize the salutary principle that the trustee can not deal to his advantage with the trust estate, and that the profits made by him therein must go to the cestui que trust, but as the trustee was not dealing with the trust estate in this transaction, it does not come within the principle in-

voked. We are of opinion that the circuit court erred in adjudging the new trial; that there were no grounds shown therefor.

The judgment is reversed and cause remanded, with directions to dismiss the petition.

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PAYTON v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed March 5, 1903.)

Railroads—Cattle guards—Construction of statutes—Appellant brought this action to require appellee to restore cattle guards removed by them which they had maintained for thirty-five or forty years on both sides of his farm crossing, and also at the property line between his farm and the one adjacent on the ground that by long, continued use of the passway he had acquired an easement in the wing fences and cattle guards which enclosed it. Held—That the common law imposed no duty upon railroad companies to fence their roads, maintain cattle guards or erect any other barrier or stay against the intrusion of stock upon their roads or right of way. Such duty could arise only from contract or a statute. No claim is made under a contract, and appellant in his petition has not brought himself within the provisions of section 1793, Kentucky Statutes, which is the only statute requiring railroad companies to maintain cattle guards at private passways. That statute requires that where a private passway crosses a railroad the land owner for whose benefit it is kept open shall bear one-half the expense of cattle guards and gates. The former to erect the gates, the corporation or person operating the railroad to erect the cattle guards. There is no averment that the passway is obstructed or that plaintiff has ever offered to pay one-half the expense of erecting or maintaining them, and no obligation rests upon the land owner to fence the way in which another has an easement. Plaintiff could not acquire any prescriptive right to the cattle guards and wing fences maintained by the company for any length of time.

W. A. Barry, J. D. Irwin and R. L. Stith for appellant.

W. H. Marriott and E. W. Hines for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, George W. Payton, brought this suit to compel the appellee, the Louisville & Nashville R. R. Co., to restore cattle guards removed by them, which they had maintained for thirty-five or forty years on both sides of his farm crossing, and also at the property line between his farm and the one adjacent, on the ground that by long-continued use of the passway he had acquired an easement in the wing fences and cattle guards which enclosed it; and that their removal had rendered his crossing less convenient in driving stock across the railroad from one part of his farm to another, as there was nothing to prevent them from running up and down the right of way. A general demurrer was sustained to the petition, and, failing to plead further, his petition was dismissed, and he appeals.

The common law imposed no duty upon railroad companies to fence their roads, maintain cattle guards or erect any other barrier or stay against the intrusion of stock upon their roads or right of way. (Elliot on Railroads, section 1198; 7 Am. & Eng. Ency. of Law, 906 and 912; Rorer on Railroads,

616; Birmingham, &c., R. R. Co. v. Parsons, 27 L. R. A., 264.) And wherever these duties exist they are always by virtue either of the contract or a statute. There is no claim that the defendant owed plaintiff any duty to maintain these cattle guards by virtue of any contract, and section 1793 of the Kentucky Statutes is the only statute bearing upon the question. It provides: "All corporations and persons owning or controlling and operating railroads, as aforesaid, shall erect and maintain cattle guards at all terminal points of fences constructed along their lines, except at points where such lines are required to be fenced on both sides and at public crossings. But where there is a private passway crossing said railroad the land owner for whose benefit it is kept open shall bear one-half of the expense of cattle guards and gates. The former to erect gates, the corporation or person operating the railroad to erect the cattle guards."

In *McKee v. Cincinnati, New Orleans & Texas Pacific R. R. Co.'s Receiver*, 19 Ky. Law Rep., 1270, it was the contention of the landholder that it was the duty of the railroad company operating its line through his farm to construct and maintain cattle guards at the point where the railroad company entered his farm and where it left it. And in that case, as in this, the company had actually constructed such guards when it built its railroad in 1876, and had torn them down in 1894, and in consequence thereof his farm had been trespassed upon and his crops destroyed. In response to this contention the court said: "The railroad company, not being under any legal obligation to maintain cattle guards at the points of entering and leaving the plaintiff's farm, merely because they were dividing lines with his neighbor, might remove them at any time. These guards were not division or partition fences between his lands and those of the company; they were wholly on the lands of the company, and the rights of the parties were not regulated by the provisions of the law as to division fences on farm lands."

There is no averment that the passway is obstructed, or that plaintiff had ever offered to pay one-half the expense of erecting and maintaining them, and consequently does not bring himself within the purview of the statute, and "no obligation rests upon the land owner to fence the way in which another has an easement." (Jones on Easements, section 409.) The cattle guards and wing fences were erected and maintained by the railroad company entirely on their own land, form no part of the division fences between their right of way and the land of plaintiff, and no length of time would have vested him with a prescriptive right to require their maintenance by the railroad company alone.

\*For reasons indicated the judgment is affirmed.

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SWINCHER v. COMMONWEALTH.

(Filed March 5, 1903—Not to be reported.)

Criminal law—Carrying concealed deadly weapons—Constitutional law—Under section 1809, Kentucky Statutes, the good intent or the bad intent of the party carrying the weapon is immaterial. His guilt does not depend on this appellant having been convicted for carrying a pistol concealed. He prosecutes this appeal, claiming that at the time of the offense charged he was a member of the Louisville Merchants' Private Police and Detective Agency,



incorporated under an act of 1884. Held—That said act is unconstitutional and appellant's appointment under it affords him no protection. Under this act there is but one disqualification of a member and that is, he shall not be a person who has been convicted of a felony and not pardoned. He is not required to be a resident of the city, county or State, nor is he required to be twenty-one years of age or a citizen of the United States, but may be an alien, owing no allegiance to either the United States or the Commonwealth of Kentucky. Moral character is not a requisite. There is no limit on the time a member of this organization shall discharge the powers attempted to be given him. For all the act provides to the contrary, he may hold his position for life. There is no limitation even that he shall hold his position during good behavior. Section 23 of the Constitution prohibits the legislature from creating any office the appointment of which shall be for a longer time than a term of years. It violates section 3 of the Constitution, in that it grants separate exclusive public emoluments or privileges to the corporation which renders no public service, and was incorporated for private gain.

Field & Forebt and Kohn, Baird & Spindle for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge Nunn.

The appellant was tried in the Jefferson Circuit Court, Criminal division, on November 29, 1902, and was convicted and fined \$50 and sentenced to jail for the term of ten days for the offense of carrying concealed, on his person, a deadly weapon. Appellant admitted that he carried, concealed on his person, the pistol, but claims that he was erroneously convicted for two reasons:

1st. He claims that he ought not to have been found guilty, because at the time he carried the pistol and was arrested he was engaged in his duties as a private policeman, acting under appointment of the county judge of Jefferson county, Kentucky, and was a member of the Louisville Merchants' Private Police and Detective Agency, incorporated under the act of the general assembly, approved March 8, 1884.

2d. That if the court should decide that the act of the general assembly referred to is unconstitutional, that he in good faith believed it to be constitutional, and that he was justified by reason thereof in carrying the pistol; that he did not have any intention to violate the law, but, on the contrary, believed that he was performing his legal duty, and for these reasons he ought to have been acquitted.

For answer to the second proposition it is sufficient to say that section 1809 of the Kentucky Statutes does not say whoever shall intentionally or willfully, and with intention to violate the law, carry concealed a deadly weapon, shall be punished, but says that whoever carries concealed a deadly weapon shall be punished as therein stated. Under that section the good intent or the bad intent of the party carrying the weapon is immaterial except to be presented to the jury or the court to mitigate or increase the punishment.

By section 1313, Kentucky Statutes, policemen of cities, when in discharge of their official duties, may carry concealed deadly weapons, and if the act of the general assembly of 1884 is constitutional, appellant ought to have been acquitted; otherwise, the judgment of the lower court should be affirmed.

This court is of the opinion that said act is unconstitutional for these reasons: Under the charter of this corporation the members thereof shall give a bond before the county clerk, to be approved by the judge of the county court, and take an oath to faithfully perform the duties of their office. A certificate of this qualification, it is provided, shall be sufficient evidence of the authority of the members of this association to make arrests and imprison persons, not only in the city of Louisville, but in any part of the State, and to register the prisoners with the jailer or prison house keeper, and to report the fact within a reasonable time thereafter, and the names of the persons arrested, charge against them and the name of the arresting officer, and a warrant is not required. The only qualification by this act required of a member to authorize him to exercise these unusual powers is that he shall be able to read and write the English language intelligently. There is but one disqualification, and that is, he shall not be a person who has been convicted of a felony and not pardoned. He may have been convicted of a felony, but if pardoned he may be a member of this association. He is not required to be a resident of the city, county or State, nor is he required to be twenty-one years of age, or a citizen of the United States, but may be an alien, owing no allegiance to either the United States or the Commonwealth of Kentucky. Moral character is not a requisite. There is no limit on the time a member of this organization shall discharge the powers attempted to be given him. For all the act provides to the contrary, he may hold his position for life. There is no limitation even that he shall hold his position during good behavior. In our opinion the legislature could not constitutionally grant such extraordinary powers to private citizens as is here attempted.

Section 23 of the present Constitution is substantially the same as that contained in the Bill of Rights of the former Constitution, and prohibits the legislature from creating any office, the appointment of which shall be for a longer time than a term of years.

Section 3 of the Constitution provides that no grant of exclusive separate public emoluments or privileges shall be made to any man or set of men except in consideration of public services. Under the charter referred to the members thereof render no public service, and they were incorporated exclusively for private gain, and they are certainly granted by said charter extraordinary exclusive privileges.

Under section 234 of the Constitution it is provided that all civil officers of the State at large shall reside within the State, and all district, county, city or town officers shall reside within their respective districts, counties, cities or towns, and shall keep their offices at such places therein as may be required by law.

For these reasons the judgment of the lower court is affirmed.

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UNITED LAUNDRY CO. v. STEELE.

(Filed March 6, 1903—Not to be reported.)

Master and servant—Negligence—Unsafe machinery—Appellee was engaged in operating a mangle machine, which is a large pair of rollers heated by steam through which the clothes are passed and ironed. Appellee, with

another girl, were feeding clothes into this machine, when her hand was drawn into machine and crushed and burned, for which she instituted this action and recovered damages, from which this appeal is prosecuted. A guard roller was put on in front of the main roller, and the girls, including appellee, were instructed that the guard roller was for their protection, and that if they got their hands under it it would rise up and stop, and in this way would keep their hands from getting to the large rollers. This was true when operating on the right side of the machine, but while appellee was operating on the left side the guard roller did not, on account of some defect, stop, but continued to roll, causing her hand to be caught in the large rollers. Appellee did not know of this defect in the machine. Held—That appellant was properly held liable for such defective machinery. The jury were properly told that it was the duty of appellant to use such machinery and appliances as were safe, and that appellant was liable if the defect was known to appellant, or could have been known by the exercise of reasonable care, and appellee did not know of the defect.

Fred Forcht, Jr., and W. H. Field for appellant.

Matt O'Doherty for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hobson.

On March 23, 1900, appellee, Julia Steele, who is about twenty-four years of age, while operating in appellant's laundry what is known as a mangle machine had her hand caught and drawn between the rollers, severely crushing and burning it, in consequence of which her hand was painfully injured; she suffered much pain and the hand is to some extent permanently disabled. The mangle machine consists of large rollers heated by steam, through which the clothes are passed and ironed. It is about nine feet wide and is fed by two girls, who put the clothes in, there being two other girls to receive them as they come out. Appellee and another girl were feeding the machine. As originally constructed there was a piece of iron fixed on the platform across which the clothes pass when fed into the machine, which served as a guard to keep the girls from getting their fingers in between the rollers, or getting them burned. In January, 1900, this metal guard was taken off, and what is called a guard roller was put on. The girls were instructed that the guard roller was for their protection, and that if they got their hands under it it would rise up and stop, and in this way would keep their hands from getting to the large rollers, the guard rollers being placed on the platform and just in front of the other rollers. Appellee worked on the right side of the machine, and while working there got her hand under the guard roller; it was raised up and stopped, as she was told it would do, and she got her hand out without trouble. But on the day in question she was working on the left side of the machine, which, as said, was nine feet wide. A piece of cloth that she was ironing would not enter the machine. She pushed it up the second time, and it failed to enter. She then caught it near the end and pressing her hand up near the roller started it under the guard roller, and her hand was drawn under with the cloth. The roller was raised up as before, but did not stop; instead it continued to revolve and drew her hand under it against the large roller, whereby she received the injury complained of. The cause of this was that the roller at-

One end fitted in a socket and at the other end in a cogwheel and when raised up on the right-hand side it stopped revolving, but when raised on the left it continued to revolve. Appellee was ignorant of this difference, and supposed it was as safe on one side as the other. She had not been informed that there was any difference, and this seems to have been her first experience to the effect that there was a difference. The instructions she had received were simply that the roller would rise up and stop if they got one of their hands under it, and she appears to have relied on this. It is insisted that the court should have peremptorily instructed the jury to find for the defendant, and the cases of *O'Hare v. Keeler*, 48 N. Y. S., 376; *Day v. Akron*, 50 Atl., 654; *Jones v. Roberts*, 57 Ill. Ap., 56; *Walsh v. Commercial Steam Laundry*, 31 N. Y. S., 833, and *Pratt v. Prouty*, 158 Mass., 333, are relied on. But this case differs from any of those cited. Here the metal guard which was fixed on the platform, as the machine was originally constructed, was taken off after appellee entered the service and the guard roller was substituted for it upon the assurance to her that if her fingers got under the guard roller it would be raised up and would stop.

This was true on the right side of the machine, and made the guard roller an ample protection on that side; but it was not true on the left side of the machine, and she was not informed of the difference; on the contrary, she was misled by the assurance given, as from what was told her she had a right to expect it to act alike on both sides. Instead of this, on the left side the roller, when raised up, would continue to revolve and draw the hand under. We see nothing in the evidence to charge appellee as a matter of law with notice of this difference in the action of the roller on the two sides of the machine, and under the evidence this was a question properly submitted to the jury.

It was charged in the petition that appellee's injuries were received "by reason and because of the dangerous, defective and insecure condition of the said machine and of the appliances connected therewith." The court instructed the jury that if "there was a defect in the construction or arrangement of the machine, and by reason thereof there was danger attendant upon the operation of the machine, which was known, or by the exercise of ordinary care could have been known, to the defendant or its officers or agents, or any of them superior in authority to the plaintiff, and said defect and danger were unknown to the plaintiff, or by the exercise of ordinary care could not have been known to her, and she had not equal means of knowledge of said defect and danger with the defendant or its officer or agent, or any of them superior in authority to her, and by reason of such defect and danger plaintiff was injured," she could recover, unless guilty of contributory negligence. It is complained that this instruction was not warranted by the allegation of the petition, and that under the pleadings the court should not have submitted to the jury whether there was a defect in the construction or arrangement of the machine.

The charge in the petition was substantially that the machine was in a dangerous, defective and insecure condition. Whether this defect was in the construction or arrangement of the machine, or otherwise, was not shown in the petition. The instruction of the court simply narrowed the general charge of the petition, submitting to the jury the alleged defect in the ma-

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chine which the evidence for the plaintiff tended to establish. It was aptly averred in the petition that the defective condition of the machine was well known to the defendant and unknown to the plaintiff, and that prior to her injury she had been assured by it that the machine and appliances were in perfect order and condition, and that she relied upon this assurance. The case appears to have been tried on the merits. The defendant seems to have understood precisely what was claimed by the plaintiff, and was in no manner misled. Both sides got their case fairly before the jury on the merits. The verdict of the jury is not excessive or against the weight of the evidence. Judgment affirmed.

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PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY v. JOHNSON.

(Filed March 6, 1903.)

Malicious prosecution—Criminal libel—Evidence—Instructions—Appellee was for some time an agent for appellant. He left its service and entered the service of another life insurance company, and after this published a card in the county paper, stating that he was misled just as hundreds of policy holders of that company had been, that is, by false representation of general agents and managers of the company; also the statement that none of the policies sold by appellant are of any value as collateral or in cash; such contracts have no reserve behind them, and on that account, are worthless, unless the insured dies while they are in force; also that the work of appellant's agents during the last five years in Western Kentucky has been characterized by twisting policies of other companies and selling their own policies under misrepresentations; also by rebating and other unfair and rotten methods. Appellant, under advice of counsel, instituted a prosecution for criminal libel. The indictment set out the matter as above stated. The defendant entered a demurrer to the indictment, and on the hearing the Commonwealth's attorney elected to prosecute for the first paragraph of the libelous matter. The case was tried on this charge and appellee was acquitted. Appellee afterwards instituted this action for malicious prosecution and recovered \$1,250 damages, from which this appeal is prosecuted. No special damage is shown, except the cost of defending the prosecution. The court erred in refusing to allow defendant to show that the second and third paragraphs of the libelous matter charged in the indictment, and known by him to be false when he published it, but confined the proof entirely to the first paragraph. Appellant had charged appellee with criminal libel in publishing the matter embraced in all three paragraphs. It was all set out in the indictment which was procured by appellant, and is the basis of the action. If appellant had probable cause for the prosecution the action can not be maintained, and if either one of the paragraphs was false and was intentionally published by the defendant without justifiable cause, this was sufficient to sustain the indictment. Appellant is not bound by the act of the Commonwealth's attorney in electing to prosecute on the first paragraph alone. Libelous matter that was laid before the grand jury, which was not included in the indictment because constituting a separate offense and properly the subject-matter for another indictment, can not be introduced on this trial to justify the action of appellant in obtaining this indictment. Proof was introduced on the trial tending to show that appellant's agent or agents who procured the indictment deceived persons into taking policies by assuring them absolutely there would be a level rate of premium. Objection is made that this evidence was incompetent.

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because it impeached the writings which showed the rates in express terms. Held—That such evidence was competent as the rule forbidding evidence contrary to the terms of the written instrument only applies between the parties to it. The court should have given to the jury instructions defining probable cause and the offense of criminal libel.

Humphrey, Burnett & Humphrey and R. B. Flatt for appellant.

Robertson & Thomas and Greer & Reed for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Hobson.

Appellee Johnson was for some time an agent of the appellant, the Provident Savings Life Assurance Society. He left its service and entered the service of the Union Central Life Insurance Co., and after this published in the county paper the following: "A few months of work for the Provident Savings convinced me that I was misled, just as hundreds of policy holders of that company have been, that is, by false representation of general agents and managers of the company. An honest man when he finds his error tries to atone for it. I am doing that now by selling my friends insurance in the Union Central Life Insurance Co., that is acknowledged by all insurance men to be absolutely reliable."

Also the following: "None of the policies sold by the Provident Savings agents as straight life, whether old or not, are of any value, as collateral or in cash; such contracts have no reserve behind them, and on that account are worthless, unless the insured dies while they are in force."

Also the following: "Also I further state that the work of that company's agents during the last five years in Western Kentucky has been characterized by twisting policies of other companies and selling their own policies under misrepresentations; also by rebating, and other unfair and rotten methods."

Appellant, after laying the facts before counsel and being advised that a prosecution for criminal libel might be maintained, went by its agents before the grand jury and had appellee indicted for libel. The indictment set out the matter above quoted. The defendant entered a demurrer to the indictment, and on the hearing of this demurrer the Commonwealth's attorney elected to prosecute for the first paragraph of the libelous matter quoted. The case was then tried on this charge; the defendant was acquitted; he afterwards filed this suit to recover of appellant damages on account of the prosecution, charging that it was malicious and without probable cause. The jury returned a verdict in his favor for \$1,250.

The proof shows that appellee, after he was indicted, had his father to go on his bond when arrested on the indictment, and was in custody but a short time, while going with the sheriff to his father's for the purpose of signing the bond. No special damage is shown, except the cost of defending the prosecution. The defendant offered to show on the trial that the second and third paragraphs of the libelous matter charged in the indictment was false, and known by the defendant to be false, when published by him. The court refused to allow this proof, confining the evidence entirely to the first paragraph. This was error. Appellant had charged appellee with criminal libel in publishing the matter embraced in all three para-

graphs. It was all set out in the indictment, which was procured by appellant and is the basis of this action. If appellant had probable cause for the prosecution, the action before us can not be maintained; and if either one of the paragraphs was false, and was intentionally published by the defendant without justifiable cause, this was sufficient to sustain the indictment. Appellant is not bound by the act of the Commonwealth's attorney in electing to prosecute on the first paragraph alone. Its action was based on all three paragraphs, and if, on the whole case, it had probable cause for its action, it is not liable in this suit. The gist of the action consists in the malicious abuse of the process of the court. The thing complained of is the obtaining of the indictment, and if there was probable cause for it, by reason of any of the matter set out therein, there was no abuse of the court's process. Appellant obtained the indictment, and for this it is sued. Libelous matter that was laid before the grand jury which was not included in the indictment, because constituting a separate offense and properly the subject-matter for another indictment, can not be introduced on this trial to justify the action of appellant in obtaining this indictment, for proof of such matter would simply show that appellant had probable cause to believe appellee guilty of another charge other than that on which he was indicted.

The policies issued by appellant are for one year, and may be renewed annually at a schedule of rates endorsed thereon, less the dividend awarded on the policies. The printed rates increase as the age of the insured advances, but it was stated that the dividend would probably offset this increase and give a level rate of premium, or practically so. Proof was introduced on the trial tending to show that appellant's agent or agents who procured the indictment deceived persons into taking policies by assuring them absolutely there would be a level rate of premium. It was objected to this evidence that it impeached the writings themselves which plainly showed in express terms that the rate of premiums increased year by year, and that necessarily the amount of dividends to be earned in the future was only matter of judgment or opinion. But the rule forbidding evidence contrary to the terms of a written instrument only applies between the parties to it. (1 Greenleaf on Evidence, section 279.) Appellee had in effect charged appellant with practicing a fraud on its policy holders, and justified the publication. If it was true, he was not for this guilty of libel, and this question of fact was for the jury on the written contracts and all the other evidence introduced on the trial. Some of the policy holders said they did not see the policies, but relied on the assurances of the agent as to the character of policy that was to be issued. The writing is potent evidence for appellant, but in a case like this it is not conclusive. As to appellee himself, however, the policy issued to him is conclusive in the absence of proof of fraud or mistake.

The court also erred in failing to define to the jury probable cause. The rule is that what facts constitute probable cause is a question of law for the court, and whether the facts exist or not is to be determined by the jury. The court did not define to the jury the offense of criminal libel or inform them what facts made out a case of probable cause for the prosecution. A criminal libel is committed by any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act which when done

is indictable. (2 Bishop on Criminal Law, 907.) If the publication in question was false the defendant was properly indicted. (2 Bishop on Criminal Law, sections 922, 938.) In defining probable cause the court should in an instruction have set out the matter charged as libelous in the indictment, and should have told the jury that it was libelous if untrue, and that the defendant had probable cause for the prosecution, and they should find for it in this action if its agent or agents who procured the indictment believed, and had such grounds as would induce a man of ordinary prudence to believe, that the matter so published, or any substantial part of it, was materially false.

Judgment reversed and cause remanded for a new trial.

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LOUISVILLE & NASHVILLE R. R. CO. v. HOWERTON.

(Filed March 6, 1903—Not to be reported.)

Railroads—Negligence—Horse frightened by hand car—Appellant brought this action to recover damages for injuries received by reason of her horse, which she was driving, becoming frightened at a hand car approaching a crossing of the railroad with the turnpike, and running off and causing the injuries sued for. Held—That the jury should have been instructed peremptorily to find for defendant, as there is nothing to show that the hand car was being operated in any other than the usual way, and without any negligence on the part of appellant's employees. Hand cars are necessary in the conduct of the business of railroads. It is impossible to run them in a noiseless manner. The fact that they are run, and that a horse became frightened by reason of their approach or the noise which they make, which results in injury to the driver, does not give a cause of action.

Willis & Willis and E. W. Hines for appellant.

R. F. Peak and P. J. Beard for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Paynter.

About four miles south of Shelbyville the appellant's track crosses, at right angles, the public road, forming what is known as the "Keene crossing." To the right of the crossing, in going from Shelbyville, there is a deep cut. The appellee and her daughter were driving a horse, proven to be gentle, from Shelbyville to their home, over the highway in question. As they approached the crossing, and as the horse's fore feet were over the first rail, it became frightened, swerved to the left and ran off, which resulted in the appellee being painfully injured.

It is claimed that the horse became frightened because the servants and employes of the appellant operated the hand car with gross negligence and carelessness. The plaintiff did not see the hand car, but as the horse lunged her daughter discovered the hand car, which was about fifty or sixty feet away, approaching the crossing through the cut. There was not the slightest evidence introduced which tended to prove that the hand car was operated in an unusual way, or that it was making any unusual noise or sounds. The mere fact that the horse became frightened at the hand car, ran off and injured the appellee, does not entitle her to maintain this action.



She could only maintain it upon the ground that defendant's servants or employees were guilty of negligence, resulting in the injury.

Hand cars are necessary in the conduct of the business of railroads; they must be used for the purpose of carrying tools and the section forces from point to point in repairing and looking after the track. It is impossible to run them in a noiseless manner. The fact that they are run, and that a horse became frightened by reason of their approach, or the noise which they make, which results in injury to the driver, does not give a cause of action. When trains are run in the ordinary way, and whistles and bells are sounded as the necessities of the business require, and a horse becomes frightened by reason thereof and damages result therefrom, no action can be maintained therefor. (*Ohio Valley R. R. Co. Rec'r v. Young*, 19 Ky. Law Rep., 158.)

Elliott on Railroads, volume 3, section 1264, says: "A railroad company is not liable for injuries resulting from horses becoming frightened upon a highway at the mere sight of its trains or noises incident to the running or operation of a railroad."

It was held in *McCarrin v. Alabama & Vicksburg R. R. Co.*, 73 Miss., 1013., that because a horse became frightened by the noise of a hand car running over street crossings and the person driving the horse was injured, the railroad company was not liable. The court said: "The defendant had the right to operate its car in the usual and customary way, and at a safe rate of speed, but had no right to convert it needlessly into a terror-inspiring thing, and for such departure from propriety would undoubtedly be liable in damages for any injury caused by this negligence to one free from fault; but rapidity of movement, noises and sudden appearances are common incidents of the operation of railroads, and one complaining of hurt from these causes must show clearly a departure by the defendant from custom and propriety to warrant recovery."

Railroads operating trains and hand cars have the right to make all reasonable and usual noises incident thereto, whether occasioned by escaping steam, gripping of cars, etc. Persons whose duties call them near railroads must know that such right exists. There is no law in this State requiring hand cars to give signals as they approach crossings, and we can not say, as a matter of law, that a failure to do so is negligence. For the reason that the plaintiff failed to show any negligence whatever which produced the injury of which she complains, we are of the opinion that the court should have given the jury a peremptory instruction to find for the defendant.

Judgment is reversed for proceedings consistent with this opinion.

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FRED v. TRAYLOR.

(Filed March 10, 1903.)

1. Slander—Injury to person in his trade or business—Instructions—Appellant and appellee were both millers, and appellant filed this suit for slander, alleging that appellee spoke of and concerning appellant as follows: "D., what do you want for your wheat?" D. answered: "I won't price it until I see Fred, as I have given him the refusal of it." Appellee replied: "Well you won't want to price it to Fred but once; if he beats you out of as much as he beat me out of. He just beat me out of \$1,100 in three months."

At the conclusion of the evidence for plaintiff the court instructed the jury peremptorily to find for defendant, from which this appeal is prosecuted. The only question involved on this appeal is whether the words spoken are actionable per se. Held—That the words spoken are actionable per se. They were an imputation of present want of integrity on the part of appellant in his business as a miller. A miller buying grain and selling his products can not exist without the confidence of his customers. He must have credit or his mill will be deserted of trade. The words charged were spoken of the plaintiff as a miller, in relation to the business he was then carrying on, as a warning to a customer not to trade with him. They necessarily touched him as a miller, and were actionable as an imputation upon his credit and honesty.

2. Pleading—Joinder of actions—Two separate slanders may be sued for in the same petition against the same party in separate paragraphs under section 83, Civil Code, and no motion to elect should be sustained.

J. B. Paxton and Robt. Harding for appellant.

W. G. Welch for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Hobson.

Appellant and appellee are both millers in Lincoln county. Appellant filed this suit against appellee to recover damages for slander, charging that the latter had said of him as a miller to one of his customers, falsely and maliciously, and for the purpose of injuring him in his business as such, the following: "'Dudderar, what do you want for your wheat?' Dudderar answered: 'I won't price it until I see Fred (appellant), as I have given him the refusal of it.' Appellee replied: 'Well, you won't want to price it to Fred but once; if he beats you out of as much as he beat me out of. He just beat me out of \$1,100 in three months.'"

Appellee, in one paragraph of the answer, denied that the words were spoken of the plaintiff as miller, and in the other paragraph he alleged the truth of the words. On the trial, at the conclusion of the evidence for the plaintiff, the court instructed the jury peremptorily to find for the defendant. This instruction was given on the ground that, although it appeared from the evidence that appellant had been for many years a miller, in the year 1900, for three months, he kept an exchange in the town of Stanford, in the employ of appellee, at which he exchanged flour and meal for wheat and corn, and sold the products of the mill for cash, and the \$1,100 transaction referred to occurred while he was so engaged. After this, however, he rented a mill and was engaged in business as a miller, when the words complained of were spoken. The petition did not sufficiently allege special damages, and so the only question in the case is, were the words actionable per se?

It is urged in support of the judgment that the vital fact that the words were spoken of the plaintiff as a miller is denied, and that his own testimony showing he was simply running the exchange for appellee at the time the transaction referred to took place, the instruction was proper. The following authorities are relied on: "It is not enough for the plaintiff to prove his special character and that the words referred to himself; he must further prove that the words refer to himself in that special character, if they be

not otherwise actionable. It is a question for the jury whether the words were spoken of the plaintiff in the way of his office, profession or trade. It is by no means necessary that the defendant should expressly name the plaintiff's office or trade at the time he spoke, if his words must necessarily affect the plaintiff's credit and reputation therein. But often words may be spoken of a professional man, which, though defamatory, in no way affect him in his profession, e. g., an imputation that an attorney had been whipped off the course at Doncaster, or that a physician had committed adultery." (Odgers on Libel and Slander, star page 541; Townsend on Slander, section 190; 18 Am. & Eng. Ency. of Law, 944.)

On the other hand, in the same works, the law as to imputations upon traders or merchants is thus stated: "The law has special regard for the reputation of men which they have acquired as merchants or traders, and, as will be seen more particularly hereinafter, in considering the precise nature of actionable words, whether oral or written, which impute to merchants, traders or other business men insolvency, financial difficulty, embarrassment, dishonesty, or fraud, or which in any other manner are prejudicial to them in the way of their employment or trade, are actionable per se." (18 Am. & Eng. Ency. of Law, page 954.)

"In those trades or professions in which ordinarily credit is essential to their successful prosecution, there language is actionable per se which imputes to any one in any such trade or profession a want of credit or responsibility or insolvency, past, present or future; as to say of a tradesman, he is not able to pay his debts; or he owes more than he is worth; he will break shortly. He is a pitiful fellow and a rogue; he compounded his debts at 6s. in the pound." (Townsend on Slander and Libel, section 191.)

In support of the texts a great number of cases are collected. There seems to be no conflict of authority on the subject. The reason for the rule is that where a man is engaged in trade his credit is the life of his business, and to destroy his credit is to ruin him. Taken as a whole, the words used by appellee, above quoted, were an imputation of present want of integrity on the part of appellant in his business as a miller. The words were spoken to a customer who had promised his wheat to appellant. They were evidently spoken to create in his mind the belief that he might suffer by keeping his promise, and to induce him to break it. They were spoken by a rival in business. If Dudderar credited what appellee said, he would necessarily believe appellant was a miller not to be trusted. The words, "well, you won't want to price it to him but once," imported a present condition rendering credit to him as a miller unsafe for one who extended it. It is true the condition was added: "If he beats you out of as much as he beat me out of;" but this only accentuated the imputation, for the following explanation was added: "He just beat me out of \$1,100 in three months." The fair meaning of the whole, taken together, was an imputation that Dudderar would not sell his wheat to Fred but once, as he would then find out that he could not afford to. A miller buying grain and selling his products can not exist without the confidence of his customers. He must have credit, or his mill will be deserted of trade. The words charged were spoken of the plaintiff as a miller in relation to the business he was then carrying on as a warning to a customer not to trade with him. They necessarily touched

him as miller, and were actionable under the rule above quoted as an imputation upon his credit and honesty. (Lawson on Rights and Remedies, section 1257; Price v. Conway, 8 L. R. A., 194, and notes; Hays v. Press Co., 5 L. R. A., 543, note.)

Two separate slanders may be sued for in the same petition against the same party in separate paragraphs. (Hargin v. Purdy, 93 Ky., 424.)

The plaintiff should not be required to elect which paragraph of his petition he will prosecute, but may sue in the one action, under section 83 of the Code, and recover for the different statements made to the two different parties at different times.

Judgment reversed and cause remanded for a new trial and further proceedings not inconsistent herewith.

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COOK v. TODD, &c.

(Filed March 10, 1903—Not to be reported.)

Damages—Breach of contract—Instruction—Evidence—Appellant invented a "metallic piston rod packing" and assigned the right to manufacture same for two years to appellee in consideration of one-half of the net profits derived from the business. It was also agreed as a part of said contract that appellee would, during the two years, employ appellant at a salary of \$70 per month to superintend the manufacture of said article, but the contract was silent as to the place where appellant should render these services. Appellee removed his manufacturing establishment from Louisville, Ky., to New Albany, and appellant being a cripple, and unable to go to New Albany to superintend the work agreed to be done, notified appellee that he could not do so. Appellant refused to pay his salary, and this suit was brought to recover same. A verdict having been rendered in favor of appellee, appellant prosecutes this appeal, assigning as ground for a new trial error of the court in the admission of evidence and in instructions given. Held—That the contract being silent as to the place where the services were to be rendered, it was competent to prove by parol evidence where the contract was to be performed. As the contract was made in Kentucky the presumption of law is that the services were to be performed somewhere in the State. Under this rule of law it was incumbent upon the appellee to show that it was agreed between the parties that the business was to be transferred to New Albany, and that appellant was to superintend it there. The court should have embraced in its instructions given the following language: "The written contract being silent as to the place where appellant was to superintend the business the law is for him, unless the jury believes from the evidence that the parties agreed at the time the contract was executed that the business of manufacturing the packing was to be removed to New Albany, and that appellant was to superintend it there. If appellant, after the execution of the written contract and before the removal of the plant to New Albany, agreed to perform his duties as superintendent there, then he would be bound by such agreement. If there was no agreement that the work which appellant was to perform was to be done at New Albany, then if the factory was removed there he was not required, under the contract, to go there to perform it. He did not have to object in order to place himself in a position to demand his rights under the contract. The third instruction, based on an erroneous construction of the law on this point, was misleading.

Mat O'Doherty for appellant.

Harris & Marshall for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Paynter.

The appellant invented a "metallic piston rod packing," and for which he obtained a patent, and on the 19th of January, 1898, was engaged in manufacturing it in the city of Louisville, where he and appellee Todd both lived, and where Todd was carrying on a manufacturing business. On that day appellant assigned to Todd for a period of two years, from February 1, 1898, all of his rights under his patent, together with some implements and tools used in the manufacture of the packing. Todd was to manufacture the packing and pay Cook one-half of the net profits derived from the business. There are some provisions of the contract which are not necessary here to be stated.

A clause in the contract reads as follows: "Second party agrees to employ first party as superintendent during said term of two years at a monthly salary of \$70, payable monthly, and his salary shall begin from and after the 1st day of February, 1898, and first party agrees to serve second party during said two years, and to perform such services as the second party may require of him, except manual labor, concerning said business."

After the contract went into force Todd attempted to manufacture the packing at his factory in Louisville, but for some reason it was abandoned, whereupon he resumed the manufacture of the packing in the house where Cook had previously been engaged in the business. Todd afterwards removed his manufacturing plant from Louisville to New Albany, Ind.

In January, 1899, while Cook was in Cincinnati, Todd had certain moulds, etc., used in the manufacture of the packing removed to his manufacturing establishment in New Albany. Cook being so badly crippled that he could not walk, it was necessary for him to be carried in a wagon, and, not being allowed to carry his wagon on the street cars, he declined to superintend the business for Todd in New Albany. The appellee failing to pay the salary after the appellant refused to superintend the business in New Albany, this action was instituted to recover it. The question here to review is as to the correctness of the instructions of the court, which are as follows:

"Gentlemen of the jury—It appears from the written contract which is sued upon by the plaintiff in this case that the contract was entered into in this State, but it fails to state where it should be executed, or, in other words, where Mr. Cook, the plaintiff, shall superintend the work that he is required to superintend by the terms of the contract. Now you will consider all the evidence and circumstances that have been admitted and determined from the evidence where the contract was to be executed, where Mr. Cook was to superintend the work that he was required by the terms of the contract to superintend, and if you shall believe from the evidence that it was the purpose or intention of the parties at the time the contract was entered into that the contract to be executed, that is, that Cook was to superintend the work that he is required by the contract to superintend in the city of Louisville, then the law is for the plaintiff; provided you shall further believe from the evidence that thereafter Mr. Cook made a bona fide

effort to obtain employment of a similar nature to that which he was required to superintend under the contract sued upon and was unable to find it; if such be the fact, then you should find for Mr. Cook in the amount he would have earned under his contract if he had been permitted to execute it, not exceeding the sum of \$800.40, the amount claimed in the petition.

"2d. But unless you shall believe from the evidence it was the intention and purpose of the parties at the time this contract was entered into that it should be executed in the city of Louisville, the law is for the defendant and you should so find.

"3d. Or if you shall believe from the evidence that the manufacturing that Mr. Cook was to superintend was not moved to New Albany by Mr. Todd against the will or consent of the plaintiff, then the law is for the defendant, and you should so find."

It will be observed that the contract is silent upon the question as to where Cook was to perform the services. As the contract was made in Kentucky, the presumption of law is that the services were to be performed somewhere in the State.

In Bishop on Contracts it is in substance stated that, in the absence of anything indicating to the contrary, the place of the making of a contract is presumably that of its performance, by the law whereof it is to be interpreted and its effect defined. It is further stated by that author that "whether mere oral evidence, where the writing is silent, is admissible to rebut the presumption, and show an intent to perform in another State or country, is a question perhaps not absolutely settled. In reason, and within a principle disclosed in another chapter, as such evidence does not contradict the terms of such contract, and is a help to the real meaning, it would seem to be admissible, and this is believed to be the better doctrine in authority." (Sections 1891-1893.)

This court in *Trabue v. Kay*, 4 Bibb., 226, states the rule substantially stated by Bishop, except it does not determine whether it is admissible to introduce oral evidence upon the silent feature of the written contract to show what the agreement was. We are of the opinion that Bishop states correctly the rule as to the admission of oral testimony to show any agreement which the parties made with reference to the place of performance, as such testimony would not contradict the terms of the agreement, the contract being silent on the question. Under this rule of law it was certainly incumbent upon the appellee to show that it was agreed between the parties that the business was to be transferred to New Albany and that Cook was to superintend it there. The court did not observe this rule in instructing the jury. The court in the first instruction told the jury that if it believed from "the evidence that it was the purpose and intention of the parties at the time the contract was entered into that the contract to be executed, that is, that Cook was to superintend the work that he is required by the contract to superintend in the city of Louisville, then the law is for the plaintiff," etc.

Again, in instruction No. 2, the court told the jury: "But unless you shall believe from the evidence it was the intention and purpose of the parties at the time this contract was entered into that it should be executed

in the city of Louisville, the law is for the defendant, and you should so find."

These instructions clearly place the burden upon Cook to show that it was the purpose and intention of the parties at the time the contract was entered into that it should be executed in the city of Louisville. The court should have embraced in its instructions which it gave the following language: The written contract being silent as to the place where Cook was to superintend the business, the law is for him, unless the jury believe from the evidence that the parties agree at the time the contract was executed that the business of manufacturing the packing was to be removed to New Albany, and that Cook was to superintend it there. The instructions were misleading in using the words "intention and purpose of the parties." Instead of that, the court should have used language as follows: That it was agreed between the parties. If there was no agreement that the work which Cook was to perform was to be done at New Albany, then if the factory was removed there, he was not required, under the contract, to go there to perform it. He did not have to object in order to place himself in a position to demand his rights under the contract, therefore, the third instruction was misleading, inasmuch as the court told the jury that the law was for the defendant if the plant was not removed against plaintiff's "will or consent."

If Cook, after the execution of the written contract and before the removal of the plant to New Albany, agreed to perform his duties as superintendent there, then he would be bound by such an agreement.

Judgment is reversed for proceedings consistent with this opinion.

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

## KENTUCKY COURT OF APPEALS.

FISHER, JR. v. MUSICK'S EX'OR.

(Filed March 10, 1903—Not to be reported.)

1. Attorneys—Personal representatives—An executor having accepted the services of the attorney for the testator in an action begun by him without objection in the lower court, can not question his authority.

2. Pleading—Statute of limitation—After a decision in the Court of Appeals setting aside a deed as fraudulent an amended petition was filed setting up claim against appellant for rents for 1889-1890, prior to the filing of the former suit; also for rents for the years 1892, 1893, 1894 and 1895. The statute of limitation was pleaded as a bar to the action for rents for 1889 and 1890. Held—That limitation is a bar to the action for rents for 1889-1890, besides, said claim should have been set up in the former action. Appellant did not receive possession of the land in 1892, and should not be charged with rent for that year. He should be held responsible for rent for 1893 and 1894, but as he did not claim possession of the land for 1895, he should not be held responsible for same.

J. A. Violet, R. C. Myers and E. E. Fullerton for appellant.

Wm. T. Cole and B. F. Bennett for appellee.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Hobson.

The facts of this case are stated in the opinion rendered on the former appeal. (Musick v. Fisher, 16 Ky. Law Rep., 277.) While the case was pending in this court under submission the appellant, Musick, died. The mandate was filed in the circuit court at its next term, in November, 1894. The death of the plaintiff was suggested, and the case continued for revivor. At the April term, 1895, an order of revivor was made reviving the case in the name of the executor, and a warning order was made by the clerk against the defendant, Fisher. At the next term of the court the report of the attorney for the nonresident defendant being filed, the case was submitted for judgment, and in obedience to the mandate a judgment was entered setting



aside the deed in contest as fraudulent, awarding the plaintiff a writ of possession for the land which had been taken from him under the judgment, reversed on the appeal, and adjudging Fisher liable for the reasonable rent of the property from the time he took possession thereunder. We do not see any irregularity in these proceedings. The case could not be revived while under submission in this court, and it was revived in the circuit court within the time it could be done. The proceedings were taken in the name of the executor by B. F. Bennett, who had been the attorney for the testator, and as the executor acquiesced in the action of the attorney, appellant can not raise the question now of his authority to act for the executor.

At the next term of the court Bennett, on his own motion, was made party to the action, and set up a claim to the property in contest by reason of his services as attorney, and process was issued against the executor who appeared in April, 1896, and filed a demurrer and some other motions, and in January, 1897, filed answer to the cross petition of Bennett. Finally, in July, 1897, the controversy between Bennett and the executor was settled by a compromise in which Bennett paid the executor \$500, and the executor conveyed him the land. The executor then filed an amended petition against Fisher, by which he sought to recover the reasonable rent of the land from the time that Fisher obtained possession of it under the reversed judgment. Fisher moved to strike this petition from the files on the ground that it set up an independent cause of action, which must be prosecuted in a separate suit. This motion was overruled; also a motion by Fisher to set aside so much of the judgment of July, 1895, as adjudged him liable for the rent. Issue was then joined on the amended petition, and after this the plaintiff filed an amended petition, in which he admitted that Fisher did not obtain possession of the land during the year 1892, and withdrew all claim for the rent of the place for that year, but in this amended petition, which was filed on January 8, 1900, recovery was sought for the rents of the land for the year 1889-1890, and to this claim limitation was pleaded. On final hearing the court gave judgment against Fisher for the rent of the farm for \$150 for the years 1889-1890; also at the same rate for the years 1892, 1893, 1894 and 1895, and from this judgment he appeals.

The rent for the years 1889-1890 was not set up in any pleading until the amendment was filed in the year 1900. It was then barred by limitation. This rent, too, accrued before the judgment which had been reversed had been rendered, and if it was sought to be recovered in that action, should have been set up before its final submission. After the action was finally submitted and a judgment entered for all that was prayed, it was too late to go back and set up, by way of amended petition, a claim for rent accruing theretofore, which had not been set up in the action. This claim, after a final judgment in the action, could only properly be asserted by a separate suit. But the rents accruing under the judgment which was reversed stand on a different plane. When the judgment was reversed the court had jurisdiction to order restitution, not only of the land, but, in its discretion, of the reasonable rent which the party in error had received by virtue of the reversed judgment. There was no abuse of discretion, therefore, in allowing an amended petition to be filed setting up these rents, and thus proceeding in an orderly way to their ascertainment, as the parties were all before the

court. But as the rent for the year 1892 was disclaimed by the amended petition, no judgment should have been entered for it. Fisher was properly held responsible for the reasonable rent of the place for the years 1893 and 1894, but we do not think under the evidence anything should have been adjudged against him for the subsequent year.

The judgment of this court was entered on September 27, 1894. Fisher had rented the place to George D. Winn for the year 1893 for a rent of \$150. There was no new contract made for the year 1894, but Winn continued in possession. When the mandate of this court issued in October, 1894, Fisher, realizing that the land was finally adjudged to Musick, made no further claim to it, and had nothing more to do with it. Winn remained in possession, and no writ of possession issued until about the time that Bennett and the executor compromised their litigation. Winn was the son-in-law of Bennett, who was the attorney for the executor and managed the litigation for Musick and the executor against Fisher. After the reversal of the judgment Fisher did not claim the land, and as the landlord (Fisher) had been evicted, the tenant might attorn to the person who, by the judgment, was determined to be the true owner. We think the evidence sufficient to show that after the year 1894 Winn held the land under Bennett, who was the attorney and only representative in this State of the executor who lived in Ohio, and not under Fisher. This is shown by circumstances that seem to us conclusive. There is no other reasonable explanation to be given for the long delay in issuing a writ of possession. Winn did not hold under Fisher during this time, but professed to hold under Bennett. Bennett knew he had possession of the land. Winn had no contract with Fisher for the land, and the entire conduct of the parties is explainable only on the idea that he was holding under Bennett, the representative in this State of the executor, who afterwards conveyed the land itself to Bennett. Fisher should be charged with the rent for the years 1893 and 1894 at \$150 a year, with interest from the close of each year, and he should be credited thereon with the taxes paid for those years and such reasonable and necessary repairs as he made on the property during the years 1893 and 1894. No other part of his counterclaim should be allowed.

Judgment reversed and cause remanded for a judgment as herein indicated.  
Judge Paynter not sitting.

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ADAMS EXPRESS CO. v. SMITH.

(Filed March 10, 1903—Not to be reported.)

1. Master and servant—Negligence—Instructions—Appellant leased a room from the L. & N. R. R. Co. at its station at Tenth and Broadway streets for its use in shipping and receiving express matter. In front of the room is a platform, about three or four feet high and about eleven feet wide, extending from the street to the station platform. On this track appellee, while bringing a heavily-loaded truck from the train to the room in the employ of appellant, was required to walk near the outer edge of the platform, and one of the planks having become rotten, broke and appellee fell to the railroad, breaking the bones of his leg and spraining his ankle, for which he recovered a verdict of \$1,000 damages, from which this appeal is prosecuted. Held—That the verdict is not excessive nor contrary to the evidence. The proof

shows that if you get down off the platform and look underneath the rottenness of the plank was apparent, but it was not so apparent from the top. The court properly submitted to the jury the question of liability for accidents from unsafe premises, if they failed to exercise ordinary care for the safety of the platform. The court properly refused to instruct the jury that if appellee had equal means of knowledge with appellant it was not liable, for it was the duty of appellant to exercise reasonable care to furnish him a safe place to work, and it was not his duty to get down off the platform and inspect it underneath to ascertain if it was safe before proceeding to run his truck over it as he was told to do. The inspection of the platform was no part of his duty. He had a right to assume it was safe unless he knew it was otherwise, or by the exercise of ordinary care he should have discovered it in the discharge of his duty.

2. Landlord and tenant—Appellant can not escape from its liability for failure to keep the premises in safe condition on the ground that it leased the premises, and did not own them.

H. L. Stone for appellant.

O'Neal & O'Neal for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Hobson.

The Adams Express Co. rents a room at the station of the Louisville & Nashville R. R. Co. at Tenth and Broadway, Louisville, Ky., at which it handles all express matter passing through that station. It keeps there a clerk, who has charge of the room, and several porters. The room is on the west side of the station building proper, and in front of the room is a platform three or four feet high, something over eleven feet wide, leading down on one side to Broadway and on the other to the station platform. On this platform trucks are run by which the freight is conveyed to and from the trains. Appellee Smith was a porter in the company's service at this room, and as such it was his duty to bring the express matter from the trains to the room. On January 5, 1900, while bringing a heavily-loaded truck from a train along this platform, he was required, in the discharge of his duty, to walk near the outer edge of the platform. There was a cover over the platform which protected part of it, but the outer part of the platform was not protected by the cover. In consequence of this the plank had become rotten, and when appellee, to keep a package from falling off, placed his foot on one of these planks, it broke, precipitating him on the railroad tracks below, breaking the bones of his leg and spraining his ankle. At least these are the facts as shown by the evidence on his behalf, which seems to have been followed by the jury. His injury was a very painful one, confining him to his house for some time and requiring him to go on crutches much longer. At the trial, in November, 1901, his leg was still not strong, although it was supposed time would gradually improve his condition. The jury fixed his damages at \$1,000, which is not excessive under the evidence.

It is earnestly insisted that he can not recover because as he passed over the platform so often in the discharge of his duty, something like twenty or thirty times a day for two or three years, he must have known the condition of the platform, and, therefore, took the risk. But he testifies that he did not know it; that he had simply gone over the platform in the discharge of

his duties, and had not observed that the plank was rotten. In this statement he is confirmed by all the servants of appellant, who are introduced as witnesses on its behalf at the trial, and had the same means of observing the platform as he had. They all testify that they did not know the plank was rotten. The proof also shows that if you got down off the platform and looked underneath the rottenness of the plank was apparent, but it was not so apparent from the top; and as appellee was not required to inspect the platform, but only to discharge the duties which were assigned him in carrying the freight to and from the train, the question was properly submitted to the jury as to whether he knew, or by the exercise of ordinary care should have known, of the defectiveness of the plank. The court properly refused to instruct the jury in addition that if he had equal means of knowledge with the defendant it was not liable, for it was the duty of the defendant to exercise reasonable care to furnish him a safe place to work, and it was not his duty to get down off the platform and inspect it underneath to ascertain if it was safe before proceeding to run its truck over it as he was told to do. The inspection of the platform was no part of his duty. He had a right to assume it was safe, unless he knew it was otherwise, or by the exercise of ordinary care he should have discovered it in the discharge of his duty. (*Champion, &c., Co. v. Carter*, 21 Ky. Law Rep., 210; *L. & N. R. R. Co. v. Foley*, 94 Ky., 224.)

It is also insisted that the express company is not responsible because it did not own the premises, but rented them from the railroad company, and it was the duty of the railroad company to keep them in repair. The platform was the only way of reaching the room in which the express company did business. The use of the platform was, therefore, a necessary appurtenance to the use of the room. Whether the express company was owner or lessor, it was incumbent on it to exercise reasonable care to furnish its employes a safe place to work, and this duty extended not only to the room in which the work was mainly done, but to the approach to that room. It required appellee to work in its service in that room and on that platform. It furnished him these as the place for the performance of his duties, and the master can not avoid responsibility for the nonassignable duty of furnishing his servant a safe place to labor by leasing the premises instead of owning them himself.

The proof shows that this platform was built about the year 1889, and that the life of such plank as composed it is about eight years. The platform, therefore, at the time the appellee was injured had stood at least two years longer than the ordinary life of the plank. It is also shown that appellant had in its employ a watchman whose duty it was to look out and report defects, and these, when reported, were remedied by the railroad company. It was also the duty of the agent who had charge of the room to do this. The proof leaves no doubt that the planks were in fact rotten and unsafe, and had been for some time, at least out at the end where appellee fell.

The first instruction, taken as a whole, only warranted the jury in finding for the plaintiff if the platform was not reasonably safe and the defendant knew of its dangerous and unsafe condition, or could have known of it by the exercise of ordinary care. This is again repeated with emphasis in the fourth instruction. There is no room for criticism, therefore, of the in-

structions as requiring of the employer anything more than ordinary care as to the safety of the platform.

Judgment affirmed.

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DYER v. BALLINGER.

(Filed March 10, 1908—Not to be reported.)

**Partnership**—In this action involving the settlement of partnership accounts between appellant and appellee the lower court gave judgment for a balance of \$9.49 in favor of appellant, and directed that each party pay half of the costs of settlement of the partnership accounts. On appeal, Held—That owing to the confused condition of accounts this court will give some weight to finding of the lower court and affirm the judgment.

L. G. Campbell for appellant.

Bertram & Bertram for appellee.

Appeal from Clinton Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, Ballinger, sued the appellant on a merchandise account, and asked for judgment in the sum of \$55.66. The appellant filed an answer and counterclaim. By the counterclaim he sought to recover from appellee more than \$200, which he claimed was due him on the settlement of a partnership venture in buying some cattle and hogs in January, 1896.

Upon the trial of the case the court gave judgment for the appellant for \$9.49, and that the cost of the settlement of the partnership be borne equally by the plaintiff and defendant. This action was filed in 1890, more than four years after the close of the partnership transaction. It does not appear that the appellant made any effort to have the partnership accounts settled. He purchased the cattle and hogs himself, although the larger part of the money used for that purpose was furnished by the appellee. The appellee does not seem to have kept an accurate account of the amounts paid for the hogs and cattle, neither did he keep one of the sales.

They both agree that something was made upon the cattle and a small amount lost on the purchase and sale of the hogs. The appellant practically concedes that the appellee advanced on the partnership account the sums claimed by him, although there is a little question of bookkeeping as to an item of \$50, but the appellant concedes that he received it. When the amount paid by the appellee is conceded, and it is admitted that there was a profit upon the cattle transaction and a small loss upon the hogs, we can not believe that the appellant contributed to the partnership as much as claimed by him. Under all the circumstances of this case we are unable to reach the conclusion that the appellant received less than he was entitled to receive by the judgment of the court. It being a question of fact, and there being some doubt on the question, we are disposed to give some weight to the finding of the lower court. The court was certainly right in making each party pay one-half of the cost incurred in this action in settlement of the partnership.

Judgment is affirmed.

## HARMAN, &amp;c. v. AVRITT, REC'R.

(Filed March 10, 1903—Not to be reported.)

Descent and distribution—State claim—In this action the claim of heirs that the commissioner owes them a balance of about \$500, funds received by him as commissioner from the sale of real estate belonging to their ancestor, is denied, as there is evidence showing a settlement made eleven years before the institution of the suit, and the court is averse to reopening a settlement made by the parties so many years ago.

C. S. Hill and W. C. McChord for appellants.

Samuel Avritt for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Paynter.

S. H. Harman died in 1885, leaving a widow and nine children. His administratrix and heirs brought a suit to sell the real estate left by him and to settle the estate. In the proceedings had it was adjudged that the widow should have paid to her \$750 out of the proceeds of the sale. It was also adjudged to her in lieu of dower nineteen and forty-two one hundredths per cent. of the amount of the sale of the real estate. At that time the appellee was master commissioner of the court, and, as directed by the court, sold the land, and, as he claims, distributed the proceeds according to the order of the court. The evidence conduces to show that more than eleven years before the institution of this suit he had a settlement with the widow and heirs.

At the instance of a part of the heirs the case was redocketed and proceedings inaugurated with a view of having it determined whether or not he had disbursed the money which came into his hands. The appellants, being the parties who were making the question, reached the conclusion that appellant had in his hands nearly \$500 of the money which he collected. To arrive at that amount they concluded that the widow was only entitled to nineteen forty-two one hundredths of the proceeds of the net amount of the sale, instead of the gross amount. Under the plain wording of the judgment she was entitled to that per cent. of the amount which the real estate brought. The appellee insists that each of the nine heirs was entitled to \$161.61. John Harman, one of the appellants, testified that he had not received his part of the estate, yet a check for that exact amount was drawn in his favor by the appellee, endorsed by the payee and the proceeds of it passed to his credit in a bank in the State of Kansas. This is referred to to show how hard it is, after the lapse of many years, to recall business transactions with accuracy and certainty.

The appellee produced the receipt of the appellant, J. H. Harman, for \$91.61, "balance in full of my distributable share in the estate of S. H. Harman, deceased." He produced an order, signed by him, in favor of Mrs. Mary Harman on him for \$70, and upon which there is a memorandum signed by Mary Harman to the effect that she had received the \$70. These amounts make the sum of \$161.61. He produced the receipt of the appellant, Martha Smock, for \$141.61, "balance in full of my share in the estate of S. H. Harman, deceased."

The fact that the amounts paid were \$161.61 is suggestive that they were paid on the settlement. Besides, some of these receipts recite that it is in

full of the signor's distributable share of the estate. The widow is not complaining that she did not receive her share of the estate. The fact that she did or did not does not diminish or add to the rights of the appellants in the least, as they were only entitled to the share of the estate going to them respectively, regardless of the sum which should have been paid to the widow by the appellee. The sum which the appellants claim the appellee owes consists of more than \$200 that should have been paid to the widow and certain costs, of which no account seems to have been taken in making the calculations to impeach the accuracy of the appellee in the settlement of the matter. When the matter was fresh in the minds of all of the interested parties they settled with the appellee, and considering that there was such a small amount of money to be distributed to each, it was hardly possible that the appellee should have retained \$100 or \$500 which belonged to the widow and the heirs without complaint, and that he should have continued to hold it for the period of eleven years without question. Besides, they had attorneys to look after their interests in the settlement of the estate, and who, the appellee says, were present when the settlements were made.

Judgment is affirmed.

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MASTIN v. ZWEIGART, &c.

(Filed March 10, 1903—Not to be reported.)

Judicial sales—Inadequacy of price—On this appeal it is sought to set aside a judicial sale of land of appellant on two grounds: That one of the appraisers was unfriendly to him and because it was appraised at an inadequate price. The land was appraised at \$20 per acre and sold for \$18.25. Held—That a judicial sale will not be set aside merely on the ground of inadequacy of price. There is nothing in the proof to show that the appraisal was made too low as the result of any unkind feeling of one of the appraisers. Appellant contends that the price should have been fixed at \$25 instead of \$20 per acre. This difference in price fixed by the appraisers could not have prejudiced appellant as it would not have enabled him to redeem. The land sold for more than two-thirds of the price that appellant fixes on it. There is nothing to show that it would have brought a better price had the appraisers fixed the price as appellant contends they should have done.

M. C. Hutchins and Allen E. Cole for appellant.

Garrett S. Wall for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Paynter.

The land in controversy was ordered sold to satisfy liens upon it. The appraisers valued the same at \$20 per acre; it brought \$18.25 at the sale. The appellant sought to have the sale set aside principally upon the grounds, first, that one of the appraisers was unfriendly to him; second, that it was appraised at an inadequate price.

This court has frequently held that mere inadequate price is not alone sufficient to set aside a judicial sale. After the appraisers had been selected and sworn, and were proceeding to appraise the land, the appellant expressed to the master commissioner a fear that one of the appraisers would not do

him justice on account of some differences between them. The master commissioner assured him that if he discovered any purpose upon the part of the appraisers not to treat him fairly in the appraisalment he would interfere to protect his rights. The master commissioner failed to discover any purpose to appraise the land at less than a fair value, and testified that he thinks it was so appraised. There is not the slightest evidence that either the master commissioner or the appraisers had any purpose in the discharge of their duty to do other than what they thought was exactly right. There is no evidence of any fraudulent conduct upon the part of the appraisers.

A mere mistaken opinion of the appraisers as to the value of the land does not affect sale. (*Vallandigham v. Worthington & Co.*, 85 Ky., 87.) The evidence that the land was worth \$25 per acre could not do more than to conduce to show that the appraisers erred in their judgment as to the value of the land. In the absence of other evidence tending to show fraud in the appraisalment of the property, it was irrelevant. (*Knight v. Whitman*, 6 Bush, 51.)

It is suggested that a brother of the appraiser to whom we have referred bid upon a small part of the land to be sold. It was held in *Isom, &c. v. Kinnard, Treasurer, &c.*, 13 Ky. Law Rep., 569, and *Barlow, &c. v. McClintock*, 10 Ky. Law Rep., 894, that the mere fact that one of the appraisers purchased the land at the sale would not render the appraisalment irregular or void, in the absence of evidence showing that he contemplated purchasing it at the time of the appraisalment. If the circumstances, as detailed in those cases, would not render the sale irregular or void, then certainly the fact that a brother of one of the appraisers bid upon a small piece of the land would not render the sale invalid. The appellant filed a number of affidavits, in part of which it was stated that the land should have been appraised at \$25 per acre; in others it was stated that it was worth \$25 per acre. If it had been appraised at \$25 per acre, as it brought more than two-thirds of that amount, the appellant would not have had the right to redeem it. The object of an appraisalment is to give the debtor the right to redeem if it sells for less than two-thirds of the appraised value.

Certainly the appraisalment did not affect the value of the land in the least. It was not shown that any one would have given more for the land had it been appraised higher, nor does any one come forward and say that he would give more than the amount bid should a resale be ordered. We do not want it understood that we hold that if some one had done so, the sale would have been set aside.

The judgment is affirmed.

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ARNOLD v. COMMONWEALTH.

(Filed March 10, 1908—Not to be reported.)

Criminal law—Murder—Instructions—Appellant was indicted and convicted of murder and his punishment fixed at imprisonment for life, from which he prosecutes this appeal. Held—That the court erred to the prejudice of appellant in failing to give an instruction authorized by section 289 of the Criminal Code of Practice, which directs the jury when they enter-



tain a reasonable doubt as to the degree of the offense to find for the lower degree.

Sweeney, Ellis & Sweeney, Walker & Slack and Wathen & Morrison for appellant.

C. J. Pratt and M. R. Todd for appellee. .

Appeal from Davless Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Lucien Arnold, and his brother, Hugh Arnold, were jointly indicted by the grand jury of Davless county, charged with the willful murder of Luther Robinson. A joint trial of the brothers resulted in their conviction, and sentenced to the penitentiary for the term of twenty-one years. Upon an appeal to this court the case was reversed. (21 Ky. Law Rep., 1566.)

Upon the return of the case to the Davless Circuit Court a separate trial was demanded and granted. Hugh Arnold being tried first, was found guilty and sentenced to the penitentiary for the term of his natural life. An appeal to this court resulted in an affirmance of the judgment. (23 Ky. Law Rep., 182.)

Upon trial of the appellant he was also found guilty, as charged in the indictment, and sentenced to the penitentiary for life, from which judgment he is now complaining on appeal to this court.

It is not necessary to set forth the facts as they are recited with sufficient amplification in the opinion in the case of Arnold v. Commonwealth, 21 Ky. Law Rep., 1566; and, furthermore, appellant, through his counsel, admits there was sufficient evidence to warrant his conviction by the jury, although he complains of the degree of which he was convicted. The instructions of the court in this case are largely the same as those given on the trial of Hugh Arnold, which were passed upon and approved in the case of Arnold v. Commonwealth, 23 Ky. Law Rep., 182; but there was one instruction given in the case cited which was omitted in this, the omission of which was prejudicial to the substantial rights of the appellant. Section 239 of the Criminal Code is as follows: "If there be a reasonable doubt of the degree of the offense which defendant has committed, he shall only be convicted of the lower degree."

In the case of Williams v. Commonwealth, 80 Ky., 313, this court said: "It was the duty of the court to state the law fully and correctly to the jury in the instructions; it was error, therefore, not to instruct them that if they should believe the appellant guilty, but entertained a reasonable doubt of the degree of his offense, they should convict him of the lower degree. This is substantially the language of section 239 of the Criminal Code, and the failure to instruct the jury affected seriously his substantial rights. It is true that the jury must believe beyond a reasonable doubt that the accused is guilty before they can convict at all, but it might be that while they had no doubt of his guilt, they entertained a reasonable doubt of the degree of that guilt, and the policy of this humane provision of the law can not be questioned, nor can it be rendered nugatory by a failure to execute it. Whenever there is evidence introduced which might be calculated to raise a reasonable doubt of the degree of the guilt of the accused, the jury should be instructed in pursuance of the provision of the Code quoted."

In both of the opinions of this court, heretofore alluded to, the number and prolixity of the instructions were criticised, and these defects undoubtedly were confusing and perplexing to the minds of the jury. We recognize that this fault is often the result of the excitement and confusion incident to a jury trial, such as was doubtless had in this case. As there must be a reversal for the reasons given we make the following suggestions for the guidance of the court in any future trial had herein :

Instruction No. 6 should be omitted as its provisions seem to be fully contained in instruction No. 9. If there be any doubt on this subject, it should be incorporated in No. 9.

Instruction No. 9 should end with a substantial compliance with section 239 of the Criminal Code.

Instructions Nos 10, 11, 12, 13 and 14 should be omitted, as unnecessary to the rights of the defendant and confusing to the minds of the jury.

Instruction No. 8 should end with the qualification of the right of self-defense, by the principle flowing from the fact that appellant may have commenced, or provoked, the difficulty in which the killing took place, in accordance with the rule laid down in the opinion in the case of *Arnold v. Commonwealth*, 21 Ky. Law Rep. , 1566. We believe that with the changes herein suggested the instructions will fully protect the legal rights of the Commonwealth and the defendant, and present the questions of law, to which the jury are to apply the facts in a simpler and less confusing form.

The case is reversed for proceedings consistent with this opinion.

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MYERS v. PEDIGO, &c.

(Filed March 10, 1903—Not to be reported.)

1. Judgments—Nonresidents—P. died owning real estate worth less than \$1,000, in which his widow and infant children had a homestead right. There was a mortgage on the property for \$450. The widow sold the property by a general warranty deed to appellant, out of which she paid off the mortgage debt. Afterwards appellant becoming doubtful of his title, instituted an action in the circuit court, setting forth these facts and asking that his title be quieted, or that he be subrogated to the rights of the mortgagee, and that a decree be entered authorizing a sale of the property. The widow and children, who had become nonresidents of the State, were proceeded against by warning order. An attorney was appointed to correspond with them, who filed his report. A judgment was entered quieting the title. More than five years after this judgment was entered appellees, who were heirs of P., instituted this action to recover the property. Held—That the judgment to which appellees were made parties was not void, and can not be attacked collaterally. It was a proceeding in rem, and the proper remedy was to institute the action authorized under section 414, Civil Code of Practice, to retry the case within five years after the entry of the judgment, or, as infants, they might at any time up to one year after reaching their majority, have opened the judgment under section 391, Civil Code of Practice. Not having pursued either of these remedies within the time prescribed by law, they are entitled to no relief.

2. Infants—Where infants are nonresidents and are properly before the court by warning order, and the attorney appointed for them as nonresi-

dents makes a report, a judgment rendered against them without a guardian ad litem having been appointed is not void.

Geo. T. Duff and W. L. Porter for appellants.

Baird & Richardson for appellees.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Barker.

S. P. Pedigo died intestate October 6, 1888, a resident of the city of Glasgow, Barren county, Kentucky. He left a widow, Mary E. Pedigo, and four infant children, Charles Pedigo, Carrie Pedigo, Amos Pedigo and Ellen Pedigo (now Matillo).

Decedent was the owner of several lots in Glasgow, upon which he resided at the time of his death, and in which he had a homestead right. This property was worth considerable less than \$1,000, and upon it there was a mortgage to George E. Pedigo to secure an indebtedness of \$425. After the death of S. P. Pedigo, his widow, presumably, being unable to pay off the mortgage, sold the homestead, by a deed of general warranty, to appellee, Robert Myers, for the sum of \$525, out of which she paid off and discharged the mortgage debt to George E. Pedigo, and then, with her children, moved to Indianapolis, Ind., where they have since resided.

In 1891 Robert Myers, evidently becoming doubtful as to his title to the property under the deed from the widow, instituted an action in the Barren Circuit Court against her and her children. In his petition he set up, substantially, the facts above stated in reference to the property, and the sale to him, and the payment of the mortgage, praying that his title be quieted; that the defendants be adjudged to have no interest in the land, and that a commissioner's deed be ordered, conveying the property to him, free from any claim of theirs; or, if that could not be done, that he be adjudged to have a lien by subrogation on the property in question, to the extent of the mortgage paid off, with the purchase money paid by him to the widow, and that the property be sold for the purpose of reimbursing him for his debt, interest and costs. Affidavit having been made as to their nonresidency, the appellees and their mother were proceeded against by warning order, and W. L. Porter, an attorney of the Barren Circuit Court bar, was appointed attorney for them, and afterwards made report of his acts, as such officer, to the court.

After the expiration of sixty days, the defendants being properly before the court by warning order, the case was submitted and a judgment rendered, divesting the defendants of all title to the property described in the petition, and ordering its conveyance by the commissioner to plaintiff, Robert Myers. This judgment was entered on the 16th day of April, 1891. After receiving the commissioner's deed Robert Myers conveyed a part of the property in question to J. W. Brooks.

On the 31st day of July, 1901, the appellees, who were the defendants in the case of Myers against Pedigo before mentioned, having all arrived at full age, instituted this action in the Barren Circuit Court to recover the property in question from the appellants, Robert Myers and J. W. Brooks. It is not necessary to take further note of the pleadings in this case, or the issues made thereby, further than to say that the appellees' right to recover

the land in question from the appellants depends upon the question as to whether or not the former judgment of the Barren Circuit Court, entered in the case of Myers against Pedigo, was void, or merely erroneous; if it is void, then it may be attacked collaterally, and affords no protection to the appellants, Robert Myers and J. W. Brooks, who claim by virtue of its validity. If it is merely erroneous, then the appellees must fail, for the reason that an erroneous judgment can not be vacated by collateral attack, such as is made herein. This proposition of law has been decided by this court so often that it is not necessary to cite the cases. Did, then, the Barren Circuit Court, in 1891, have jurisdiction of the subject-matter brought before it by the petition of Robert Myers against Mary E. Pedigo, the widow of S. P. Pedigo, and her infant children? Myers presented to the court his claim to the property, which was the deed from Mary E. Pedigo to him, and he also presented the facts of the payment of money by him to relieve the homestead mortgage, and submitted to the court two propositions: First, that the deed was valid, and vested him with a fee-simple title to the property as against appellees and their mother; second, if that was found unsound, that he was entitled by subrogation to a lien on the property in question, and an enforcement thereof for the purpose of reimbursing him for his outlay. The proceeding was entirely in rem. If the Barren Circuit Court had no right to pass upon this claim of Robert Myers, then no court had such jurisdiction. There was no tribunal in which he could have his rights adjudicated except the Barren Circuit Court.

In Freeman on Judgments, section 118, it is said: "The power to hear and determine the cause is jurisdiction."

It seems to us clear that the Barren Circuit Court had the right to hear and determine the matter in dispute between Robert Myers and the appellees; and they having been constructively summoned, it had jurisdiction both of the subject-matter and the persons of the parties. The infant defendants being properly before the court by warning order, and having an attorney appointed for them as nonresidents, the judgment was not void as against them, for the reason that no guardian ad litem was appointed for them, or defense made by him for them. (*Oliver v. Parks, &c.*, 19 Ky. Law Rep., 179; *Norfleet, Adm'r v. Logan*, 21 Ky. Law Rep., 1900; *Simmons v. McKay*, 5 Bush, 25.)

It may be conceded that the judgment divesting appellees of their interest in the land in question was erroneous, but not being void, they can not vacate it by the collateral attack instituted in this action. As nonresidents they had five years after the rendition of the judgment to vacate it upon proper showing under section 414 of the Civil Code of Practice, which is as follows: "A defendant against whom a judgment may have been rendered upon constructive service of a summons, and who did not appear, may, at any time within five years after the rendition of the judgment, move to have the action retried; and security for the costs being given, shall be admitted to make defense; and thereupon the action shall be retried as if there had been no judgment; and upon the new trial the court may confirm the judgment or modify or set it aside, and may order the plaintiff to restore any money of such defendant paid to him under it, or any property of the defendant obtained by the plaintiff under it and yet remaining in his

possession, and pay to the defendant the value of any property which may have been taken under an attachment in the action, or under the judgment, and not restored."

Or, as infants, they might at any time, up to one year after reaching their majority, have opened the judgment, under section 391 of the Code, which is as follows: "An infant, other than a married woman, may, within twelve months after attaining the age of twenty-one years, show cause against a judgment, unless it be for a tort done by, or for necessities furnished to, the infant, or unless it be rendered upon a set-off or counterclaim stated in an answer; but the vacation of such judgment shall not affect the title of a bona fide purchaser under it."

Appellees did not proceed under either section of the Code mentioned, and as the time has long since expired in which they may do so, those remedies are denied them.

The judgment is reversed, with directions to dismiss the petition.

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BURKAMP, TRUSTEE v. HEALEY, &c.

(Filed March 11, 1903—Not to be reported.)

Mortgage by corporation—Pleading—Appellees brought this action to settle the affairs of the Newport Printing and Newspaper Co. as an insolvent. Appellant was made a defendant and filed its answer and counterclaim, setting up a mortgage for \$1,500 on personal estate, and claimed a prior lien on the property to secure same. Appellees filed no reply or objection to same. The commissioner made a report, allowing the same as a preferred claim to the extent of \$1,300. Appellees excepted to the allowance of this claim on the ground that the mortgage was without the corporate seal of the company; also because the corporation never authorized the execution or delivery of the mortgage. The court sustained the exceptions, and adjudged that appellant was entitled to share only pro rata in the distribution of the assets, from which this appeal is prosecuted. Held—That the court erred in sustaining said exceptions. Such objections were matter of defense that should have been pleaded. This mortgage executed by the president and secretary purporting to be the obligation of the corporation, it is to be presumed that they had the authority to execute it. No scroll or seal is necessary to the validity of a chattel mortgage executed in this State, if otherwise properly executed.

W. A. Burkamp and J. C. Wright for appellant.

Aubrey Barbour and Thomas Healey for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted by Ellen Healey, executrix, against the Newport Printing and Newspaper Co., to settle the affairs of the defendant as an insolvent. Appellant was made a defendant, and he filed his answer and cross petition, setting up a claim against the corporation for \$1,500, secured by a mortgage on personal property upon which payments had been made. No reply was filed to this pleading. Upon reference to the master commissioner the appellant also proved his claim; the master reported in favor of

appellant's claim as a preferred one for \$1,300, with interest thereon from July 5, 1901. To this report appellee filed two exceptions: First, the mortgage was without the corporate seal of the company; second, the company never authorized the execution or the delivery of the mortgage. The court sustained the exceptions and ordered a pro rata distribution of the funds, from which judgment appellant appeals.

The appellees did not file any reply to appellant's answer, nor take any proof with reference to appellant's claim. There is nothing in the record showing when or how the Newport Printing and Newspaper Co. obtained its charter, or what powers and privileges under the charter it had, or whether it was authorized to transact its business by a board of directors, president or secretary. If this corporation had no power to create a liability except by the use of its seal, or if the president and secretary had no power to bind it except by direction of the board of directors, these facts should have been presented by appellees by proper pleadings. This mortgage executed by the president and secretary, purporting to be the obligation of the corporation, it is to be presumed that they had the authority to execute it.

In the case of *Kentucky Tobacco Association v. Ashby*, 9 Ky. Law Rep., 110, the court said: "If the alleged agreement was made by the president and secretary of appellant, we think that it is bound by the agreement unless it can show some valid restriction on their authority to bind the corporation. The president is the chief officer and ought to be presumed to have authority to make contracts pertaining to the business of the corporation, unless the contrary be shown." (*L. & N. R. R. Co. v. The Literary Societies of St. Rose and St. Catherine*, 91 Ky. 399.)

These literary societies were both corporations for educational purposes, and the corporation or society of St. Catherine made a subscription of \$500 for the building of a railroad to the town of Springfield, Ky., its place of business. In that case the court, by Holt, C. J., said: "The obligation given by the society of St. Catherine is merely signed by the prioress, who is the chief officer of the institution; but it purports to be the obligation of the society; the face of the instrument shows that it was so intended; its execution by the corporation is not questioned by the pleading, and the officers of each institution knew of the execution by the chief officer of its respective obligation. They must be held, therefore, to have been in form properly executed."

In our opinion no scroll or seal is necessary to the validity of a chattel mortgage executed in this State, if otherwise properly executed.

The lower court erred in refusing to allow appellant's claim as a preferred claim, and for these reasons the case is reversed and the cause remanded to the lower court for further proceedings consistent herewith.

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CARTER v. FARTHING.

(Filed March 11, 1903.)

1. Usury—Appellant purchased a tract of land, and as part consideration therefor executed three notes bearing interest at the rate of 8 per cent. per annum. He paid the first and third, and suit was brought on the second for the debt and for the enforcement of the lien on the land. The answer set up

the defense that defendant was entitled to a credit of \$100; also entitled to be credited with all usury on this note; also for all usury paid on the other two notes. The other two notes were paid more than one year before this action was brought. The court rendered judgment for the debt, less the usury embraced therein, and also gave defendant credit for \$100 contended for, but refused to allow him credit for usury paid on the two former notes, from which appellant prosecutes this appeal. Held—That the court properly refused to allow defendant credit for usury embraced in the former notes as same had been paid more than one year. Although the three notes evidenced one consideration and one transaction, the usury on two notes can not be eliminated when suit is brought on the remaining note.

2. Appeals—Although the amount of usury claimed is less than \$200, the Court of Appeals has jurisdiction as it involves the enforcement of a lien on land.

Robertson & Thomas for appellant.

R. E. Johnston and James Webb for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Settle.

On the 6th of October, 1887, appellee sold and by deed conveyed to appellant three parcels of land, aggregating 126 acres, situated in Graves county, Kentucky, at the agreed price of \$1,650. Three hundred and fifty dollars of this sum was immediately paid by appellant, and he executed three several notes for the remainder of the consideration as follows: Two of \$500 each, due January 1, 1889, and January 1, 1890, respectively, and one of \$300, due January 1, 1891, all to bear interest from January 1, 1888, until paid at the rate of 8 per cent. per annum.

Appellant made annual payments of interest at the rate of 8 per cent. on all three of the notes for several years, and finally paid the principal of the first and last notes, but on October 28, 1901, this action was instituted by appellee in the Graves Circuit Court on the second note of \$500, which became due January 1, 1890. The answer filed by appellant sets forth his purchase of the land from appellee; the payment of the \$350 by him; his execution of the three notes for the remainder of the purchase money, and the further fact that he had paid the first and last of the notes after their maturity, respectively, with 8 per cent. on each from January 1, 1888, until paid, and also that he had paid from January 1, 1888, to June 1, 1901, 8 per cent. on the note sued on, and \$100 in addition on August 15, 1898, for which last payment appellee had failed to give him credit on the note.

The answer contains the further averment that the appellant should be credited on the note sued on by all interest in excess of 6 per cent. paid thereon, as well as by the excess over 6 per cent. paid on the notes that had been satisfied by him, on the ground that such excess was and is usurious, and that appellee had no legal right to exact usury of him. Appellee filed demurrer to the answer, and at the same time entered motion to require appellant to make it more specific. The lower court sustained the motion to make the answer more specific, and when an amended answer was tendered by appellee in compliance with the order of the court in that particular, permission to file the same was refused. The court thereupon sustained the demurrer to the original answer, and rendered judgment in appellee's favor

for the amount due on the note sued on, less the usury that had been paid thereon, and the \$100 with which appellant had not been credited; also decreed the enforcement of the lien retained in the deed, and a sale of enough of the land thereby conveyed to pay appellee's debt and costs, but refused to allow him credit for any of the sums of usury that had been paid by him on the other two notes. From this judgment of the lower court appellant has appealed.

There are but two questions presented by the record for our consideration, viz.: First, has this court jurisdiction of the appeal? secondly, did the lower court err in refusing to credit the note sued on with the sums of usury that were paid by appellant upon the two notes discharged by him? It is contended by counsel for appellee that the appeal can not be entertained by this court, because the aggregate amount of the usury paid by appellant upon the two notes that have been satisfied, and for which he now asks credit, is less than \$300. We are unable to sustain his contention for the reason that this court has more than once decided the point otherwise. Its most recent deliverance in regard thereto may be found in *Smith's Adm'r's v. Catlin, & Co.*, 23 Ky. Law Rep., 381, wherein it is said: "This court has been uniformly holding for a number of years that where a lien is asserted upon land, the title to it is brought in controversy, regardless of the amount of the claim asserted or adjudged. Whether this court was in error in so holding it is too late now to consider." It, therefore, follows that the motion to dismiss the appeal must be overruled.

In considering the second and only remaining question involved in this appeal we take it for granted that the lower court refused in its judgment to credit appellant by the sums of usury which he paid on the two notes discharged by him, because his demand for such credit was not made for more than a year after the payment of the notes, that is, beyond the statutory period in which usury may be recovered of the payee by the payor, and we are constrained to hold that this conclusion of the lower court is sustained by the law. It is contended, however, by counsel for appellant that the entire sum of \$1,800, for which the three notes were given, constituted but one debt contracted for the land, and the three notes only evidenced that one debt, though dividing the periods as to which each particular part of it would have to be paid by appellant, and that as long as any part of the debt remained unpaid all usury paid on any of the notes could be applied as payments thereon. We are unable to find that this view of the law is supported by any of the authorities cited in the brief of counsel for appellant.

It has, however, been repeatedly held in this State that usury can not be recovered after the expiration of a year from the time of the extinguishment of the debt upon which it was paid, and in *Sutherland v. Owensboro Savings Bank*, 8 Ky. Law Rep., 431, it was held by the Superior Court that "where separate obligations, or bonds, are executed by a debtor at the same time, to the same obligee, payable at different times, each constitutes a separate and distinct debt, and one of them having been paid off, with usury, the fact that the others remain unpaid will not extend the time in which the debtor may sue to recover the usury paid on the first bond; therefore, in



an action upon the bonds remaining unpaid the debtor will not be entitled to a credit for usury paid on the first bond, more than one year having elapsed from the time of payment."

In *Riddell v. Rosenfield*, 103 Ill., 600, it was held that "the payment of usurious interest upon the first four notes of a series does not entitle the maker to plead it as a defense to an action on the fifth."

While the prime object of the usury laws is to protect the debtor from the oppressive exactions of the creditor, where, as in this State, the statute fixes the period after the extinguishment of the debt within which an action may be instituted to recover the usury paid, it must be brought within the time thus fixed, or the courts will be powerless to grant relief, and this we understand to be the rule though the usury be paid upon one or more of a series of notes, leaving others to be thereafter paid. It has been held by this court that in the sale of land an agreement by the purchaser to pay a rate of interest in excess of 6 per cent. in notes given therefor may be enforced, provided such interest constitutes a part of the consideration to be paid for the land. It is not averred by appellee, nor claimed in argument, that the 8 per cent. interest expressed in the notes executed by appellant constituted any part of the consideration agreed to be paid by him for the land sold him by appellee, so that question does not arise in this case.

Finding no error in the judgment of the lower court the same is affirmed.

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NEW YORK LIFE INSURANCE CO. v. CURRY & BRO.

(Filed March 11, 1903.)

Insurance—Forfeiture of policy for nonpayment of interest on loan—The question involved on this appeal is whether or not appellant has the right to declare as void a policy of life insurance under a loan agreement providing for such forfeiture on failure to pay interest on the loan. Held—That such forfeiture will not be recognized by a court of equity. The lender is only entitled to a return of the money loaned with legal interest. In this case there is no perceivable reason why the insurance company lending the money is, or can be, in a different position from any other lender of money, had the policy been assigned to the latter as collateral and a default in interest had occurred. If it loans money on its policies held by its policy holders its rights as lender are exactly what they would be if, instead of the policies, the borrower pledged stocks, bonds or policies in other companies, or gave a chattel or real estate mortgage to secure the loan. There is nothing in appellant's business or charter rights which entitles it to privileges when loaning its money not enjoyed generally by banks, trust companies and other corporations and individuals.

Willis & Willis and Humphrey, Burnett & Humphrey for appellant.

Gaither & Vanarsdall for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge O'Rear.

George J. Anderson was the holder of a paid-up policy of insurance upon his life for \$630, issued by the appellant, and payable upon the death of the insured to his estate. Anderson borrowed \$150 from appellant and executed

to it a writing, called a loan agreement, by which he pledged to appellant the policy to secure the repayment of the loan. Interest on the loan was payable on August 1 of each year (that being the anniversary of the insurance), so long as the principal was owing.

The loan agreement contained the following: "It is agreed that interest at the rate of 5 per cent. per annum shall be paid upon said loan at the anniversary of the insurance next succeeding, and annually thereafter, at the office of said party of the first part. It is agreed that although it is not intended that said party of the first part shall demand payment of said loan until the first day of August, 1909, on which date said loan shall become and be due and payable, or until the death of the party whose life is insured under said policy, said party of the first part reserves the right to demand repayment provided said interest is not duly paid."

It is further provided as follows: "It is agreed that in the event of the default of any payment of said interest, or of said loan, or of any premium on said policy for thirty days after they shall respectively become due, said policy shall be deemed to be, and shall be, in effect, at the option of said party of the first part, surrendered to said party of the first part at the customary cash surrender value then allowed by said party of the first part for the surrender of policies of this class, said party of the first part in that case being liable to said party of the second part for the return of the balance only of said cash surrender value, after deducting said loan and interest and any expenses incurred hereon."

And further: "It is agreed that said party of the second part has deposited said policy and its accumulation with said party of the first part as collateral security for said loan, on the terms and conditions of this agreement, and covenants and agrees to and with said party of the first part to abide by and perform all and singular the stipulations and agreement contained in this agreement."

And further: "It is agreed that all the conditions, limitations and requirements of said policy, except as herein expressly modified, remain in full force."

On the 1st of August, 1899, when the interest on the \$130 loan became due and payable according to the terms of the contract, it was not paid, nor was it paid for more than thirty days thereafter, nor was it offered to be paid until nearly eight months after its maturity. Appellant then refused to receive it and reinstate the insurance (which it had cancelled as forfeited because of the nonpayment of interest as provided in the agreement above copied) unless the insured would furnish a certificate of his then good health. That he didn't do, and possibly could not have done. As a matter of fact appellant admits that the "accumulations hypothecated with this policy as collateral to its loan of \$130 were, when included in the "cash surrender value then allowed" by appellant on this class of policies, some \$12.47 more than the principal and interest owing appellant when the default occurred. Before the interest above named became due Anderson had assigned the policy for value to appellees, his creditors, of which appellant had notice at the time. Being apprised of the appellant's claim of the forfeiture of the policy, appellees tendered the interest and principal of Anderson's loan and offered to redeem the policy for their benefit as as-

signees and creditors. Being refused, this suit was brought to compel appellant to reinstate the policy, or to pay its value above the amount of appellant's debt and interest, to appellees; that excess of value was alleged to be \$300. Appellant, by answer, relied on the surrender and cancellation of the policy under the contract and conditions above stated. The circuit court sustained a demurrer to the answer, and adjudged that upon the payment to appellant of the \$130 and interest that it reinstate the policy. This appeal involves the validity of the clause of the above agreement, providing for the surrender, or practically for the forfeiture of the policy if the interest on the loan was not promptly paid when due. By the terms of this writing, if the loan or its interest was not repaid when due under the loan agreement, the policy was to be "surrendered" to the insurer "at the customary cash surrender value then allowed by said party for the surrender of policies of this class." That is, pure and simple, a provision for the forfeiture of the policy upon such terms as the payee of the note may require and at its option. The difference between this and the ordinary unqualified forfeiture lies alone in the extent of the forfeiture. It operates as an enforced conversion without further notice to, or consent of, the borrower of his collateral, if he fails to promptly pay the interest upon his debt.

The contract of insurance between appellant and Anderson had been fully executed so far as Anderson was concerned. He had paid all that he was required to pay to be entitled to receive from appellant the full sum stipulated to be paid, \$630 at his death. The \$180 was borrowed from appellant since that completion of the contract. The courts have uniformly held in favor of the insurer that agreements for the forfeiture of the policy when premiums were not paid when due are valid, and their enforcement is upheld. This is said to be because "on the prompt payment of the premiums depends the mutuality of the contract and the ability of the insurance company to meet its obligations." But both the reason and the rule are restricted to the matter of premiums alone. Forfeitures are disfavored in law. When they are mere penalties for the nonpayment of borrowed money they are not allowed. They lead to, and themselves, are unconscionable oppressions of the unfortunate. The question in this case in collateral form has been before this court several times.

In *St. Louis Mut. Life Ins. Co. v. Grigsby*, 10 Bush, 810, a policy provided that if the interest upon premium notes given by the insured was not promptly paid when due it should work a forfeiture of the policy, including all that had been paid on it. Said the court (per Lindsay, J.): "We are satisfied from the nature of the contract that the forfeiture was intended as a penalty to secure not the ultimate, but the prompt, payment of the interest to become due, and as the default is only in time, and as the company can be given all that it stipulated to receive, a case is presented in which relief can and ought to be afforded."

In *Montgomery v. Phoenix Mutual Life Ins. Co.*, 14 Bush, 51, the question was whether a failure to surrender the old policy and to demand a paid-up policy for the lesser sum, in case of default after paying a certain number of premiums, forfeited the insurer's rights. This court (per Cofer, J.) held that time was not of the essence of the undertaking; that the clause for a forfeiture was repugnant to the policy of the law, and was contradic-

distinguished from conditions precedent. The court quoted approvingly the following section from Story's Equity (section 1814): "Wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and, therefore, as intended only to secure the due performance thereof, or the damage really incurred by the nonperformance. In every such case the true test by which to ascertain whether relief can be had in equity is to consider whether compensation can be made or not."

In *Northwestern Mutual Life Ins. Co. v. Fort's Adm'r*, 82 Ky., 269, the question was whether the failure of the insured to pay promptly the interest on certain premium notes voided the policy under a provision which declared "which interest shall be paid annually or the policy be forfeited," the court (per Lewis, J.) held: "Here the default, if any, has occurred, is not of the substance of the contract, but in the time of the payment of interest, and the company can be given all that it stipulated to receive. On the other hand, to forfeit the whole policy on account of default in time of payment of the interest, which formed but a small part of the consideration and which the company is secured in the full payment of, if not already paid, would impose upon the assured the entire loss of the premiums actually paid. A forfeiture under such circumstances would be extremely oppressive, and if provided for between individuals concerning any ordinary business transaction, be held as in the nature of a penalty."

The later case of *Mutual Life Ins. Co. v. Jarboe*, 102 Ky., 80 (19 Ky. Law Rep., 1501), was quite similar to *Montgomery v. Phoenix Mut. Life Ins. Co.*, supra. It was there reasserted (per Guffy, J.): "Time is not generally of the essence of contracts. (Story's Equity, section 776.) It may be so when the contract is executory on both sides, or when the nature of the transaction or the stipulation of the parties shows it was so intended by them. But when the defendant has received the entire consideration for performance on his part, and has no other defense except that the plaintiff did not come within the stipulated time to demand performance, we are not acquainted with any authority or legal principle upon which such a defense can be upheld in a court of equity." (*Manhattan Life Ins. Co. v. Patterson*, 22 Ky. Law Rep., 1282; *Washington Life Ins. Co. v. Miles*, 23 Ky. Law Rep., 1705.)

In all of these cases the failure relied on as a forfeiture was connected with the existence of the original contract of insurance. It was not always easy to distinguish between the legal principles governing the right to provide for forfeiture because of nonpayment of premium notes and the nonpayment of interest on premium notes. The evident aim of the insurers was to bring the interest upon the notes within the principles governing the notes themselves. The court, however, noted a distinction, and applied it.

In the case at bar there is no perceivable reason why the insurance company lending the money is, or can be, in a different position from any other lender of the money had the policy been assigned to the latter as collateral, and a default in payment of the interest had occurred. If it loans money on its policies held by its policy holders, its rights as lender are exactly what they would be if, instead of the policies, the borrower pledged stocks, bonds

or policies in other companies, or gave a chattel or real estate mortgage to secure the loan. There is nothing in appellant's business or charter rights, so far as we are advised, which entitles it to privileges when loaning its money not enjoyed generally by banks, trust companies and other corporations and individuals. We are of opinion that the provision in the loan agreement for a surrender or forfeiture of the policy upon the nonpayment of the interest upon the loan is void.

The judgment of the circuit court is, therefore, affirmed.

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HOWARD v. LONDON MANUFACTURING CO.

(Filed March 11, 1903—Not to be reported.)

**Judgment—Satisfaction—**This appeal involves the question as to whether the lower court erred in setting aside an endorsement of satisfaction on the record of a judgment and in ordering land sold to satisfy same. Held—That the proof satisfies the court that the judgment had been satisfied, and the endorsement of satisfaction properly made and the sale of land improperly ordered to satisfy the judgment.

W. R. Ramsey, B. B. Golden, E. H. Johnson and H. C. Hazlewood for appellant.

Jas. Sparks for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Chief Justice Burnam.

In February, 1895, C. L. Troutman recovered a judgment against B. F. Howard for \$158.48, with interest and cost, and for the enforcement of a mortgage lien upon the tract of land belonging to the defendant in Laurel county, Kentucky, to secure the payment of his judgment. A short time after the entry of this judgment B. F. Howard sold and conveyed this tract of land, subject to the judgment of Troutman, to his father, W. M. Howard, as trustee, for his seven brothers and sisters, most of whom were infants. After this transfer, in March, 1895, W. M. Howard, for the purpose of paying off this judgment, contracted with the London Manufacturing Co. to sell and deliver to them sixty thousand feet of logs, which were to be cut from the land, and by agreement with McKee, the manager of the manufacturing company, and Sparks, the attorney and father-in-law of Troutman, it was agreed that the manufacturing company should pay the Troutman judgment in dressed lumber furnished to Troutman, and charge its value to Howard's account for the logs, and on the 18th day of November, 1895, James Sparks, as attorney for Troutman, endorsed on the margin of the record of the judgment "satisfied in full." After the delivery of the sixty thousand feet of logs originally contracted for, Howard continued to furnish logs to the company until he claims they were indebted to him in \$1,765.18, on which they paid him, including the Troutman judgment, \$1,590.84, leaving a balance due to him of \$178.63. On the other hand, the company claimed that it had overpaid W. M. Howard for the logs purchased from him as trustee, excluding the Troutman judgment, and in September, 1899, they procured, for the first time, a written assignment to them of this judgment, and instituted

this suit, in which they ask that the endorsement on the margin of the judgment be set aside; and that the deed from B. F. Howard to W. M. Howard, trustee, be cancelled, and the land be subjected to the payment of the Troutman judgment. The defendant by way of answer relied upon the facts recited above. The question at issue being altogether one of fact, W. M. Howard testified that in November, 1895, after the delivery of a good many logs, and after Troutman had received the dressed lumber contracted for, he asked that the mortgage be released, and was told by McKee to have Sparks release it; that he immediately went to see Sparks and Sparks said that he would see McKee before doing so, and went immediately for that purpose, and returned in a few moments, and then went with him to the courthouse and endorsed the satisfaction of the judgment. Sparks, in his deposition, admits the transaction with him testified to by W. M. Howard, and further says that when he went to see McKee that he understood him to say that the judgment had been settled by Howard and to release the lien, and that he did so; but that the next morning McKee told him that he did not mean that the judgment had been paid, but only that arrangements had been entered into by which it would be paid by Howard. McKee corroborates Sparks. But the fact remains that no steps to correct the alleged error on the part of Sparks entering the release were made before the institution of this suit, some four years later. W. M. Howard's statements are fully corroborated by W. R. Grant, who says that he was acting as sawyer for the London Manufacturing Co. at the time the Howard logs were manufactured, and that McKee told him that he had agreed to take logs from Howard and furnish dressed lumber to pay off the Troutman judgment, and that the judgment had been fully satisfied.

Under this proof the trial court entered a judgment subjecting the land to the payment of the judgment, and the manufacturing company became the purchaser at the price of their debt, interest and cost, and from that judgment defendant appeals.

We are of the opinion that the decided weight of the evidence in the case is on the side of the appellant. All the parties agree that Sparks, as attorney for Troutman, objected to Howard's cutting the timber from the land mortgaged to secure his client's debt until satisfactory arrangements had been made to secure its payment by the manufacturing company, and this was the main inducement which brought about the arrangement made with appellee. Nor is it controverted that shortly after this arrangement was entered into Troutman got the dressed lumber to satisfy his judgment. As the logs were cut from the land of the infant, it was the duty of their father and trustee to see that their price was applied first to the extinguishment of the lien against the land itself, and it is more reasonable to believe that this course would have been adopted by both appellant and appellee than that they should have applied the price of these logs in other directions. A debtor has always the right to designate the particular indebtedness to which the payments made by him are to be credited. We are, therefore, of the opinion that the trial court erred in allowing the price of these logs to be applied to other indebtedness due by Howard, as trustee, to the appellant, if such in fact existed, and leave the lien against the land to be enforced years after it had been stripped of what constituted its chief value.

For reasons indicated the judgment subjecting the land to the Troutman judgment is reversed and cause remanded, with instruction to set aside the sale made to appellees thereunder and to cancel their deed and for other steps not inconsistent with this opinion.

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ILLINOIS CENTRAL R. R. CO. v. GLASSCOCK, &c.

(Filed March 11, 1908—Not to be reported.)

Damages—Bill of exceptions—Appellees recovered a judgment against appellant for damages caused by negligence of appellant in causing and permitting oil and molasses to pollute the waters of an artificial lake and kill valuable fish therein, from which this appeal is prosecuted. It is insisted that the bill of exceptions should be stricken from the record. The admitted facts are that at the term of court at which the judgment was rendered an order was entered reciting that a bill of exceptions was tendered and signed, when in fact no bill was tendered until the first day of the succeeding term. It is claimed that this was in accordance with the practice of the judge of that court. Held—That the bill of exceptions should be stricken from the record. Sections 834 and 837, Civil Code of Practice, provide for extension of time for filing bills of exceptions, and this rule can not be changed by any rule of practice. The petition stating a cause of action, the judgment is affirmed.

W. H. Marriott, J. M. Dickinson and Pirtle & Trabue for appellant.

Sprigg & Chelf for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Nunn.

The appellee, S. D. Glasscock, and about thirty others, filed their petition in the Hardin Circuit Court against the appellant, alleging, in substance, that they were the joint owners by purchase of a certain tract of land lying near Stephensburg, in Hardin county, Kentucky, consisting of about twenty-seven acres, on which there was located a valuable lake of water covering about twelve or fifteen acres of land, and that their interest and ownership therein was known as the "Stephensburg Lake and Improvement Co.;" that they had incurred great cost and expense to purchase said lake, to remove the stumps, trees and obstructions from said lake; to stock the same with all kinds of choice fish, and to fit up the same as a desirable fishing, bathing and boating resort; that the appellant, by and through its gross negligence and carelessness, caused and permitted large tanks filled with oil and molasses, containing many thousand gallons thereof, to be thrown from the cars near and into said lake, and negligently and carelessly caused and permitted the oil and molasses contained in the tank to leak, run and flow therefrom into the lake; to poison and pollute the waters thereof and to render the same putrid, offensive and unwholesome, and by reason thereof all the fish therein, about twenty thousand pounds, were killed, smothered and destroyed, and rendered the lake unfit for boating, bathing and fishing purposes; that the lake has been thereby rendered totally unfit for any purpose whatever, to their damage in the sum of \$2,000.

Appellant filed answer, traversing each and every allegation contained in

the petition. A trial was had and the jury returned a verdict in favor of appellees for the sum of \$750, on which the court rendered judgment for appellees. Appellant filed reasons and moved the court to grant it a new trial. The court overruled the motion, the appellant taking all proper exceptions, and the case is now here on appeal. At the same term of the court at which this judgment was rendered there appears from the record this order: "Came defendant by attorney and filed herein its bill of exceptions and statements of evidence, which, having been examined and approved by the court, was signed and made part of the record." The record shows, and it is admitted, that the bill of exceptions and statement of evidence were not filed nor signed and approved by the judge at that time, nor was there an order made extending the time for filing same to any day in the succeeding term; but it is agreed that the bill of exceptions and statement of evidence were in fact signed on the first day of the succeeding March term of the court, over the objection of appellees. The record shows that appellant's counsel and the court claim that it was the custom of that court to make an order filing such bill of exceptions and statement of evidence when in fact they were not filed, with the understanding that they were to be prepared and approved after the adjournment of the court and dated back as of the date of the order filing same, and that they heard no objection on the part of appellees' counsel to such a proceeding in this case. Appellees' counsel contend that they did object.

In the case of *Newport News, &c., Co. v. Stavig*, 98 Ky., 534, which is a case in all particulars like the one before us, the court said: "The case was tried at the January term, 1893, and an order was then entered, stating that the bill of exceptions and statement of evidence were filed, signed by the judge and made a part of the record. But at the succeeding April term an order was made to the effect that at the January term no such bill or statement had in fact been filed, and a bill and statement, over the objection of the appellees, were then filed and signed by the judge as of the date of the former order. While this is said to have been the practice in that circuit, we can not approve it.

The law provides that time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term to be fixed by the court, and unless such time be given the party excepting shall prepare and file his bill, properly signed, during the term at which the judgment becomes final. These are the plain provisions of sections 834 and 837 of the Civil Code, and can not be changed by any rule of practice. To the same effect is 19 Ky. Law Rep., 1300, and 21 Ky. Law Rep., 685. For these reasons the motion of appellee to strike from the record the bill of exceptions and the statement of evidence must be sustained. The petition states a cause of action in the plaintiffs, and without a bill of exceptions and statement of evidence in the record, it must be presumed that there was no error committed on the trial.

Wherefore, the judgment is affirmed.



## GORMAN'S ADM'R V. LOUISVILLE RY. CO.

(Filed March 11, 1908—Not to be reported.)

**Street railways—Negligence—Instructions—**This action was brought to recover damages for the death of a child six years of age, resulting from injuries received while she was attempting to cross the track of appellant in front of a car in an unfrequented part of the city. A trial resulted in a verdict for defendant. On appeal it is insisted that the court erred in giving instructions defining the degree of care required to be exercised by a motorman to prevent injury to a child. Held—That the court properly instructed the jury that ordinary care means the degree of care usually exercised by ordinarily careful and prudent persons under the same or similar circumstances. Negligence is the failure to exercise ordinary care. Besides, the instruction offered by appellant contained substantially the same definition of ordinary care.

W. O. Harris, B. K. Marshall and O'Neal & O'Neal for appellant.

Fairleigh, Straus & Eagles and Kohn, Baird & Spindle for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge O'Rear.

Appellant's intestate, a child about six years old, was killed by being run over by one of appellee's cars. The neighborhood where the accident occurred was sparsely settled. There was not a crossing at the point where the child attempted to cross appellee's track when it was injured.

Appellee's motorman testified that he did not see the child till it darted in front of his car; that a large four-horse brick wagon was just ahead and to the side of the car track, and as it passed the child she attempted to cross the track. The evidence was conflicting, touching the motorman's negligence, but the jury returned a verdict for appellee. The only question presented is the correctness of the instructions. The court told the jury that it was the duty of the motorman in charge of the cars to watch the street in front of his car, so that he might avoid injury to persons upon the street, if he could do so by the exercise of ordinary care, and that if they believed from the evidence that the death of Catherine Gorman (appellant's intestate) was caused by the failure of the motorman to exercise ordinary care to discover her peril or danger from his car, and to prevent injuring her, the law was for the plaintiff. The gravamen of the negligence charged in the pleadings, and pointed out in the proof, was that the motorman had negligently failed to keep a lookout, and because of that fact the injury occurred. The duty of the motorman is stated in the instruction to be, first, to keep such a lookout on the street in front of his car so that by the exercise of ordinary care in operating his car he might avoid injury to others using the street at the same time; second, to use ordinary care to discover the peril or danger of such others as might be attempting to use the street at that point when the car was passing; and, third, to use ordinary care to prevent injuring such one.

Appellant complains because a higher degree of care was not required of the motorman. He argues that as to young children a different and higher degree of care is owing than is to adults under similar circumstances. We believe that is true. We are also of opinion that the instruction given by

the court defining "ordinary care" fairly submitted that idea to the jury, viz.: "Ordinary care means the degree of care usually exercised by ordinarily careful and prudent persons under the same or similar circumstances. Negligence is the failure to exercise ordinary care."

It might be impossible to lay down a general rule that would aptly and minutely define the care to be exercised under every conceivable state of case, nor would it be wise to attempt it. What would amount to ordinary care in operating an electric car in a sparsely settled, unfrequented part of a city might be gross negligence in a much used down-town thoroughfare. And what would be ordinary care toward an adult, under similar circumstances, might be criminal negligence toward an infant of very tender years. Ordinarily careful and prudent persons regulate their conduct by the difference in circumstances surrounding the act. This is generally known and recognized of all people. That is what makes it ordinary care. So when the jury were instructed that the motorman must regulate his conduct in operating the car by the standard of conduct and caution usually exercised by ordinarily careful and prudent persons in operating electric cars in such neighborhoods where small children were likely to be upon the streets, his full legal duty was stated.

It has been held in this State, and we believe is generally held, that operators of street cars, while held to the highest degree of care toward their passengers, are required to use but ordinary care towards others using the streets. (*Passamaneck's Adm'r v. Louisville Ry. Co.*, 98 Ky., 195; *L. & N. R. R. Co. v. Cummins' Adm'r*, 23 Ky. Law Rep., 683; *Louisville, C. & L. R. R. Co. v. Goetz's Adm'r*, 79 Ky., 449; *Sherman & Redfield on Negligence*, section 485a; *Wood on Railroads*, section 323.) If they discover the peril of the pedestrian, it is then their duty to exercise the highest degree of care to prevent his injury. (*Passamaneck's Adm'r v. Louisville Ry. Co.*, 98 Ky., 195; *Ry. Co. v. Blades*, 21 Ky. Law Rep., 668.)

But whether the law defining the degree of care in this case was fully and accurately given or not we are of the opinion that the error, if any, would not be available to appellant because in the only instruction he asked for (and which was embraced, substantially, by those given by the court of its own motion) embodied this same standard. That instruction was: "Although the jury may believe from the evidence that plaintiff's intestate, Catherine A. Gorman, was guilty of negligence which contributed to cause the injury complained of in this suit, yet if they further believe that the motorman in charge of the car did see her in time to have prevented the accident by ordinary care on his part, or if they believe from the evidence that he could by the exercise of ordinary care have seen her in time to so prevent said accident, then in either such a case the law is for the plaintiff, and the jury should so find."

This court has frequently held that when the trial court is induced to give an erroneous instruction the error can not avail the party in fault on appeal. (*Union, & Co., Co. v. Hughes*, 22 Ky. Law Rep., 560; *First National Bank v. Germania Safety Vault & Trust Co.*, 23 Ky. Law Rep., 2124; *L. & N. R. R. Co. v. Penrod's Adm'r*, 24 Ky. Law Rep., 51.)

The judgment is affirmed.

## HERRING v. JOHNSTON.

(Filed March 11, 1903—Not to be reported.)

Homestead—Execution—Husband and wife—Estoppel—A common law judgment by default was rendered against husband and wife on a note executed by them since 1894, and an execution issued thereon which was levied on a tract of land belonging to the wife, and at the sale the plaintiff, a bank, became the purchaser for less than two-thirds of its appraised value. It assigned its purchase to appellee, its attorney, and the wife, the appellant, brought this action to set aside the sale and deed on several grounds. She insists that she was only surety on the note for her husband, and had never set apart her real estate by mortgage or deed to secure the payment of the debt. Held—That having suffered judgment to go against her by default, the court will presume that it was for her debt. The defense that she was surety only was one which she might have pleaded in the former action. Failing to do so, she is now estopped. She alleges that she was prevented by appellee from redeeming her land. Held—That no offer by her or any one for her having been made until after the time for redemption had expired, and the agreement on the part of the bank to permit the redemption was without consideration and unenforceable. She insists that she was entitled to a homestead in the land, and that none had been set apart to her. Held—That she is entitled to have a homestead set apart to her out of her land as the family residence was on her land. Although it is the duty of the husband to provide a home for the family, if he fail to do so she may claim a homestead out of her own land. An abandonment of the homestead for temporary purposes only does not prevent her from claiming same as exempt. The statute having enlarged the responsibility of married women as to debts, it is but fair and just that her rights to exemptions should be enlarged.

W. I. Williams for appellant.

J. W. Alcorn for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge O'Rear.

A common law judgment was rendered against appellant, Myrtle Herring, and her husband, James Herring, at the suit of the Citizens National Bank of Lancaster. An execution issued upon the judgment, directed to the county of Garrard, was levied upon the tract of land owned by appellant. At the sale the bank became the purchaser at less than two-thirds of the appraised value of the land. Appellant failed to redeem within the year allowed by the statute. Subsequently the bank sold the land and the sheriff conveyed it to appellee, who had been the bank's attorney in the above-named suit.

This suit was brought by appellant to set aside the sale and to cancel the sheriff's deed, upon three grounds:

1st. That the judgment under which the land was sold was rendered upon a note executed by her and her husband, being the debt of her husband, that she had signed the note as surety only, and that she had never set apart by deed of mortgage or other conveyance any part of her estate to secure the payment of the debt.

2d. That the judgment creditor, the Citizens National Bank, granted the privilege of redeeming the land for the payment of the debt, and that she was prevented from doing so by the acts of appellee Johnston.

3d. That she was entitled to a homestead in the land at the time of the sale, and that none had been set apart to her.

We are of opinion that the first ground relied upon is unavailing. Under the act of 1894, sections 2127-2128, Kentucky Statutes, a married woman is given the power to contract debts on her own behalf, and to sue and be sued as though she were single. Having suffered the judgment to go against her in that action, the court will presume that it was for her debt; or, in other words, she was concluded by the judgment in that action. The defense that she was surety only on the debt was one which she might have pleaded in the former action. Failing to do so, under familiar principle, she is now estopped. (*Wren v. Ficklin*, 22 Ky. Law Rep., 1085.)

As to the second ground, it appears that the agreement of the bank to allow appellant to redeem was made after her right of redemption had expired. It was a voluntary parol agreement, without consideration, and not binding upon either party. The bank could not have enforced it against her, and she consequently can not now enforce it against the bank or its vendee. We are furthermore satisfied that the agreement was never had with the bank by appellant, or at her instance, or with her knowledge. Two of her brothers-in-law volunteered to redeem the land from the bank. The bank officials supposed it was for appellant. Whether these brothers-in-law intended to give appellant the benefit of their assignment from the bank, had they procured it, is not material now, because we are satisfied from the evidence that they had waived any claim they might have had to buy the land by their failure to comply within the time fixed by the bank's proposition. Nor do we see anything in the record that, properly construed, can reflect upon the fair dealing and proper conduct of appellee in the premises.

Appellant at the time of the levy of the execution upon her land, and of its sale thereunder, was a married woman with a family. The family was composed of appellant, her husband and a number of infant children. Appellant was the debtor in this case. She was so treated by the bank. By suffering the default judgment upon the note, we have just held that she so admitted herself. The statute (section 1702, Kentucky Statutes) exempts from ordinary debts a homestead. Unlike the statutes of many of the States, this exemption is not to "the head of the family," nor to the "householder," but it is "so much land, including the dwelling house and appurtenances owned by the debtors, who are actually bona fide housekeepers, with a family, resident in this Commonwealth, as shall not exceed in value \$1,000."

It is true where the husband is living he is still bound, notwithstanding the removal of the most of the former legal disabilities of married women, to provide a home and support for his family, his wife included. But many of them do not do it. Married women have been given more and more rights over their property, and more power to contract and trade as if single. The design of the legislature has been to enlarge their opportunities and privileges to the end that their conditions might be improved. It could never have been their purpose to give married women the almost unrestricted right to contract debts, and not to afford to them the same exemptions from debt that are given to men. If the woman assumes debts, having a family, she ought to be, and is, entitled to just the same exemptions as a man with a family. If her husband can not, or will not, support her and her children,

she must do it herself. When she becomes the debtor, the statute is for her protection, and for the protection of those dependent upon her. (Waples' Homestead and Exemptions, 125.) The legislature has expressly recognized that the married woman may own a "homestead" in her own right by section 1708 of the Kentucky Statutes, providing that "the homestead of a woman shall, in like manner, be for the use of her surviving husband and her children," etc. (Hemphill v. Haas, & Co., 88 Ky., 492; Ellis v. Davis, 90 Ky., 183.)

We are of opinion that appellant was entitled to the homestead exemptions provided by section 1702 unless she had abandoned it. It is not necessary to determine now, and we do not decide, that both the wife and her husband are entitled each to a separate homestead of \$1,000 in their lands respectively. That question is not presented in this case, although the husband owned a small tract of land adjoining his wife's, but without a dwelling house on it, and which had never been occupied by either of them as a homestead. It was claimed that appellant had abandoned her homestead. The facts on this point are shown to be that a short while before the levy of the execution she removed from the premises in question, which were situated in a remote country neighborhood, to the city of Danville. She testified that this removal was temporary only, and was for the express purpose of availing her children of educational advantages not to be had in their country location; that she intended to return to her home. Whether she had abandoned that intention since the execution sale does not appear to us to be material to this case. It was held in Cincinnati Leaf Tobacco Warehouse Co. v. Thompson, 105 Ky., 627 (20 Ky. Law Rep., 1439), that such a temporary removal by the debtor was not an abandonment of his homestead. We are of opinion that the circuit court erred in denying appellant a homestead in the premises.

The judgment is reversed and cause remanded, with direction to enter a judgment in favor of appellant cancelling the sheriff's deed to appellee and the sale under the execution.

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KING'S ADM'R v. COVINGTON, FLEMINGSBURG AND ASHLAND  
RY. CO.

(Filed March 11, 1903—Not to be reported.)

Railroads—Negligence—Appellant, as administrator of K., brought this action to recover damages for injuries received by him while in the employ of appellee; that he was watchman, and it was also his duty to aid in replacing cars on the track that might be derailed under direction of appellant's manager; that on the day he received the injuries he was directed to board a hand car and go to help about a car that was derailed; that after he started the manager had a large heavy truck filled with men and started to the same place; that the truck was following close behind the hand car and had no breaks on it; that while the hand car was going down a grade, on account of the defective track, the hand car became derailed, throwing K. on the track, inflicting serious injuries, and that before he could get off the track the truck ran over him and killed him. A demurrer was sustained to the petition and petition dismissed, from which this appeal is prosecuted. Held—That the petition states a cause of action, showing gross negligence on the part of those in charge of the truck.

W. G. Dearing and G. A. Cassidy for appellant.

John P. McCartney for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Chief Justice Burnam.

The plaintiff, Amelia King, as administrator of P. H. King, instituted this suit against the defendant, the Covington, Flemingsburg & Ashland Ry. Co., to recover damages for the death of her husband, which resulted from injuries received on the railroad of appellee while he was in their employ. A general demurrer was interposed and sustained to her amended petition, and plaintiff declining to plead further her petition was dismissed, and she has appealed.

The petition alleges in substance that plaintiff's intestate, P. H. King, was in the employ of the defendant as night watchman; and that in addition thereto, when required, he assisted in putting engines and cars which had been derailed back on the track; that on the 13th of May, 1901, one of the defendant's trains ran off the track between Flemingsburg and Poplar Plains, and that by direction of defendant's manager he started on a down grade on a hand car from their engine house towards the place of derailment of the train; that shortly afterwards the manager had a large truck, weighing about 4,000 pounds, which was not equipped with brakes or other appliances of any kind for stopping it, placed upon the track, loaded it with men and started it in the same direction in which the car on which he was riding was going; and that while the hand car on which he was passing over a long and high trestle at a rapid rate, it came to a point on the road where the rails on the track were not properly joined or aligned, and in consequence thereof the hand car suddenly jumped the track, throwing him off on the roadbed, and that before he could get off the heavy truck, which was following, ran over him, inflicting injuries from which he shortly died.

The demurrer admits that plaintiff's intestate was in the employ of the company and that his duty required him, when called upon by his superior, to go to the assistance of derailed trains; that in obedience to a request from the manager of the road he was on his way to the scene of the wreck on a hand car, and that it left the track by reason of its defective condition; and that he was thrown upon the track and seriously injured; and that before he could escape a heavy truck, loaded with men destined for the same place, and for the same purpose, which was not equipped with brakes of any kind, ran over him and killed him. In our opinion this petition states a good cause of action. If its averments are true, it was plaintiff's intestate's duty to obey the orders of defendant's manager on the occasion in question; and if in consequence thereof he was injured, either on account of the defective condition of the track or because of the company choosing to send a heavy truck without brakes after him on a down grade, so close to the hand car on which he was traveling as to make it impossible for those in charge of the truck to arrest its progress in time to have avoided injuring him, the company was guilty of gross negligence.

For the reasons indicated the judgment is reversed and cause remanded, with instructions to overrule the demurrer.

1944 COMMONWEALTH V. HAMILTON'S TRUSTEE, &C.

COMMONWEALTH v. HAMILTON'S TRUSTEE, &c.

(Filed March 11, 1908—Not to be reported.)

Assessment for taxation—Statute of limitation—In 1897 the auditor's agent filed a statement in the Fayette County Court, alleging that 470 acres of land had been omitted to be assessed for the year 1895, and caused summons to be issued thereon against "Mrs. Emma Hamilton, trustee for Archie Hamilton," which was executed upon her. The proceeding was continued until 1901, when summons was issued against her individually and as guardian of Archie L. and Amelia Hamilton, and against the infants to show cause why the assessment of said land should not be made for 1895. The county court assessed the property for 1895, and an appeal was prosecuted to the circuit court, where the proceeding was dismissed. Held—That the lower court properly dismissed the proceeding as to all except Mrs. Emma Hamilton, under section 4021, Kentucky Statutes, for the reason that more than five years had elapsed after failure to assess the property before the proceedings were commenced against them. But as to Mrs. Hamilton the proceedings were begun against her in time, and as she was the owner of the first freehold in one-third of the land she is bound for the payment of the taxes thereon under section 4049, Kentucky Statutes. Although she was described in the proceeding as trustee, she, in her individual capacity, was the only defendant in those proceedings.

H. T. Duncan, Jr., for appellant.

Morton, Darnall & Morton for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Nunn.

This was a proceeding begun in the Fayette County Court by the auditor's agent to cause the assessment for taxation of 470 acres of land belonging to the appellees, valued at \$30,000, which had been omitted to be assessed for the year 1895. It had been regularly assessed before that year and ever since at that price. It seems that the omission for that year was caused by a change of trustees for the estate of Archie L. Hamilton.

On the 14th day of August, 1897, the auditor's agent filed with the county court a statement alleging that the 470 acres of land had been omitted to be assessed for the year 1895, and caused summons to be issued thereon against "Mrs. Emma Hamilton, trustee of Archie Hamilton," which was executed by the sheriff upon her. The proceeding was continued from that time until January 24, 1901, when the auditor's agent filed an amended statement with the county court and caused a summons to be issued thereon against Mrs. Emma Hamilton, the Security Trust and Safety Vault Co., Mrs. Emma Hamilton, guardian of Archie L. and Amelia Hamilton, and Archie and Amelia Hamilton, to appear and show cause why the land should not be assessed for the year 1895 at the price named. They all appeared, and on a hearing of the case the county court assessed the property in accordance with the statements of the auditor's agent, and from that order the defendants there, appellees here, appealed to the circuit court, and that court sustained their defense and dismissed the proceedings, from which judgment the Commonwealth appealed to this court.

We are of the opinion that the lower court was correct in dismissing the proceedings against all the defendants except Mrs. Emma Hamilton, for the

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reason that more than five years had elapsed after the failure to assess the property before the proceedings were commenced against them. Section 4081 of the statutes reads as follows: \* \* \* "When any lands or improvements shall not be assessed in any one year, it may be assessed retrospectively in the manner provided by law for that year, at any time not later than five years thereafter."

But the court erred in dismissing the proceedings as to Mrs. Emma Hamilton, it appearing from the record that she owns a dower interest of one-third in the land, and she should pay the taxes thereon. The proceedings were commenced against her in the year 1897, and she was summoned to answer the proceedings. It is true that she was summoned as "Mrs. Emma Hamilton, trustee of Archie Hamilton," but the words "trustee of Archie Hamilton" were only descriptive of the person, and she in her individual capacity was the only defendant in those proceedings. The record shows that the proceedings were continued at her request, and no further steps were taken until January, 1901, when the auditor's agent filed an amended statement, giving a more perfect description of the property and the ownership therein, in nowise changing the cause of action as to her except to decrease her liability for the taxes from the whole to one-third.

Section 4049 of the Kentucky Statutes is as follows: "Real estate, or any interest therein, shall be listed in the county or district where situated, against the owner of the first freehold estate therein." \* \* \*

The appellee, Mrs. Emma Hamilton, owning the first freehold in one-third of the land, is bound for the payment of the taxes thereon. But even if she had given in the whole of the survey for taxes, having no interest therein except as to one third, such action by her would not have been binding upon the children or remaindermen. (Payne, &c., By Guardian v. Arthur, Trustee, 16 Ky. Law Rep., 785.)

For these reasons the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

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RICE & TURNER v. STRANGE, &c.

(Filed March 11, 1903—Not to be reported.)

Wills—Power of Executor to borrow money—A married woman devised to her children, who were infants, all of her property, consisting of a tract of seventy-four acres of land, farming implements, live stock and household furniture. The will contained this clause: "I want my husband, David Strange, to have charge of all of the above property, both real and personal, to keep and use to the best advantage for the benefit of my children during his lifetime, and at his death to be sold and the money to be divided amongst the five children equally." Appellant brought this suit to collect a loan of \$250 made to the husband, alleged to have been made for the benefit of the children. Held—That the husband held the land as executor, and had no authority as such to charge it by taking a loan on same.

D. T. Edwards for appellants.

Richard Godson for appellees.

Appeal from Woodford Circuit Court.



## Opinion of the court by Judge O'Rear.

The will of Georgia Belle Strange devised to her children, who were infants, all of her property, consisting of a small tract of about seventy-four acres of land, farming implements, some live stock and household furniture. The will contained this clause: "I want my husband, David Strange, to have charge of all the above property, both real and personal, to keep and use to the best advantage for the benefit of my children during his lifetime, and at his death to be sold, and the money to be divided amongst the five children equally as aforesaid."

It is averred that appellants loaned and advanced \$250 to David Strange, as executor of his deceased wife's estate, to enable him to care for and preserve the tobacco crop raised by him on the said premises, and to enable him to procure seed to sow wheat upon a portion of the land. It was stated in the petition that the estate had no money or means with which to care for the tobacco crop and to seed the land; and that it was necessary that the means be procured to preserve the estate to its beneficiaries. This money was furnished within about eighteen months after the date of the will. This suit was brought to subject the estate to the payment of the above-named sum, upon the theory that the executor, as trustee, had the power and was under the duty to operate the farm, and, if necessary, to incur this liability and make it a charge upon the land and other estate. The court is of opinion that David Strange held the estate at the time he borrowed the money as executor, and not as testamentary trustee. (Johnson v. Fuquay, 1 Dana, 514; Warfield v. Brand's Adm'r, 18 Bush, 77.)

An executor has no power to bind the estate represented by him by borrowing money for its use unless he is authorized to do so by the will, or in particular instances by an order of a court of competent jurisdiction. An executory contract of an executor or administrator, if made on a new and independent consideration moving between the promisee and the personal representative as promisor, is the latter's personal contract, and can not, in the absence of authority given by the statute or the will of the decedent, bind the estate. The estate is not bound, not so much because of lack of consideration as for the want of power in the personal representative to bind it in that character of transaction.

The judgment of the circuit court sustaining a demurrer of the guardian ad litem to the appellant's petition, and dismissing it, is affirmed.

## KING &amp; KING v. BALLOU.

(Filed March 11, 1903—Not to be reported.)

Husband and wife—Agents—Specific performance of contract—A married woman being a member of a firm had the right to make a contract for the purchase of land under section 2128, Kentucky Statutes, whether her husband approved of it or not and whether her partner approved of it or not, and where there was a mistake in the description of the lot bought a court of equity has the right, in a suit for specific performance of contract, to correct the mistake and give judgment for the balance of the purchase money due.

O. H. Waddle for appellants.

W. A. Morrow for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee sold to appellants two lots of land in the town of Burnside, and executed a bond for title. The purchase money was not then paid. This suit was by appellee to collect the balance of the purchase money owing, and to correct what he alleges was a mistake in the bond for title. The transaction took place between a brother of appellee, representing him as his agent, and a member of the firm of appellants. The agent wrote appellee that he had sold to appellants two lots in Burnside for \$185. Appellee drew up and signed the bond for title, in which he described the lots as being in the town of Burnside, one on the north of the depot and the other on the south. The evidence is conclusive that the agent did not sell, nor did appellants buy, the last named lot, nor did either of the parties to the trade understand that lot was included. This mistake seems to have grown out of the trader's calling the first named lot "lying on both sides of the railroad" two lots, while appellee regarded it as one lot only.

Appellee's agent testifies to the particulars of the sale, and says that the bond mistakenly includes a lot not intended to be sold. The member of the firm with whom the trade was made did not testify. Instead, another, the general manager of appellant firm, testified that he executed the note, and that the purchase was made subject to his ratification; that appellant firm is composed of the wife and the sister-in-law of the manager; that when his wife reported that she had bought the lot she did not claim to have bought the one south of the depot; that when he saw the bond he approved the purchase, relying on its recitals. He says that his wife wanted to buy the lot, but that he did not.

While an agent may buy subject to his principal's ratification, when the principal buys it is immaterial whether the agent ratifies or approves it, or does not. Where a married woman is in business on her own account under the statute now in force (section 2128, Kentucky Statutes), she can buy land and bind herself and her estate for it, even though her husband disapproves the transaction. It, therefore, appears that the understanding appellants' agent had about the trade was not material, as he was not making it. But, appellee's agent and the purchaser, Mrs. King, having agreed about the lot, and the bond containing an unquestioned mistake as to one of the lots named, the circuit court properly corrected the error and rendered judgment for the balance of the unpaid purchase money.

Judgment affirmed, with damages.

HAYS, &c. v. ISON, &c.

(Filed March 12, 1903—Not to be reported.)

Title — Evidence — Appellants brought this action to recover damages against appellees for cutting and destroying timber on land claimed by appellants. The answer denies that appellants own the land. At the close of appellants evidence the court gave a peremptory instruction for appellees, from which this appeal is prosecuted. Held—That the court properly gave

an instruction to find for defendants as appellants failed to produce in evidence the deed under which they claimed. A map in the record which was not introduced in evidence on the trial can not be considered on appeal. Said map was incompetent as evidence as no evidence was introduced to show that the notes from which the map was made were correct or true.

Hall & Baker, David Hays, W. F. Hall and Ira Fields for appellants.

J. G. Forrester for appellees.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Barker.

The appellants, David Hays and Jonathan L. Holcomb, instituted this action in the Letcher Circuit Court against the appellees, D. D. Ison and Jesse Holcomb, to recover damages for a trespass alleged to have been committed by them on the property of appellants. The petition states that David Hays and Jonathan L. Holcomb, "at all times on and after the 6th day of October, 1899, were, and are, the owners of about two hundred poplar, ash and cucumber trees standing on the land of John Holcomb. These lands are situated in Letcher county, Kentucky." Then follows a description by metes and bounds, "that the defendants, D. D. Ison and Jesse Holcomb, by themselves, agents and employes, on the 9th day of October, 1899, and since plaintiff's purchase of said timber, unlawfully, forcibly and without right, entered upon said land and cut down 117 of said trees, to plaintiff's damage in the sum of \$500."

The answer of appellees, who were defendants below, puts in issue the ownership of appellants to the trees in dispute, and also denies the trespass in manner and form as stated in the petition. By affirmative allegations it sets up title in appellee, Jesse Holcomb, to the land on which the trees are said to have been cut, and further pleads that the contract of purchase of the trees in question was champertous, because the land on which they stood was in the actual, adverse possession of Jesse Holcomb at the time it was made. The reply of appellants placed in issue all of the affirmative allegations of the answer.

On trial of the case in the Letcher Circuit Court, after appellants had introduced all of their evidence, appellees moved the court for a peremptory instruction to the jury to find a verdict in their favor, which was sustained. Appellants' motion for a new trial having been overruled, they have brought the case to this court on appeal. The only question involved here is the correctness of the judgment of the court in sustaining the motion of appellees for a peremptory instruction. The bill of exceptions recites that all of the evidence introduced on the trial of the case is contained in the transcript of the notes of the official stenographer, which is filed in the record and properly certified. We find attached to the transcript in this case a large map, and several of the witnesses speak as if they had before them a map of the land in dispute, but it nowhere appears that any map was introduced in the evidence, or that the particular map attached to the record was the one used on the trial in the circuit court. On the subject of some the map, which appears to have been used at the trial, plaintiffs introduced Steven Fairchild, who testifies as follows:

"Q. Tell the jury whether or not you surveyed the land and made that map."

"A. Yes, sir."

"Q. Tell the jury what you know about the correctness of that map?"

"A. I made the map from my brother's notes, and I presume it is correct."

No evidence was introduced to show that the notes from which the map was made were correct or true. It thus appears that the map used by the witnesses was neither put in evidence nor was its correctness established by testimony. The appellants claim title to the trees cut down by deed from John Holcomb, who, they allege, is the owner of the land on which the trees stood. Although their title to the trees was put in issue by the answer, the deed from John Holcomb to them was not introduced as evidence upon the trial. The appellant, David Hays, in testifying, speaks of this deed as if he had it in his hands at the time his testimony was given, but the deed itself was not introduced in evidence, nor is it copied in the transcript. There seems to have been a survey made by one James Caudill, the official surveyor of Letcher county, of the property in question, for the purpose of the trial to be had between appellants and appellees; and this officer was introduced for the purpose of testifying with reference to this survey and his report, but the report was not introduced as evidence, or read to the jury, so far as the bill of exceptions show.

The ownership of the timber described in the petition having been placed in issue by the answer, it was necessary for the appellants to establish their disputed title by an exhibition of the deed from John Holcomb, under which they claim. As the bill of exceptions shows they failed to do this, the circuit judge was, of necessity, compelled to sustain the motion for a peremptory instruction to the jury to find for the defendant.

Wherefore, the judgment is affirmed.

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MARKS & STIX v. GAUZE, &c.

(Filed March 12, 1903—Not to be reported.)

Attachment—Surety—Indemnity—This action was instituted under section 237, Civil Code of Practice, for indemnity, alleging that appellees were principals on a note with W. as surety, and sued out an attachment on the ground that appellees were about to remove from the State and also remove their property, not leaving enough to satisfy the debt sued on or claims of other creditors. The attachment was levied on a stock of goods and the petition was finally dismissed and attachment discharged on the ground claimed by defendants, that the petition was fatally defective because it failed to allege that neither of the defendant's had sufficient property in this State subject to execution to satisfy the demand sued on, and that the collection thereof would be endangered by delay in obtaining a judgment or return of no property found. On appeal, Held—That the petition was sufficient. The strict rule as to the grounds of attachment generally does not apply to actions brought under this section of the Code. In this state of case, notwithstanding there may be other co-obligors amply good for the debt, and it is not endangered by delay, the creditor is entitled to avail himself of this remedy of attachment, and all that he has to allege with reference to the particular debtor to entitle him to the remedy is that he has

done, or about to do, some of the acts denounced in subsections 3, 4, 5, 6, 7 and 8 of section 194.

J. G. Whitt and J. E. Clark for appellants.

W. A. Young, G. B. Caywood and E. W. Senff for appellees.

Appeal from Rowan Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 12th day of July, 1901, appellants, Marks & Stix, brought this suit in equity in the Rowan Circuit Court against the appellees upon a note for \$479.25, dated the 2d of February, 1901, and due on the 2d day of August, 1901, with interest from date, which had been executed and delivered to them by the appellees. The suit was brought under section 237 of the Civil Code for indemnity. The petition is in the usual form, and then goes on to allege that the defendants, A. J. Gauze and Martha Gauze, are about to depart from the State, and are about to move out of the State their property, or a material part thereof, not leaving enough therein to satisfy the claim sued on, or claims of other creditors; that A. J. and Martha Gauze are principals in the note and Wilson security. The necessary affidavit, bond, etc., having been executed, a general attachment issued against the property of the defendants, A. J. and Martha Gauze, which was levied upon a stock of goods in the house of the defendants, and which was discharged upon motion of the defendants by the circuit judge of that judicial district, on the 20th day of July, 1901, and which was reinstated by a judge of this court on the first day of August thereafter. The defendant, Gauze, and wife filed a general demurrer to plaintiff's petition, which was sustained, and plaintiff declining to plead further, his petition was dismissed, and from that judgment they appeal.

It is insisted that the petition is fatally defective, in that it fails to allege that neither of the defendants had sufficient property in this State subject to execution sufficient to satisfy the demand sued on; and that the collection thereof would be endangered by delay in obtaining a judgment or return of no property found. In support of this contention they refer to *Francis v. Burnett*, 84 Ky., 80, and *Dunn's Trustee v. McAlpin & Co.*, 90 Ky., 28. The attachment in both of the cases relied on was sued out under subsection 8 of section 194 of the Civil Code. This ground of attachment is not based upon the idea that the defendant is a wrongdoer, or contemplated any wrongdoing with reference to his creditors. He may be subjected to this remedy, though his honesty is unquestioned. And it was very properly held that to authorize an attachment upon this ground, where two or more obligors were sued on the same debt, it was not sufficient to allege that one of them did not have sufficient property in the State subject to execution to satisfy the demand, and that it would be endangered by delay, etc., but that this allegation must be made as to each of the joint obligors to authorize an attachment.

This proceeding was not instituted under the section on which those suits were predicated, but under section 237 of the Civil Code, which reads: "Before a debt or liability upon a contract becomes due or matures, an equitable action for indemnity may be brought by a creditor against his debtor, by a surety against his principal; or by one who is jointly liable with another for such debt or liability against the latter. \* \* \*

"Subsection 2. If there exists against the defendant any of the grounds for an attachment, which are mentioned in subsections 3, 4, 5, 6, 7 and 8 of section 194."

A wholly different state of fact is presented where one of several co-obligors is about to dispose of his property with a fraudulent intent to cheat his creditors. In this state of case, notwithstanding there may be other co-obligors amply good for the debt, and it is not endangered by delay, etc., the creditor is entitled to avail himself of the remedy of attachment, and all that he has to allege with reference to the particular debtor to entitle him to the remedy is that he has done, or is about to do, some of the acts denounced in subsections 3, 4, 5, 6, 7 and 8 of section 194. In our opinion the petition contains every averment necessary to support a cause of action, and the trial court erred in sustaining a demurrer.

For reasons indicated the judgment is reversed and cause remanded, with instructions to overrule the demurrer.

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CHOWNING v. HOWSER, &c.

(Filed March 12, 1903—Not to be reported.)

Conveyances—Undue influence—H., an old man whose wife was dead, and who had no children or any one to live with or care for him, induced appellant, a nephew, who lived some distance from him, to sell his farm and remove with his wife to the farm of H., and live with him and care for him during the remainder of his life, and agreed to convey to appellant 112 acres of land if he would come and live with him. Appellant sold his farm and removed to the farm of H., and H. executed a deed of conveyance in accordance with his agreement. The parties lived together for nearly five years, and seem to be satisfied with the arrangement. This suit was instituted by a nephew to set aside this deed, alleging that H. was feeble in mind and body, and the nephew obtained the deed by fraud and undue influence. Held—That the proof does not sustain the charge that the deed was executed through fraud or undue influence.

Gilbert, Peak & Gilbert for appellant.

J. C. Beckham & Son, J. W. Crume and T. L. Edelen for appellees.

Appeal from Spencer Circuit Court.

Opinion of the court by Judge Hobson.

Bradford Howser died intestate a resident of Spencer county in December, 1890, without issue. His wife had died some years before. This suit was filed on October 20, 1901, by B. H. Howser, who was his nephew and one of his heirs at law, to set aside a deed made by the intestate to C. R. Chowning, another nephew, for a tract of 112 acres of land, on the ground that the deed was obtained when the intestate was feeble in mind and body, by fraud and undue influence. The allegations of the petition were denied, and on final trial the court set the deed aside.

The deed was executed on February 23, 1895. The grantor, Bradford Howser, was at this time seventy-three years old. He owned about 200 acres of land, worth, say, \$25 an acre; he had something like \$1,400 in money; his wife had died some years before; they had no children, and after his wife's

death a man named Stewart lived with him for a year or two; Stewart moved away and he then remained at home, keeping a negro man with him for some months. Chowning, who was his nephew and only a few years younger than he, lived in the neighborhood on a tract of his own; Chowning had no children with him, and the uncle, Bradford Howser, proposed to him that if he would sell his place and move to the uncle's place and take care of him as long as he lived he would deed him the 112 acres in controversy. It was suggested to the old gentleman by a mutual friend, who was present, that he sell his place and come and live with Chowning at Chowning's home. He said no; his land was better than Chowning's, and he wanted to be at his old home, and he wanted Chowning to have the place. Chowning hesitated to sell his place, but after the second visit of his uncle agreed to the arrangement, sold his farm and moved to the uncle's place. The uncle got a surveyor to come and run off the 112 acres he was to convey to Chowning, and went himself to a neighboring town and had the deed written, Chowning not being present. The next day he and Chowning went in together, and the deed was read to Chowning. They then went before the clerk; the uncle acknowledged the deed and it was put to record. From that time until his death he made his home with Chowning, and no question was made of the fairness of the transaction until some time after his death. The consideration of the deed as originally drawn by the draftsman was thus stated: "For and in consideration of the sum of \$1 cash in hand paid, the receipt of which is hereby acknowledged, and for the further consideration of Bradford Howser making his home during his natural life with C. R. Chowning, his heirs or assigns, on the property this day conveyed from said Howser to said Chowning," etc.

When it was read to the old man, Chowning not being present, he suggested to the draftsman that \$1,000 would sound better, and at his suggestion it was changed so as to read \$1,000 instead of \$1. When it was read to Chowning the next morning he at once said that this had not been mentioned to him, and the uncle stated that he was not to pay anything. There is some proof in the record, on behalf of the appellees, showing that from his youth Bradford Howser was subject to spells, during which he was not competent to transact business; but even the evidence for appellees shows pretty conclusively that at other times he was a man of good sense and capable of attending to his business. He had made what he had. He had always transacted his own affairs, and from the record it is apparent that those who knew him did not question his power to dispose of his property according to a settled purpose of his own. His family physician and a number of his neighbors, whose testimony was taken for appellant, testify that he was a man of strong mind, or at least of average capacity. Other persons traded with him, and two of the witnesses, whose testimony was taken for appellees, seem to have contemplated making an arrangement with him about taking care of him without any idea of his incapacity to contract with them. The testimony of the friend, who was present when the arrangement with Chowning was proposed, the surveyor of the land, the draftsman of the deed, the clerk who took the acknowledgment, all testify to his capacity at the time of the transaction, and there is in fact no contrary evidence worth considering, except such as relates to conduct at other times, in

many cases years before, when he was in one of the spells referred to. He was an ignorant man; he had many notions that a man of more intelligence would not have entertained, but that he had sufficient capacity to make a contract the great preponderance of the evidence establishes beyond doubt. The direct testimony of the witness on this subject is sustained by the circumstances disclosed by the proof.

There is an utter want of proof that any undue influence was exercised by Chowning, or that any fraud was practiced by him in the obtaining of the deed. The proposition for the arrangement came from the uncle, and was pressed by him. Chowning then lived at some distance from him; the old man was alone; he had but one brother surviving, who lived in Missouri; he was apparently not very friendly with appellee, B. H. Howser, the nephew who brought this suit, and declared that he should have none of his estate. He was attached to Chowning and wife, and it was important for him in his declining years to have somebody with him who would treat him kindly and do for him the tender offices that affection only will perform for the old. He had a cancer on his nose; it was uncertain how long he would live, or what his condition would be during that time, and if he had lived out his expectancy of life Chowning would have well earned the value of the farm in taking care of him. Chowning and his wife and the old man constituted the family. We think the proof shows unquestionably that the old man was kindly treated, and was satisfied with the arrangement. He so declared on numerous occasions, and also declared the nature of the contract made with Chowning. The people who lived in the house from time to time with them, or worked on the farm, testify to a state of facts showing that the old man got at the hands of Chowning and his wife what he wanted. It is true he carried in his own wood; some times made up his own bed; he often bought sugar or coffee, or other things; but all this he did of his own volition. It is also true that after his death but \$40 in money came to the hands of his administrator, but there is an utter want of evidence to show what had become of the money, or that Chowning received it. The fact is shown that he was in the habit of hiding his money around, and it also appears that he lent a niece \$600, which she testifies she paid back to him in small sums from time to time, except what she paid to his administrator after his death.

Under all the evidence it seems to us the arrangement made with Chowning was not an unreasonable one for the old man to make. They were both not far from the same age; the old man was of a disposition that everybody could not get along with him. He had no near relations, and he was in a condition in which he needed a home and provision against the infirmities of coming years. He had a right to secure himself in these by a disposition of his property if he saw fit. Want of capacity or fraud or undue influence is not presumed without proof. The law presumes a man sane until the contrary is proved. It presumes a contract was fairly made unless undue influence is shown. It is not presumed that a grantee practiced a fraud in a transaction with the grantor; on the contrary, fraud must be established by positive proof, or by circumstances which can not reasonably be reconciled with the presumption of fair dealing. The evidence before us utterly fails to overthrow the presumption in favor of the deed. On the contrary, taken as a whole, it preponderates on the side of appellee.

The judgment, therefore, cancelling the deed is reversed, with directions to dismiss the petition.



OLLIGES v. KENTUCKY CITIZENS BUILDING AND LOAN  
ASSOCIATION'S ASS'EE.

(Filed March 12, 1903—Not to be reported.)

Building and loan association's—Expenses and losses—Usury—Appellant was a borrowing member of appellee and borrowed from it \$900, and made the last payment of premiums on it in November, 1893, and in February, 1896, she had a settlement with it, and paid all amounts claimed of her. Within one year thereafter she brought this action to recover usury paid. Shortly after the suit was brought the association made an assignment for the benefit of its creditors. On a former appeal this court decided that appellant was only chargeable with her share of losses and expenses that were incurred prior to November, 1893, when she ceased to be a member, and on a return of the case the commissioner was given directions to ascertain and report such losses and expenses and amount of usury paid. He made a report, showing that appellant was entitled to \$344.60. The court sustained exceptions to this report and a re reference was had, and the commissioner reported that appellee owed appellant only \$1.70. This report was confirmed and judgment rendered in accordance therewith, from which this appeal is prosecuted, and appellant also asks that judgment be entered in her favor for the balance shown to be due her by the first report. Held—That the court erred in charging appellant with any part of uncollected usury as losses, and the proof does not satisfactorily show that the association was insolvent in November, 1893, or that the legitimate losses and expenses prior to that date exceeded \$1 per month that she paid as expenses. She is entitled to have judgment entered in her favor for \$344.60.

C. B. Blakey for appellant.

Phelps &amp; Thum and S. E. Sloss for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Burnam.

This is the second time this case has been brought to this court on appeal. The opinion in the former appeal is reported in 28 Ky. Law Rep., 2067. The questions involved upon the appeal have been so frequently decided that it is only necessary that a summary of the facts leading up to the judgment appealed from should be stated to enable the court to correctly determine the legal questions involved.

On the 2d day of May, 1892, the appellant borrowed from the appellee \$900, and executed her note therefor, secured by a mortgage on certain real estate, and at the same time subscribed for ten shares of stock of the association. At the beginning of her dealings with the company there was deducted from the \$900 loaned her \$55, the amount of money actually received by her being \$845. She made sixteen monthly payments of \$15 as interest and premiums, the last being made on the 30th day of November, 1893. On the 7th day of February, 1896, she had a final settlement with the company, at which time she surrendered to them for cancellation her certificate of stock, which was valued at \$134.80, and paid to them the additional sum of \$1.-033.50, and the association then cancelled the mortgage held by them upon her property. On the 4th day of February, 1897, she instituted this suit against the association to recover \$277.98 of usury collected from her by the association. On the 29th of June, 1897, the association made a general deed

of assignment for the benefit of its creditors to the appellee, W. R. Logan. And on the 2d day of July, 1897, he instituted a suit for the settlement of the assigned estate. On the 1st of February, 1898, the assignee filed an answer to the suit for usury, and subsequently this suit was consolidated with the suit for a settlement of the assigned estate brought by the assignee. The case was then submitted upon appellant's motion for judgment, which the chancellor overruled upon the ground that she should be charged with her share of the losses and the expense of the business, and subsequently dismissed her petition. That judgment was reversed by this court, the court holding that whilst appellant was properly chargeable with her proportionate share of the expenses and losses of the association up to the date of her withdrawal therefrom, she was entitled to have these expenses clearly ascertained and credited upon what was due her from the company. After the return of the case to the lower court it was referred to the master commissioner to ascertain the amount due appellant. Under that order the commissioner reported that appellee owed appellant \$844.50, with interest from the 24th of June, 1902. Numerous exceptions were filed to this report, and the trial court decided that appellant was entitled to no credit for the money paid by her on her stock; that she should be charged with all dividends declared on her stock, whether paid to her or not; that she was not entitled to a credit for the \$10 paid by her to the association as an admission fee, and that she should be charged \$32.55, which the court found to be her proportionate share of the losses sustained by the association during her connection therewith, and remanded the case to the commissioner, with instructions to report in accordance with his rulings upon these exceptions. In pursuance to the second order of reference the commissioner reported appellee indebted to appellant in \$1.70, and judgment was entered in conformity therewith, and she appeals, and asks that the judgment be reversed and the trial court instructed to enter a judgment for the amount found due by the first report of the commissioner.

It was held in *Safety B. and L. Ass'n v. Eckler*, 20 Ky. Law Rep., 1770, that a borrowing member in settling with a going concern was entitled to credits for everything paid in in excess of 6 per cent. interest, but that if the association was insolvent, the borrower as a stockholder should bear his proportionate share of the losses and expenses of winding up the association, and the rule laid down in this case has been uniformly followed in repeated decisions of this court. The plaintiff ceased to be a stockholder in the association on the 30th day of November, 1893, when she ceased to pay premiums upon her stock, and her connection with the company as a borrower ceased on the 7th day of February, 1896. The only evidence in the case on the question of losses is to the effect that since the assignment the assignee, under orders of court, has charged off \$24,274.90 on account of uncollected usury; and that borrowing members of the association have recovered judgments for usury collected against the association since the assignment by suit of about \$5,000. There is no evidence at all in the record which conduces to show that the association was insolvent when appellant's connection with it terminated as a stockholder in 1893, or that it had lost any money prior to that date, and this court, in a number of cases, has held that losses based on the failure to collect usury are not such losses as can be properly

charged to a borrower; that it was simply a failure of the company to realize certain anticipated profits. (Peoples S. and B. Association v. Denton, 21 Ky. Law Rep., 148; National B. and L. Ass'n v. Bybee, 21 Ky. Law Rep., 1070.) Appellee was charged during the time of her connection with the company \$1 a share per month on all the stock held by her to meet expenses, and while there is some testimony to the effect that this did not cover the expenses during that period, it is not made to appear in such tangible and definite form as would justify the court in allowing any additional credit on this account. (U. S. B. and L. Ass'n's Ass'ee v. U. S. B. and L. Ass'n's Ass'ee, &c., 21 Ky. Law Rep., 1763; and as the proof fails to show that any expenses or losses were incurred whilst appellant was a member of the association, she was entitled to a judgment for the balance found due her by the commissioner's report filed on the 24th of May, 1902.

The judgment is, therefore, reversed and cause remanded, with instruction to render a judgment in favor of appellant for \$344.50, with interest from the 24th day of May, 1902, the balance found due to her by the first report of the commissioner.

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COOK v. KENTUCKY GROWERS INS. CO.

(Filed March 12, 1908--Not to be reported.)

Insurance—Death of insured—Appellee issued to C. a policy of fire insurance on his residence. Appellee's company conducted its business on the plan of a mutual benefit association. Every one who became a policy holder became a member of the company, and all losses were paid by assessment of all members having property embraced in the same class. A short time after C.'s death the house was burned, and his son, who was the devisee of said property, brought this action to recover for the loss under said policy. Held—That this insurance by the terms of its contracts was based on the idea that each policy holder should become a member of the company and be liable for its assessment, and as the son never became a member of the company the policy failed, and the son could not collect the loss under the policy.

W. I. Williams for appellant.

W. McC. Johnston for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Barker.

On the 6th of November, 1897, the appellee, the Kentucky Growers Insurance Co., issued to one J. V. Cook an insurance policy, whereby it insured him against all direct loss or damage by fire, lightning or wind, to an amount not exceeding \$1,500, on a dwelling house owned by him located in Lancaster precinct, Garrard county, Kentucky, on the Lancaster and Danville pike, about two and a half miles from Lancaster, Ky. The consideration of this policy is stated by its term to be the payment by J. V. Cook of \$10.50 policy contract and the stipulations contained in the policy, the insurance being for such time as he shall "fully comply with our by-laws and regulations, or until this policy is cancelled or withdrawn."

J. V. Cook seems to have continued a member of appellee up to the time of his death, which took place in February, 1901. By his last will and testa-

ment he devised the property, upon which was situated the dwelling house insured under the policy in question, to his son, the appellant, W. R. Cook. Afterwards, on November 14, 1901, the house was destroyed by fire, upon the happening of which event W. R. Cook gave appellee notice, in accordance with the terms of the policy, and upon its refusal to pay instituted this action in the Garrard County Circuit Court. His petition sets forth the facts substantially as herein set out, and with it he filed the policy of insurance under which he claimed. A general demurrer to the petition was sustained, and appellant declining to amend his petition, it was dismissed by the court, and from that judgment he has appealed. The question for adjudication is whether the insurance contract sued on was one of personal indemnity which ceased upon the death of J. V. Cook, or whether it is a chose in action passing by the will of J. V. Cook to W. R. Cook under the devise of the house upon which it was based. Undoubtedly the general rule is that fire insurance is a contract for personal indemnity, and does not pass by assignment.

The policy sued on contains the following stipulation:

"Section 20. In case of change of ownership of property insured in this company, notice shall immediately be given the company, with payment of all claims due from the property, and the policy shall cease and determine, and in this event the executive board may determine all equities."

Appellees contend that by the death of J. V. Cook he ceased to be a member of its company, and the devise to W. R. Cook was such a change in the ownership of the property as is contemplated by section 20, above quoted, and the policy by its terms ceased and determined, and, therefore, all liability under it at once ended.

Undoubtedly much authority can be cited to sustain this view, but this court, in the case of *Richardson's Adm'r v. German Insurance Co. of Freeport, Ill.*, 12 Ky. Law Rep., 87, held that the death of the insured, and descent of the insured property, was not such a change in the title as would work a forfeiture under a clause on this subject substantially the same as that contained in section 20 of appellee's policy above quoted. The policy, in the case cited, contained a fixed and determinate term of indemnity, for which the insured had paid the required premium; it also contained, among other things, the following stipulation: "And the said company hereby agrees to make good unto the said insured, his executors, administrators and assigns, all such immediate loss or damage, not exceeding in amount the sum insured, nor the interest of the assured in the property, nor the cash value of any building or other property at the time of loss, as shall happen by fire or lightning to the property above specified, from the 10th day of March, 1883, at 12 o'clock noon, to the 10th day of March, 1888, at 12 o'clock noon. \* \* \* Or if the property, or any part thereof, shall be sold, conveyed, encumbered by mortgage or otherwise, or any change take place in the title, use, occupation or possession thereof whatever, \* \* \* the policy shall be void."

Said the court in their opinion in the case cited: "According to the only meaning we think the language used fairly capable of, the property was insured for a specified period of time, which could, after the premium had been fully paid, be abridged by the company only upon notice and refunding

the unearned part of the premium. For it agreed, in express terms, to make good, unto not merely the insured himself, but as well his executors, administrators and assigns, the immediate loss or damage that might happen by fire or lightning to the property at any time during that period, whether before or after his death. And, therefore, to treat that event as ipso facto a termination of the policy and liability under it, would be contrary to the express terms of it, under the stipulation for payment to the personal representative of the insured, and allow the company to retain the full consideration paid, while being held to only part performance of its agreement. "It is true, as argued, the property might have been destroyed before, though the loss not made good until after, his death; but the stipulation of the company to pay his personal representative was not necessary to meet such contingency, because the amount due could have, in that case, been collected without. On the other hand, it is both rational and provident for a person obtaining a policy of fire insurance to have provision in it against destruction of the property after his death, and in such case the stipulation mentioned becomes applicable and necessary. It seems to us the force and effect of language so comprehensive and clear should not be neutralized, or to any extent impaired, by a subsequent forfeiting clause of a policy of insurance, unless the words used for that purpose be so definite, explicit and free from ambiguity as to leave no other reasonable alternative. For while forfeitures are not favored by law, and provisions in a contract therefor are always to be strictly construed, the terms of a policy of insurance, as said in *Etina Insurance Co. v. Jackson & Co.*, 16 B. M., 242, should be liberally construed for the benefit of the insured, and so as to effectuate, as far as may reasonably be done, the indemnity he justly expected. It is evident the clause referred to was prepared with care, and a purpose to guard every supposed right and interest of the company. Yet of the seven distinct clauses for forfeiting the policy therein enumerated, not one of them, in express terms, or by fair implication, relates to, or includes, the death of the insured: nor is it any where mentioned as a condition or cause for forfeiting or terminating the policy. The only part of the clause which can be construed to have any relation at all is expressed as follows: 'Or any change takes place in the title, use or occupation or possession thereof, whatsoever.' And that, we think, does not necessarily or properly refer to a change unavoidably resulting from his death, but rather such as might be caused or suffered by the act of the insured while living, which is the case in each one of the other causes or conditions set forth in the forfeit claim, as well as those which precede as those following the one quoted. But be that as it may, each condition of forfeiture mentioned may, without destroying or lessening its proper meaning or effect, be reconciled with a continuation of the policy after such death to the end of the period; and it, therefore, should be done rather than defeat what was elsewhere in the policy clearly provided for."

It will be noticed that the court in the case cited placed stress on the fact that the policy, in case of loss, was payable, not only to the insured, but, in the case of his death, to his executor, administrators and assigns, and, further, that there is no similar clause in the policy sued on here, and this case might be distinguished from the case cited for that reason; but it seems

to us that the policy of insurance in the case at bar is wholly different from the policy in the case cited.

Appellee is not an ordinary insurance company; it is a mutual benefit assessment insurance company; an examination of its policy shows that the insured must be a member of the company, and the indemnity against loss exists only during such time as he shall fully comply with the by-laws and regulations of the company, or until the policy is cancelled or withdrawn under the terms of the policy. Its by-laws, applicable to the questions involved in this case, are as follows:

"1st. This company is organized for the purpose of protecting its members in case of loss or damage to their property by fire, lightning and wind, and shall be known as the Kentucky Growers Insurance Co., with general office in the city of Lexington, Ky., and doing business in the territory embraced in the charter.

"2d. Any person owning property in the territory embraced by our charter who shall sign an application and hold a policy in this company, shall thereby become a member of the same, and any person living within the territory, and who may be appointed or elected by the board of directors or executive board to fill any office of the company, shall thereby become a member of same.

"13th. All persons who desire insurance in this company must make written application through one of its officers on blanks furnished by the company. This company insures detached property only, and reserves the right to accept or reject any application.

"14th. The property insured in this company shall be divided into seven classes, and each piece of property shall bear its pro rata of all losses and expenses, and assessments shall be made in proportion of 50 cents for the first class; 60 cents for the second class; 70 cents for the third class; 80 cents for the fourth class; \$1 for the fifth class; \$1.25 for the sixth class, and \$1.40 for the seventh class.

"16th. Policies issued by this company shall be perpetual, unless withdrawn by the insured or cancelled by the company, for which policy the applicant shall pay a policy contract, the amount of which to be determined by the executive board, both in time and manner of payment, but shall be equitable between the classes in a similar ratio as assessment. No policy shall be issued for a greater sum than 1 per cent. of the amount of property insured in the company at the time of its issue. All policies not bearing the signature of the president and secretary and the seal of the company shall be null and void.

"17th. No property shall be insured for more than three fourths of its value. The valuation and classification is left to the judgment and discretion of the company.

"23d. Losses and damages shall be payable in sixty days after the same shall be ascertained and proven according to the terms and conditions of this policy of insurance and these by-laws, and any member suffering a loss or damage, and entitled to insurance, shall pay his pro rata of the loss or damage.

"26th. Any member failing to pay his assessments for thirty days after the same has been issued shall pay a fine of 25 cents, and should the company be compelled to collect the same by law it may use the penalty therein."

Losses under this policy are to be made good by an assessment of every member of the class in which the destroyed property is listed. It is absolutely essential to the existence of the company, and the carrying on of its business under its charter, that every insured should also be a member of the company, and be ready and willing to pay all proper assessments made against his respective class. The very object of the company was to insure its members against loss, and no one else. The appellant makes no pretense to having been a member of the company; it could not have called upon him for assessments to pay the losses of others in the class to which his property had belonged; he was under no obligation, either legal or moral, to pay such assessments, and the company had no claim on him for them, and could not have collected them from him, as a matter of legal right. To hold that the company was bound to appellant under the policy in question would be to bind it under an instrument to which he was not amenable. Such a construction would do violence both to the letter and spirit of the contract between the company and appellant's testator, J. V. Cook. As there was no legal obligation on the part of appellant to comply with any of the conditions and stipulations which the policy required of its insured and members, as he was not a member of the appellee company and did not comply with its rules and regulations, there can not be any liability on the part of appellee to indemnify him against loss under the contract made with his ancestor.

Wherefore, the case is affirmed.

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SMITH, &c. v. CURD.

(Filed March 12, 1903—Not to be reported.)

Husband and wife—Fraudulent conveyances—Parties to actions—This action was brought to recover judgment on a note and account against S., and his wife and G. were made parties defendant. It was alleged that G. had conveyed a house and lot to the wife in fraud of his creditors. Objection is made to the joinder of the wife and G. as parties defendant. Held—That under section 1907a, Kentucky Statutes, they were properly joined as defendants before a judgment and return of no property found, and the proof shows that the property was bought and paid for out of the means of the husband, and was properly subjected to his debt.

J. P. Holt for appellants.

J. H. Coleman for appellee.

Appeal from Calloway Circuit Court.

Opinion of the court by Judge Paynter.

The appellee instituted this action to recover a judgment against R. H. Smith on a note and account, to which action he made R. H. Smith's wife a defendant, and also J. W. Gilbert.

The purpose of the action was to recover personal judgment against R. H. Smith, and subject to the payment of it a house in Murray, Calloway county, upon the ground that it had been conveyed to Mrs. Smith fraudulently to prevent its being subjected to the payment of the husband's debts. It is urged as a ground for reversal that the action could not be maintained to set aside the deed which had been made to Mrs. Smith because a court of

equity did not have jurisdiction for that purpose before a recovery of a personal judgment against the debtor. This question is answered by section 1907a, Kentucky Statutes, which reads as follows: "That hereafter in this Commonwealth it shall be lawful for any party who may be aggrieved thereby, when any real property has been fraudulently conveyed, transferred or mortgaged, to file in a court having jurisdiction of the subject-matter a petition in equity against the parties to such fraudulent transfer or conveyance or mortgage, or their representatives or heirs, alleging therein the facts showing their right of action and alleging such fraud, or the facts constituting it, and describing such property, and when done a lis pendens shall be created upon the property so described, and said suit shall progress and be determined as other suits in equity, and as though it had been brought on a return of nulla bona as has heretofore been required. All laws or parts of laws in conflict herewith are hereby repealed." By this section the legislature intended to change the old rule with reference to such actions.

Mrs. Smith endeavored to show that she obtained from her father's estate the money with which the purchase money was paid. Her testimony does not satisfactorily establish that as a fact. The contract for the purchase of the property was made with Gilbert by the husband, and the purchase money to be paid was \$100. Afterwards \$40 was borrowed from Gilbert to be used in the erection of improvements on the lot. The evidence tends to show that the property, after the improvements were made, was worth \$350, and Mrs. Smith does not seem to have paid any part of the cost of the improvements, unless it was the \$40 borrowed from Gilbert. We are of the opinion that the court below was justified in its conclusion that the property was purchased and the improvements erected upon it out of the means of the husband, and, therefore, it was subject to the payment of his debts. We have considered all of the questions raised by counsel for the appellant, and have reached the conclusion that there are no grounds for reversing the judgment.

Judgment is affirmed.

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GARTH'S GD'N v. THOMPSON, &c.

(Filed March 12, 1903—Not to be reported.)

Infants—Partition of land—Reports of three different sets of commissioners appointed by the circuit court to partition the lands between joint tenants, one of whom was an infant, and the last report confirmed, the Court of Appeals will not disturb the action of the lower court as the difference between the three reports is small and no injustice seems to have been done the infant in the division. The commissioners were not disqualified to make the division as two of them acted, one of whom denied that he was related by blood or marriage to the parties, and although the other had examined the land with the view to testifying concerning it, he was not for that reason disqualified.

H. C. Howard for appellant.

T. Earl Ashbrook for appellees.

Appeal from Bourbon Circuit Court.



Opinion of the court by Judge Barker.

Joanna Garth and Frank Allison Thompson, who are half-sisters, and infants, by their statutory guardian, Frank P. Bedford, filed their joint petition in the circuit court of Bourbon county, praying for the appointment of commissioners, and the division of a tract of land which they jointly owned, under section 499 of the Civil Code of Practice.

In accordance with the prayer of the petition, the court appointed commissioners, who made a division of the tract of land in question, and reported their action to the court. Upon exceptions filed the court set aside the division, as made by the commissioners, and entered a judgment dividing the land between the sisters. Upon appeal to this court the case was reversed (*Garth's Gd'n v. Thompson*, By. &c., 28 Ky. Law Rep., 403), for the reason that the court had no power, by judgment, to make the division, but it was required, if it sustained the exceptions, either to appoint other commissioners, or re-refer the matter to the old commissioners for a new division. Upon the return of the case the court appointed Frank P. Clay, Sr., James Barlow and Miller Lail as commissioners to divide the land equally between the sisters. It seems that only two of these commissioners acted in making the division for which they were appointed. For some reason Miller Lail did not meet, or act, with his fellow commissioners. The report of the commissioners having been filed, it was excepted to by H. C. Howard, guardian ad litem for the infant, Joanna Garth. These exceptions having been overruled by the court, the case has been appealed to this court for review.

Appellants filed exceptions, both to the report of the commissioners and to the commissioners themselves, who, it is said, were incompetent to act, because James Barlow is distantly related to Frank Allison Thompson, and F. P. Clay, Sr., examined the land for the purpose of testifying in her favor upon a former trial. James Barlow, when on the stand as a witness, testified that he was not related by blood or marriage to the infant appellee; and it seems to us that the fact that F. P. Clay, Sr., had examined the land for the purpose of testifying as a witness did not render him incompetent. The division to be had was one of judgment, and was to be made under his oath of office, and we can not see how any prior examination that he may have made of the land would render him less competent to judge of its value.

There have been three divisions of the land made in this case, and except the change of a certain tobacco barn and about an acre of land on which it stands, there is no difference in any of these divisions. By the first division Joanna Garth received lot No. 1, containing 51.40 acres; Frank Allison Thompson received lot No. 2, containing 44.15 acres. This report having been set aside, the court divided the land as follows: Joanna Garth, lot No. 1, containing 51.55 acres; Frank Allison Thompson, lot No. 2, containing 44 acres, with the barn. By the present report Joanna Garth received 50.55 acres; Frank Allison Thompson received 45 acres, with the barn. In none of these divisions has either of the infants received more than one acre more or less than she received in the other divisions, so that it may be said that one acre of land and the barn constitute the difference between the three divisions. There is much contrariety in the evidence concerning the value of the respective tracts of land; of the weight of the testimony. This court is

not in a position to judge so well as the judge of the circuit court; but we are not inclined to accept the statements of appellant's witnesses of the immense difference in value in the two tracts, as against the judgment of the commissioners appointed by the court for their competency, and sworn to do their duty with reference to the two infant sisters.

In the cases of *Chamberlain v. Ballinger*, 11 Ky. Law Rep., 966, and *McCallaghan v. McCallaghan*, 12 Ky. Law Rep., 440, it is said that this court is exceedingly loth to set aside the division of land made by commissioners, unless it appears that substantial injustice has been done. We do not believe there is any substantial inequality between the two tracts of land allotted to the two infant parties hereto, and we think it best for the interest of both that this litigation should end.

Wherefore, the case is affirmed.

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GARTH'S GD'N v. TAYLOR, &c.

(Filed March 12, 1903.)

Guardian and ward—The appointment of a guardian for an infant over fourteen years of age by the county court of the county of his residence on a written nomination of the guardian is void unless said appointment is made on the written nomination of the infant, signed in the presence of the judge, after a privy examination, or in the presence of the court as required by section 2022, Kentucky Statutes.

McMillan & Talbott for appellant.

Brent & Thomas for appellees.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Barker.

On the 23d day of May, 1900, the judge of the county court of Bourbon county, Kentucky, upon what purported to be a written nomination of Joanna Garth, an infant over the age of fourteen years, appointed the Central Trust Co. as her statutory guardian. Under this appointment it continued to act until the 9th day of November, 1901, when the order of May 23, 1900, was vacated and set aside upon the motion of Joanna Garth by her next friend, Curley Taylor.

Afterwards, on the 23d day of November, 1901, the court entered the following order: "At the further hearing of this matter, adjourned to this 22d day of November, 1901, the court, the applicant, Joanna Garth, having in its presence and also by writing signed by her in the presence of the judge thereof after privy examination by him, nominated Catesby Woodford, Esq., to be her guardian, doth hereby order and adjudge that said nomination be, and the same is hereby, approved, and said Woodford is appointed to succeed the said Central Trust Co. heretofore acting as her guardian. Said Woodford having qualified and given the security required by law, the aforesaid Trust Co., which is hereby superseded as guardian, is ordered to settle its accounts as such, and turn over the control of said Joanna Garth and her property in their hands to its successor above named. To all of which the said Central Trust Co., as guardian of Joanna Garth, objects and excepts, and prays an appeal to the Bourbon Circuit Court."

Afterwards, on the 29th of March, 1903, the case, on appeal to the Bourbon Circuit Court, came on for trial, and the court, by its judgment, held that the order of the county court of Bourbon county of May 28, 1900, appointing the Central Trust Co. guardian of Joanna Garth, was void, and also adjudging that Catesby Woodford, appointed by order of the county court on November 23, 1901, is, and has been since that date, the guardian of Joanna Garth, and as such is entitled to control her person and estate. From this judgment the Central Trust Co. is appealing to this court. The only question for adjudication in this case is whether or not the order of May 28, 1900, is void. Section 2022 of the Kentucky Statutes, is as follows: "If a minor is fourteen years of age, he may, in the presence of the court, or by writing signed in the presence of the judge, after a privy examination, nominate his own guardian; but if the person so nominated is not approved by the court, or if the minor, after summons, fails to nominate a suitable person, or resides out of the State, or if the testamentary guardian fails for three months to qualify, the court may appoint a guardian of its own selection."

It will be seen that the above statute points out the precise manner in which a minor of fourteen years of age may nominate his own guardian: First, he may do it in the presence of the court; or, second, he may do it by a writing signed in the presence of the judge, after a privy examination. The statutes only authorize the nomination of a guardian by a minor in the manner set out. These statutory barriers are for the protection of the infant by enabling the judge of the county court to know himself that the infant is not under the domination or control of designing persons in his selection, and it enables the judge to protect the infant from the machinations of interested persons who might influence him to his injury in the selection of a guardian. It is of the utmost importance to the infant that all of the provisions of the statutes, protecting him from youthful indiscretion, should be enforced, and this can only be done by firmly establishing the principle that the conditions upon which a minor may nominate his own guardian are jurisdictional, and if they are not complied with, the nomination is void.

It is conceded in this case that the writing purporting to be the nomination of the Central Trust Co. by Joanna Garth was not signed in the presence of a judge of the county court, and that she was not privily examined by him.

We are, therefore, constrained to hold that the order of May 28, 1900, was void, and as this was the view entertained by the judge of the circuit court of Bourbon county, the judgment is affirmed.

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SMITH v. SMITH, &c.

(Filed March 12, 1903—Not to be reported.)

1. Wills—Fee-simple title to devisee—A testator by his will devised all his estate to his wife in fee simple to hold and possess during her natural life, after having paid all his debts. He next expressed the desire that his wife act in her own way in settling up all his business of any kind, and that he

desired no administration. Held—That upon a construction of the entire will it was the evident intention of the testator to invest the wife with the fee-simple title to his estate.

2. Evidence—While parol evidence is competent to place the court in the light of circumstances of the testator, or to explain a latent ambiguity; it is never received to explain an ambiguity appearing on the face of the instrument.

R. A. Burnett for appellant.

John C. Dabney for appellees.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Hobson.

The will of J. F. Smith is in these words: "I, Joe F. Smith, being of sound and disposing mind, do make this my last will and behest, to wit: I give to my wife, M. E. Smith, all of my estate which I now own or may acquire in fee simple, to hold and possess during her natural life, after having paid all my just debts, also desire and hereby empower my wife to act in her own way in settling up all my business of any kind, and desire no administration. In witness whereof my hand and seal this 28d day of March, 1893.

J. F. SMITH.

"Witness:

"J. T. MITCHELL,

"D. H. ARMSTRONG,

"A. G. P. POOL."

The widow, M. E. Smith, took charge of the estate after his death, and acting upon the idea that it was devised to her in fee, disposed of the personal property in order to pay the debts. After the personal property was exhausted she made a mortgage on the real estate to get the money to pay the remainder of the debts. The adult children acquiesced in her construction of the will, but later some question was made as to the proper construction of the will, and as some of the grandchildren were infants this suit was filed by the widow for a construction of the will and a determination of her rights under it. The real estate consists of 196 acres of land worth about \$2,000. The amount of the mortgage executed on the land to finish paying the debts is not shown by the record. The infants, by their guardian ad litem alone, defended the action and made the point that under the will the widow only took a life estate in the property. This construction of the will was adopted by the learned circuit judge, and the widow appeals.

The proof taken shows that the will was written on March 28, 1893, six years before testator's death. He was then living on the land in contest, and continued to live there until his death. He had a number of children who were all of age and several grandchildren who were infants, the issue of daughters who had died. From the condition of the family it is evident that he and his wife were advanced in years. The draftsman of the will when sent for to write it remarked it was something new to him, but if they would give him a start he could perhaps formulate it. The doctor who was present said to begin, "I, Joe Smith, being of sound and disposing mind." Mr. Smith then said he wanted his wife to have everything and to dispose of it in her own way, and he did not desire any administration

The witness used his own phraseology to carry out the wishes of the testator. This testimony is confirmed by the other witness who was present at the time, and makes substantially the same statement, but exceptions were filed to this testimony as incompetent, and were properly sustained by the court, for the reason that the ambiguity is patent on the face of the will, and while parol evidence is competent to place the court in the light of circumstances of the testator, or to explain a latent ambiguity, it is never received to explain an ambiguity appearing on the face of the instrument.

It remains, therefore, for the court to determine from the will itself what its meaning is, reading it in the light of the circumstances of the testator at the time it was made, and if possible we must give some force to all the words of the will, as it can not be presumed that in so short an instrument it was intended that one part of it should contradict another. That construction is to be preferred which reasonably reconciles all the parts of the instrument, rather than that which makes one part destroy another, other things being equal. As it is also apparent from the instrument that it is the work of one not acquainted with legal forms, the words should be read in their ordinary sense, rather than according to any technical meaning. The words, "I give to my wife, M. E. Smith, all of my estate which I now own or may acquire in fee simple," plainly carry a fee, and if the will had stopped here there would be no trouble about the testator's meaning, for there could have been no purpose in using the words "in fee simple," if an absolute estate in the devisee had not been contemplated. But these words are added: "To hold and possess during her natural life, after having paid all my just debts." These words, standing alone, would clearly give the devisee only a life estate, but if read in connection with the preceding words, which had already invested the devisee with the fee, they may, according to the ordinary and untechnical use of language, be read as simply explanatory of the preceding words and as meaning that after she had paid the debts the devisee was to hold and enjoy the property. Then follows the concluding sentence of the will, in these words: "Also desire, and hereby empower, my wife to act in her own way in settling up all of my business of any kind, and desire no administration." This provision carries out the same idea as that conveyed by the first clause, and is entirely inconsistent with the idea that the wife was to have only a life estate, for she is empowered to act in her own way in settling up all the business of any kind and no administration is to be had. The provision that he desired no administration is only consistent with the idea that his wife was to have everything as her own, and this idea is borne out by the fact that there is no devise over and nothing is said about the children of the testator, although he had a number of children and grandchildren. Construing the will as a whole, we think that there was no inconsistency intended between any of its provisions, and that a purpose to give everything to the wife absolutely is the natural meaning of the instrument as a whole. It is common to add an habendum clause to deeds; the draftsman seems to have had a vague idea of following such a form and to have added the words not for the purpose of restricting the fee previously granted, but simply to show that the wife during her natural life was to do as she pleased with the property, for in the last part of the will the same idea is set forth as in the first, and it can not be presumed

that the intermediate words were used for a different purpose. The law favors the vesting of estates. At the death of the testator all the parties in interest would seem to have given it the construction that the wife took a fee, and while the matter is not free from difficulty, we are of opinion that the contemporary construction was in accord with the real intention of the testator, and that this intention sufficiently appears from the will as a whole to be enforced by the court.

The rule that in case of a conflict the latter clause of a will prevails over a former clause has no application here, for the reason that the entire instrument is written in one short clause; the difficulty arises on the words of the same clause, and the later expressions of the will clearly indicate the same intention as the first part of it. The testator had but a small estate; the two objects he had in mind apparently were the payment of his debts and a provision for his wife. The entire surplus of his estate was little more, if any, than the property exempt by law. The sum of his will is that his debts are to be paid; that his wife is to have everything that is left in fee simple; that there is to be no administration, and that she is to do as she pleases with the property. The expression "to hold and possess during her natural life" was not used to restrict the estate which had been granted or to change its character, but to show that she was to enjoy the estate, for immediately following it is said that she is to act in her own way in settling up the business.

Judgment reversed and cause remanded, with directions to enter a judgment as herein indicated.

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COOK'S ADM'R v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed March 12, 1903—Not to be reported.)

Railroads—Contributory negligence—A railroad company is not liable in damages for the death of a boy nineteen years of age who fell under the wheels of a freight car while attempting to board a train running at the velocity of thirty miles an hour. By his own reckless conduct he contributed to his own injury.

S. M. Payton and J. P. O'Meara for appellant.

W. H. Marriott and E. W. Hines for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Paynter.

Virgil Cook was a boy nineteen years of age. On the morning he was killed he left his home about ten miles from Upton, a station on the appellee's road. So far as this record shows without permission or consent of any one he boarded a freight train at that station; when the train arrived at Sonora or Nolin it took on some hogsheads of tobacco; the deceased and some other boys who were on the train assisted the crew in putting them on the train. One of the boys testified that the conductor, in referring to the hogsheads of tobacco, told them to roll them in. There is some proof that upon arrival at Elizabethtown he helped some there in loading or unloading a car. The train proceeded on its way north and arrived at Colesburg. There is no evidence that he did anything there towards loading or unload-

ing a car. He was seen on the platform of the station, and the down grade seems to be considerable at that place; after the train had reached the velocity of thirty miles an hour the appellant left the platform and attempted to board the train, and in making the effort he was thrown under the wheels of the cars and killed.

There is no evidence tending to show that any of the train crew knew that he was standing on the platform, or that they saw him make the effort to board the train.

It is sought to hold the appellee liable upon the grounds:

1st. That appellant was a minor and had become by the acts which we have detailed a servant of the appellee.

2d. That those in charge of the train had failed to instruct him in his duties, that is, that it was dangerous to act in the capacity in which he was acting, and that they failed to give him any information as to the grade of the road going north from Colesburg. Counsel for appellant discusses the question as to the liability of masters to servants, and especially the obligation they are under to minors whom they engage in their service, etc. All of the services which the appellant performed have been detailed above. Assuming that he assisted at Sonora or Nolin and at Elizabethtown in placing articles upon the cars, still he was not injured while performing that service. He was not injured while assisting in loading or unloading a car, nor was he injured while doing anything for appellee, hence he could not have been doing anything for appellee with the consent or permission of those in charge of the train. It was not shown that he did anything, or that he was expected to do anything, in the way of operating the brakes or looking after the train. There is not the slightest evidence that the train crew knew that it was his intention to go beyond Colesburg, or that they knew that he was on the platform, or that he would again attempt to board the train before or after it started on its journey to Louisville. He was injured not in the discharge of any duty for appellee, but in a reckless and almost insane effort to board a train going at the rate of thirty miles an hour.

The employees of the appellee were under no duty to look after the appellant to see whether or not he boarded the train. Had he succeeded in boarding the train at that station he would have been, if not a trespasser, a mere licensee. We will not enter into a discussion of the question as to what would have been the liability of the appellee had the deceased, a minor, been killed in the discharge of a duty assigned to him by the master, because, in our opinion, no relations existed between appellee and the deceased which imposed any duty upon its servants to see that appellant boarded the train in safety, or that he got on it at all.

If a boy nineteen years of age should get upon a passenger train to be carried between stations the conductor would be under no obligation to advise him that it was dangerous to get off and on a train while it was moving. He would have the right to presume that he had sense enough not to do so reckless a thing. If a boy of that age should board a freight train with the knowledge of the conductor to ride between stations, the conductor would be under no obligation to advise him that it was dangerous to get on and off the train while moving; he would have the right to presume that such a boy would not be guilty of such reckless conduct as attempting to get on

the train after it had attained the speed of thirty miles an hour. The appellee was no more liable or responsible for the act of the deceased than it would have been had he purposely cast himself under the wheels of the car, and thus been killed. We think the court properly gave the jury a peremptory instruction to find for the appellee.

Judgment is affirmed.

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NEWPORT AND DAYTON LUMBER CO. v. LICHTENFELDT, &c.

(Filed March 13, 1903—Not to be reported.)

**Lien—Pleading—Exhibits**—A petition seeking to enforce a lien under section 2468, Kentucky Statutes, on property for lumber furnished in the construction of a building, is fatally defective in failing to allege that the statement required to be filed with the county court clerk was subscribed and sworn to by plaintiff or some one on its behalf. The defective allegation was not cured by filing the statement with the petition as an exhibit.

Tisdale & Gray for appellant.

M. Herold for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Nunn.

The appellant sold and delivered to one Nagel, a contractor, \$45.80 worth of lumber, which was used in the repair or erection of a house for the appellees; and he filed, or attempted to file, in the county court clerk's office, under section 2468 of the Kentucky Statutes, a statement of its claim for the purpose of perfecting a lien upon appellees' property to secure its claim, and he filed its petition in the Campbell Circuit Court to enforce its lien on the property. The appellees demurred to the petition because it did not state facts sufficient to constitute a cause of action. Afterwards appellant moved the court to submit the cause for judgment and order of sale, which was done over the objection of appellee. The court took the case under advisement, and made an order dismissing appellant's petition and rendered judgment against him for costs, from which judgment appellant appealed. We are of opinion that the appellant's petition did not state a cause of action. It was fatally defective in not stating, as required by section 2468, Kentucky Statutes, that the statement which it filed in the county court clerk's office, to secure its lien, was subscribed and sworn to by it, or some one in its behalf. Volume 13, page 969, Am. & Eng. Ency. Pl. & Pr., 2d edition, it is said: "A party seeking to enforce a mechanic's lien must by his pleadings bring himself strictly within the terms of the statutes creating the lien. \* \* \* It must be shown that the claimant has taken the requisite steps to create the lien. The sufficiency of the complaint is to be determined by the statute."

And, again, on page 988: "If the statute requires the notice to be verified before filing, the complaint will be demurrable unless it alleges that this was done." In volume 15, page 161, Am. & Eng. Ency. of Law, 1st edition, it is said: "Where the lien law requires that a notice to create a lien shall be verified before filing a complaint in an action to foreclose a lien which con



tains no averment that the notice was verified, does not state facts sufficient to constitute a cause of action."

The filing of a copy of the statement with the petition did not cure this defect. In the case of *Green v. Page*, 80 Ky., 370, the court said: "Counsel insists, however, that the exhibit controls the allegation in the petition. This is not the rule under our Code. An exhibit neither aids nor destroys the material averments in a pleading, and are not to be considered by the court in determining the sufficiency of a pleading, but may be properly considered as evidence on the trial of an issue tendered."

In the case of *Saur, & Co. v. Sayers*, 2 Ky. Law Rep., 229, the court, by Chief Justice Cofer, said: "A material fact can not be supplied by means of an exhibit."

Perceiving no error in this case, the judgment of the lower court is affirmed.

#### EZELL v. OUTLAND.

(Filed March 13, 1908—Not to be reported.)

**Damages—Instructions—Appellant and J. became engaged in a difficulty in J.'s wagon, when the horses attached to the wagon became frightened and ran away, when appellee, who was in the front part of the wagon, had dropped the lines from some cause and was thrown from the wagon and injured in the head, and in this action recovered a judgment for \$200 against appellant on the allegations that he caused the horses to run away. (On appeal, Held—That the court erred in giving an instruction authorizing the jury to find both compensatory and punitive damages, although the assault on J. by appellant may have been without fault on the part of J., and that J. acted only in self-defense. The evidence showed that appellant assaulted J. without lawful excuse, and the instruction given was not prejudicial. The damages given were merely compensatory.**

W. J. Webb and S. H. Crossland for appellant.

Webb, Johnston & Seay for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Settle.

Appellant and one Joseph J. Jones engaged in an altercation in the latter's wagon, on the streets of Mayfield, June 1, 1901.

Appellee, J. S. Outland, was at the time occupying a seat in the front end of the wagon, and holding the lines by which the horses attached to the wagon were controlled. During the difficulty the lines were knocked, or fell, out of appellee's hands, the horses became frightened at the noise of the combat and ran away, throwing appellee from the wagon to the ground and thereby injuring him, as alleged, in the head and other parts of the body, for which alleged injuries, loss of time, doctor's bills, and other expenses, resulting therefrom, he brought suit against appellant in the Graves Circuit Court, laying his damages at \$1,500. The petition sets forth the facts mentioned, and in addition that appellee was assaulted and struck by appellant with his fist and a stick, during the latter's fight with Jones. Appellant filed answer, denying the assault and battery complained of, or that appellee was damaged thereby, and for further defense averred that while he (appel-

lant) was engaged in an altercation with Jones, and acting in his necessary self-defense, the team ran away and appellee, in attempting to get out of the wagon, received some slight injuries, which were purely accidental, and for which appellant was not responsible.

The allegations of the answer were controverted by the reply filed, and upon the issues thus formed the trial followed, and the jury returned a verdict awarding appellee \$200 in damages, and the lower court having refused appellant a new trial the case has been brought to this court by appeal. The motion for a new trial was based on the grounds usually presented in such cases, and we deem it necessary to consider but one of them, as it raises the question chiefly relied on for a reversal, viz., that the lower court erred in the matter of giving and refusing instructions. We are unable to find any valid reason for condemning instruction No. 1, given by the court as it is predicated upon the state of facts set forth in the petition, and properly defines both compensatory and punitive damages.

Instruction No. 2 is as follows: "The court further says to the jury that if they should believe from the evidence that defendant assaulted one John J. Jones, and said assault or difficulty caused the team which plaintiff was driving to run away with the wagon, and by reason of said runaway plaintiff was thrown out of the wagon, and hurt or injured, they will find for plaintiff such actual and punitive damages, if any he sustained, as they may believe from the evidence he is entitled to, not exceeding in all, however, the sum of \$1,500, unless the jury should believe from the evidence that at the time defendant assaulted said Jones, if he did assault him, defendant believed in good faith that he was in danger of receiving at the hands of said Jones great bodily harm, then the jury will find for plaintiff only such actual or compensatory damages as they may believe from the evidence he sustained."

This instruction is clearly erroneous, as it in the first place authorized the jury to find for appellee both compensatory and punitive damages if they believed from the evidence that the appellant assaulted Jones, and thereby caused the team to run away and injure appellee, without regard to whether the assault was unlawful or justifiable, and in the latter part of the instruction the jury were further told that although they might believe from the evidence that appellant in the assault upon Jones was acting in his necessary self-defense, they should nevertheless find for appellee actual or compensatory damages. If there had been any evidence tending to show that Jones commenced the difficulty with the appellant by first assaulting him, the jury should have been told that if they believed from the evidence that such was the case, and that appellant used only such force as was necessary, or appeared to him to be necessary, to protect himself from injury at the hands of Jones, and that while so engaged the team became frightened by reason of the difficulty and ran away, thereby injuring appellee, the jury should find for appellant.

In other words, if Jones on the occasion in question had commenced the difficulty by attacking appellant, and the latter, acting in his necessary self-defense, was merely resisting the attack, thereby repelling force by force, and the team that appellee was driving becoming frightened because of the difficulty, had run away and thereby injured him, appellant would not have

been liable in damages therefor. But a careful examination of the record forces us to the conclusion that in the difficulty between appellant and Jones, the former was the aggressor, for he testified that he and Jones, while in the latter's wagon, had a conversation in reference to an overpayment of money made by him to Jones on his tobacco; that angry words ensued, and he struck Jones with his fist because of the insulting language used by him; that Jones thereupon put his hand in his pocket, and appellant believing that it was his purpose to draw a knife, or other weapon with which to attack him, got off the wagon, went to the rear end thereof, secured a tobacco stick, again got into the wagon, and returning to where Jones was standing in the front of the wagon, repeatedly struck him with the stick, either knocking him down, or causing him to fall out of the wagon, thereby so frightening the team as to cause it to run away.

It is patent, therefore, that appellant was not acting in his self-defense at the time of the difficulty with Jones, and if a wrongdoer in respect to the difficulty, he was also in the wrong in the matter of causing the team to run away, therefore, the error committed by the court in giving instruction No. 2 could not have been prejudicial.

We are of the opinion that the court did not err in refusing to give instruction asked by counsel for appellant, as they are all predicated upon the theory that he was acting in self-defense in the difficulty with Jones, when in fact there was no evidence whatever to support that theory. It is not clear from the evidence that appellant actually struck appellee with his fist or otherwise. Much of the evidence tends to show that he did not do so, and if he did we are satisfied that it was not intentional, for he had no quarrel with appellee, and the latter gave him no cause to strike him, as he did not offer to interpose in Jones' behalf. But appellee testified that appellant, in assaulting or beating Jones with the tobacco stick, did strike him on his hands with his elbows and the stick, and the lines were thereby knocked from his hands, and when the horses ran from the fright occasioned by the combat between appellant and Jones, the loss of the lines prevented him from controlling or stopping them.

Appellant testified that he did not strike appellee, or knock the lines from his hands, and no other witness in the case seemed to know how he lost the lines, but the jury doubtless accepted appellee's version of the affair, and they were the sole judges of the credibility of the witnesses, and of the weight to be given to the statements of each or any of them. But whether appellant actually struck appellee or not would seem immaterial, if his misconduct brought on the difficulty with Jones, and the fight between them caused the horses attached to the wagon to run away, and as these facts are alleged in the petition, as well as the fact that appellant struck appellee with his fist or stick, and there was some evidence introduced to prove them, we can not afford to disturb the finding of the jury. We find nothing in the record to support the contention of appellant's counsel that the jury were influenced by passion or prejudice, and it is evident that only compensatory damages were allowed by them.

For the reasons indicated the judgment of the lower court is affirmed.

## BRINEGER v. LOUISVILLE &amp; NASHVILLE R. R. CO.

(Filed March 13, 1903—Not to be reported.)

Railroads—Contributory negligence—Bill of exceptions—Appellant, while a passenger on a passenger train on appellee's road, had his thumb mashed by a door having been slammed against it, while his hand was resting on the door facing. Held—That appellant, by his contributory negligence, was properly denied recovery of damages. Under section 337, Civil Code of Practice, a bill of exceptions which is not signed by the judge can not be considered as a part of the record.

N. B. Hays for appellant.

J. W. Alcorn, C. W. Metcalfe and E. W. Hines for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Brineger, with his fourteen year old son, were riding in a passenger coach on appellee's road which runs from Middlesborough to Mingo mines. The coach was divided into three compartments, the front one was exclusively for the use of white passengers, the rear one for the use of negroes, and the middle one for the storage of baggage. When the whistle blew for South Boston appellant left his seat in the front portion of the car, passed through the baggage compartment and stood in the door opening into the end of the car for negroes, with his hand against the door facing; the thumb of his right hand was on that part of the facing to which the door would be shut. Whilst in this position a brakeman, who had his back to appellant, and who was stooped down, attempting to light a lantern, called out "shut the door," presumably to avoid a draft which was blowing through the car. Some one near the door gave it a sudden push, and the door caught the thumb of appellant and crushed it. And he instituted this suit to recover damages therefor, which he alleges was due to the negligence of appellee's brakeman in directing the door to be shut. The answer traversed all the allegations of negligence, and plead contributory negligence.

The trial resulted in a verdict for the defendant under a peremptory instruction, and plaintiff has appealed. The transcript of the testimony introduced upon the trial is shown in the bill of evidence, transcribed by the official stenographer of the Bell Circuit Court, and is attested by the judge thereof. And there is a paper copied in the record which purports to be a "bill of exceptions," which refers to the bill of evidence, but which is not signed by the judge. Section 337 of the Civil Code required the judge to sign the bill of exceptions, if he approves it, and it shall be then filed as a part of the record. Under this state of fact neither the bill of evidence nor exceptions can be considered by the court. (*Stanford v. Parker*, 12 Ky. Law Rep., 878; *L. & N. R. R. Co. v. Finley*, 86 Ky., 294; *New York Life Ins. Co. v. Brown's Adm'r*, 28 Ky. Law Rep., 2072.) Consequently there is no proof that we can legitimately consider upon the trial of the appeal. But we are satisfied from a careful reading of the bill of evidence that we would not be justified in reversing the case on its merits, even if the testimony were properly before us, as there is no evidence of negligence on the part of the defendant, and plaintiff was himself guilty of such contributory negligence as would have precluded recovery.

Judgment affirmed.

## BLACK v. COMMONWEALTH.

(Filed March 13, 1903—Not to be reported.)

1. Criminal law—Murder—New trial—Appellant prosecutes this appeal from a conviction and sentence of death for murder. One of the grounds relied on for a reversal is that the lower court erred in refusing to grant a new trial on the ground of newly-discovered evidence. Held—That an error in overruling a motion for a new trial on the ground of newly-discovered evidence is not a ground for reversal.

2. Evidence—Error in admission of evidence as to grounds for belief of the insanity of the accused not prejudicial in this case. The evidence upholds the finding of the jury, and no prejudicial error appears in the instructions given.

Jos. E. Conklin and H. W. Saunders for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge Nunn.

The indictment charging the appellant with willful murder of Archie James was returned at the June term of the Jefferson Circuit Court, 1902. On the 10th day of the same month the appellant was brought into court, and with his attorney, Henry Tilford, consented to dispense with the formalities of an arraignment and entered a plea of not guilty of the offense charged. On that day an order was made by the court appointing Joseph L. Reed and Dudley C. Jones attorneys to defend the case. The trial of the prosecution was assigned for June 17, 1902, and when the prosecution was called for trial Joseph E. Conklin and H. W. Saunders appeared as counsel for appellant, and on their motion the case was continued until September 26, 1902. On the calling of the prosecution, on the last date, the same counsel appeared, and on their motion the trial was postponed until September 30, and on the last-named day no further motion for a continuance was made, and the trial was entered into. The jury returned a verdict of guilty and fixed appellant's punishment at death.

The appellant, by counsel, filed reasons and moved the court to grant him a new trial, which motion was overruled, and he has appealed to this court to reverse that judgment. The facts in the case, as shown by the record, are in substance these: In the month of May, 1902, the appellant, at Second street market in the city of Louisville, stabbed and killed Archie James. It occurred under the following circumstances, as related by the witness, Edgar Johnson, who was a butcher in that markethouse: "Archie James was sitting in a wagon; the wagon was backed right up against the curbstone in front of the market and he had his head down this way, and this man was in the rear end of the market, about forty feet from James. John Black came walking from the rear end of the market and said to me, 'I want to borrow your knife,' and took the knife, about a twelve-inch blade, and walked out to where the old man, James, was, and I happened to look just at that time, the old man raised his head and Black stuck the knife in his neck. Neither said anything to the other. Black turned immediately, and walked back through the meat market and out the back door. Archie James jumped up and stepped a few feet forward and fell, with his head in the door, and died in a few moments. Black was sober."

Several other witnesses corroborated this witness, Johnson. There was no attempt to contradict this testimony. There was some intimation that they had had some words the night before at James' house. When arrested appellant said "he was trying to run his bluff on me." All the testimony shows that the old man was unarmed, and was sitting in his cart about half asleep. Deceased was about sixty-five years old, and appellant a young man and a nephew of the deceased. The only attempt made to excuse appellant from this foul crime was insanity. All the witnesses for the Commonwealth, seven or eight in number, said that he was of sound mind at all times when sober. The appellant's witnesses, except one or two, agreed with those of the Commonwealth as to this. Appellant's counsel contend for a reversal on three grounds:

1st. That the lower court failed to grant appellant a new trial on account of newly-discovered evidence.

2d. That the second instruction given by the court to the jury was prejudicial to him.

3d. That the court permitted incompetent evidence to be introduced over his objection.

As to the first ground, the newly-discovered evidence, if introduced, would have been only cumulative and would not have strengthened that adduced to any appreciable extent, and under section 281 of the Criminal Code of Practice, which says that the decisions of the lower court upon motions for a new trial shall not be subject to exceptions, and in the case of *Gambill v. Commonwealth*, 15 Ky. Law Rep., 477, this court said: "One of the grounds for a new trial is the discovery of new evidence tending to contradict the evidence of the witness for the Commonwealth. It is only necessary to state that the lower court, having passed upon that matter, its judgment thereon can not be reversed here, for this court is confined in its review of criminal appeals to errors of law occurring on the trial."

In the case of *Hatton v. Commonwealth*, 7 Ky. Law Rep., 46, this court said: "An error in overruling a motion for a new trial on the ground of newly discovered evidence is not a ground for reversal." In the same book, page 377, the court said: "This court can not review the action of the lower court in overruling a motion for a new trial made upon the grounds of newly discovered evidence."

As to the second ground, there was no error in the giving of instruction No. 2, complained of, and taking all the instructions together they were more favorable to appellant than he was entitled to.

As to the third ground, the only evidence complained of was brought out on the cross examination of Jane Black, a sister of the appellant. She was asked this question by the Commonwealth's attorney: "Now, don't you know that the reason that you were afraid of him, he cut two other men and was sent to the pen for it," which question was not answered by the witness. Then the Commonwealth's attorney asked this question: "Now, don't you know that that was the reason you were afraid of him," to which witness answered: "No, sir; I was not scared of him about that." This was improper as appellant did not testify, and the court should not have permitted it, but in view of the defense made by appellant of insanity alone, and the effort on the part of his counsel in the cross-examination of appel-

lee's witnesses and in the examination of his own to show his attempts to out men and boys frequently as an evidence of his insanity, this evidence was not prejudicial to him, but was rather in aid of his attempted defense. This record discloses the fact that the appellant committed a most foul, brutal and unprovoked murder, and the jury saw proper to fix the death penalty, which this court does not feel justified in interfering with.

Wherefore, the judgment of the lower court is affirmed.

Whole court sitting.

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RENO, &c. v. BLACKBURN.

(Filed March 18, 1908—Not to be reported.)

Title—Possession—Statute of limitation—Appellants claiming to be heirs at law of P., brought this suit to recover fifty acres of land which was owned by him at the time of his death. Appellee claims the land as having been given to his wife by will of P., who was her former husband, and that she held said land under said will for twenty-nine years. Held—That the proof shows that there was a will executed by P., and that it was destroyed by fire when the office of the clerk of the county court was burned, but the nature of said will is not definitely shown, but as the wife claimed to hold said land as devisee under said will for more than fifteen years adversely to all persons, appellants can not recover.

J. M. Nichols & Son for appellants.

Gus Thomas for appellee.

Appeal from Carlisle Circuit Court.

Opinion of the court by Judge Settle.

Appellants, Margaret Reno and others, claiming to be of kin to and the only heirs at law of Lloyd Pickett, deceased, brought this action in the Carlisle Circuit Court to recover of the appellee, Cal Blackburn, fifty acres of land lying in Carlisle, formerly Ballard county.

It appears from the record that the land was formerly owned by Lloyd Pickett, who was residing thereon at the time of his death, which occurred in 1872. It further appears from the record that Lloyd Pickett left no children, but that his wife survived him. In 1874 she married the appellee, Cal Blackburn, with whom she lived until her death in March, 1900. It is averred in the petition that Lloyd Pickett died intestate, and that appellee is wrongfully in the possession of the land left by Lloyd Pickett, upon whose death it is claimed it descended under the statute to appellants, and that they are now the owners and entitled to the possession thereof.

The answer of appellee, as finally amended, denies that appellants are the owners or entitled to the possession of the land, and avers that Lloyd Pickett left a will which was admitted to probate in the Ballard County Court, and duly recorded in the Ballard County Court clerk's office, but that the courthouse and clerk's office in that county were destroyed by fire in 1880, for which reason the will can not be produced; that by its term the land was devised absolutely to the testator's wife, who from his death, in 1872, to her own, in 1900, a period of more than twenty-nine years, continuously had and held the actual possession thereof, claiming it adverse to all

the world, and that appellants, who resided near her, had notice of the nature of her title and the character of her possession, and appellee also pleads and relies on the statute of limitation to defeat appellant's action.

The reply filed by appellants traverses the averments of the answer, and charges that the wife of Lloyd Pickett occupied the land in controversy only as a homestead, and this averment is denied by the rejoinder. The lower court upon these issues, and the proof taken by the parties, rendered judgment dismissing the petition, and allowing appellee his costs. The evidence furnished by the depositions tends to show that a will was executed by Lloyd Pickett. Three witnesses testified that they were present when it was written. These witnesses also agree that Lloyd Pickett's wife was the sole devisee under the will, though none of them could give the precise terms of the will, or tell what character of estate was given her in the land. It is not clear either who the attesting witnesses were. There is also some evidence in the record tending to show that the will was carried after the death of Lloyd Pickett to Blandville, the county seat of Ballard county, and delivered to Corbett, the county clerk, for record. The witness, Sarn, who testified to this fact, seemed to have the impression that he paid for the recording of the paper when it was handed by him to the clerk, and that the money for the purpose was furnished him by one Wiley Dicus. A small book containing many entries of various kinds was filed with the deposition of one of the witnesses, and by him identified as the former property of Wiley Dicus, who is dead, and the following entry in this book was identified as in the handwriting of Wiley Dicus, viz.: "October 4, 1872, \$1.40 paid cash for recording Lloyd Pickett's will to his wife." An inspection of the book and entry will show that the entry is not of recent date. The book and entry can not, in our opinion, be treated as competent evidence as the entry was not made by the direction of any one authorized to act for the estate of the testator, nor by one who is shown to have had any control of the will, or who had been intrusted with the duty of having it probated.

It is shown beyond question that the clerk's office and courthouse of Ballard county were burned in 1880, and all the public records of the county then in existence were destroyed, which would account for the loss of the will of Lloyd Pickett, if he left one, that was admitted to probate; but while the evidence introduced in support of the contention that such a will was made by Pickett for the benefit of his wife is persuasive in the extreme, and indeed sufficient to satisfy us that the will was at one time in existence, it is by no means sufficient to convince us that the will was duly attested by two witnesses as required by law, and if it were proved that it was legally executed, we would still be without information as to whether or not it was admitted to probate in conformity to the provisions of the statute. While the evidence is insufficient to authorize this court to hold that the wife of Lloyd Pickett took the land in controversy as devisee under the will of her husband, we are of opinion, from all the facts and circumstances connected with her holding of it, that some sort of a paper was executed by the husband, whether valid as a will or not, under and by virtue of which she claimed to own the land, the evidence shows that her claim of ownership as well as her possession of the land was derived from and based on what she believed to be a valid will of her husband, and that her possession



was actual, continuous, notorious and adverse to appellant and all others for more than fifteen years. It also appears that her claim of ownership was generally known throughout the neighborhood, and that many of the appellants were close neighbors, and must certainly have known of it, yet not one of them ever denied or controverted her claim while she lived, nor have any of them testified in this case in contravention thereof.

It is alleged in reply that the widow of Lloyd Pickett occupied the land as a homestead, which is denied in the rejoinder. No proof has been made to show that she occupied the land as a homestead, though under the pleadings the burden was upon the appellants to show that such was her true interest.

In *Yeatman v. McDonald*, 4 Ky. Law Rep., 348-9, only the syllabus of which is reported, this court announced that fifteen years' adverse possession by the wife, under claim of title, perfected her title to the lands of her husband, as against other claimants, and in *Hogan v. Kurtz*, 94 U. S., 817, it was said by the Supreme Court: "By the record it appears that the testatrix of the defendant was twice married; that her first husband emigrated here in the year 1794, married here, purchased the lot in question and built a house on it as a family residence; that they never had any children, and that he died in 1838, leaving her surviving him; that she married a second husband, whom she survived, and died testate in 1869, devising the property to her sister, the defendant in error. Throughout her life, subsequent to the decease of her first husband, the testatrix held actual, exclusive, continuous, visible and notorious possession of the property, and the evidence is full to the point that the defendant as her devisee continued to so hold the same from the death of the testatrix to the present time. Forty-two years elapsed after the death of the first husband of the testatrix before the present suit was commenced, the plaintiff's claiming to be collateral heirs, or the representatives of collateral heirs."

Under these facts the court held that the possession of the widow was adverse to the heirs, and her title was perfected by lapse of time. We see no reason why the principle announced in the case *supra* should not be applied in this case. The failure of appellants to assert title to the land in controversy until since the death of Pickett's wife, the knowledge that they must have had of the adverse claim of title set up by the widow of Lloyd Pickett, so long ago, coupled with her actual possession of twenty-nine years, convinces us of the insincerity and staleness of appellants' claim and of the propriety of applying to it the bar that may be interposed in such cases by the statute of limitation.

The judgment of the lower court is affirmed.

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LANCASTER, &c. v. CITY OF OWENSBORO.

(Filed March 13, 1903—Not to be reported.)

Municipal government—Taking census—Injunction—Fraud and mistake—Appellees, citizens of Owensboro, seek to enjoin the city from issuing \$200,000 of bonds, which is only authorized when either the Federal census or census taken by authority of the city shows a population of 15,000. The grounds alleged for an injunction are that the persons appointed to take the census committed frauds and mistakes, which showed that the population

was over 15,000, when in truth it was less. Held—That the evidence fails to show that any fraud was committed in taking the census, and that all the mistakes shown to have been made were unintentional and would not reduce the census below 15,000.

Wilfred Carrico and W. S. Morrison for appellants.

Geo. W. Jolly for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge O'Rear.

This suit was brought by appellants, taxpayers of the city of Owensboro, against that city and its mayor and clerk to enjoin the issuance of \$200,000 of the city's bonds, voted to be issued at the November election, 1900. It is the same bond issue involved in the case of O'Bryan v. City of Owensboro, 24 Ky. Law Rep., 469.

It was held in the opinion delivered by this court in that case (O'Bryan v. Owensboro) that the act of enumerating the inhabitants of a community by way of a census was a legislative act, and that unless there was fraud or mistake in making the enumeration that changed its practical result, the action of the local legislative body in fixing upon and declaring such result was conclusive upon all persons. In this case, the taxpayers, appellants here, alleged that the city authorities, the mayor and common council, with the fraudulent purpose of making the total population of that city appear to be greater than it was in fact, and to make it appear that it was in excess of 15,000 souls on the 1st day of August, 1900, instead of some 13,189, its alleged actual population, caused the census to be taken by the city enumerators to be so changed in two wards as to include the same persons twice, in a great number of instances, and to include a great number as citizens who were not such in fact. The two wards included in that charge were the first and fourth.

By reference to the former opinion it will be seen that unless the city's population was 15,000 or more when the vote was taken for the bond issue in question the incurring of that liability was void, as being prohibited by section 158 of the Constitution. The last Federal census, taken as of June 1, 1900, showed the total population of the city to be then 13,189. But additional territory had been added between the dates of June 1 and August 1, 1900. Besides, the municipality was not bound to rely upon the accuracy of the Federal census.

In making the enumeration the city council provided by ordinance that the mayor should appoint four enumerators, who should be citizens; that they should make accurate lists of all persons residing in the city as of August 1, 1900, and make a true and complete record of all persons included in the enumeration. This record was to be, and was, bound in the form of a permanent volume, and is presumably yet among the public records of the city. It was required to show, and so far as this record discloses did in fact show, the name, age, color, sex, employment, place of abode, and social condition (whether married or single) of each person enumerated. The enumerators were made public officers by the ordinance providing for the census. They were appointed by the mayor, confirmed by the common council; and took the oaths of office required by law. Until their complete and

certified work is impeached by proper and sufficient evidence it must be given the credit and presumption accorded by law to all other official acts.

Appellants' principal complaint is that the enumerators were assigned to their respective wards, each taking the list of his ward; and that the act of the mayor and council in having three of the wards subsequently reenumerated by one of the enumerators was unauthorized by the ordinance, and was in fact void. Four enumerators were appointed. The ordinance did not confine any of them to any particular part of the work. Any of them, therefore, was authorized to do any part of it that the council or mayor may designate. And if one committed errors, or otherwise failed in his work, another might go over it and correct it. The object being to attain accuracy as near as possible, all the usual aids and checks commonly employed to that end were proper. The enumeration was not complete until the result was declared by the ordinance of the council adopting the completed work of their enumerators. One of the enumerators, P. J. Murphy, the one selected to retake the enumeration in three of the wards, was an experienced assessor; had for twenty years or longer been engaged as county or city assessor in taking somewhat similar lists in Daviess county and the city of Owensboro; had lived for many years in that city, and was both well acquainted with its inhabitants and peculiarly qualified for the duties of his office. His previous selections for such work by the people of those communities attest alike his qualifications and character. He says he did the work carefully and as accurately as was possible; that true records were made and returned to the city clerk, which were shown to be in his custody while the proof was being taken in this case. There is no evidence of fraud, not a scintilla. The mistakes shown in the work of Murphy were not as many as twenty, all told. There was an entire failure of proof to sustain appellants' charges. The record, as completed, was a public one; was open to appellants' inspection. Certain evidence of errors called out by their cross-examination of Murphy indicates that they did inspect it. We must presume that they called attention to every error discoverable by such inspection. For while it would be exceedingly difficult to prove that a census did not contain all the inhabitants, it is comparatively a simple matter to show, from such record, that it contained duplications and names of persons not in fact resident in the city if such were the facts. Appellants' failure to show these facts persuades us that they did not exist. In view of the conclusion at which we have arrived on the material issues in the case we deem it unnecessary to notice certain matters of practice alluded to in argument.

The judgment of the circuit court refusing the injunction and dismissing the petition is affirmed.

Whole court sitting.

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#### HUDGINS v. CARTER COUNTY.

(Filed March 13, 1903.)

Fiscal courts—Claim of health officer—Jurisdiction—Appellant was appointed health officer of Carter county by the board of health of said county, and presented to the fiscal court his claim for \$4,550 for services rendered and medicines furnished during an epidemic of smallpox in said county. Said court refused to allow his claim. He brought this action in the circuit

court on his claim for \$4,550. The circuit court dismissed his petition on the ground that the proceeding should have been by appeal from the judgment of the fiscal court, and because the circuit court has no jurisdiction to vacate or modify an order or judgment of the fiscal court except on appeal taken to said court. Held—That while it was necessary that appellant should first present his claim to the fiscal court, he is not confined to his remedy by appeal, but may they institute an action on his claim. He must confine his claim to the amount presented to the fiscal court. He can not recover against the county for services and medicines rendered and furnished to persons who were able to pay for same. He can only recover for his services and medicines rendered and furnished to indigent persons, and for services and general supervision rendered by him which was necessary, or reasonably necessary, to quarantine and keep the smallpox under control, and prevent the spread of the disease and for attention to those quarantined.

Theobald & Theobald for appellant.

Armstrong & Woods for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Nunn.

The appellant filed his petition in the Carter Circuit Court against the appellee, alleging that he was a regular practicing physician, residing in Carter county, and was duly authorized to practice medicine under the laws of this State; that about the 5th day of June, 1900, the State Board of Health of Kentucky appointed three persons, naming them, as the local board of health for the county of Carter, and that the last-named board, at a meeting held on or about the 5th day of June, 1900, selected and appointed the appellant as health officer for Carter county, and that he at once accepted and entered upon the discharge of his duties as such, and continued to act as such health officer from that date until the filing of his action; that between October, 1900, and the 15th day of October, 1901, there prevailed in Carter county an epidemic of smallpox, which kept him constantly employed in looking after the same for at least two hundred and seventy-five days of that time, and required him to make about six hundred and seventy-five visits, vaccinate over six hundred people, make nine hundred and sixty-three prescriptions, and furnish medicine, involving four hundred and seventy-two people, four hundred and twenty-five of whom were quarantined, and to furnish a quantity of disinfectants used in the necessary fumigation of infected premises, and that such services rendered by him as health officer for Carter county were reasonably worth \$4,550, and that he had not received anything as compensation; that he made out and presented his claim for \$4,050 to the fiscal court and asked that same be allowed him, and the court refused to allow him anything thereon. He then asked judgment for the \$4,550. Appellee answered, controverting appellant's claim, and alleging that the fiscal court allowed appellant \$700 on his claim, which was all he was entitled to for his services, and refused the balance.

It afterwards offered to file an amended answer, to which there was an objection made, and while the court had this motion under consideration the appellee, on motion, withdrew its answer and amended answer and filed the following demurrer to appellant's petition:

"The defendant, Carter county, comes and demurs specially to the plaintiff's petition:

"1st. Because the amount sued on is not the same as the amount presented to and passed on by the Carter Fiscal Court.

"2d. Because the Carter Fiscal Court has had no opportunity to pass on and allow or disallow the claim as set out in plaintiff's petition.

"3d. Because at the regular January term, 1902, of the Carter Fiscal Court the plaintiff presented his claim of \$4,050 for allowance, and the said court then and there allowed plaintiff the sum of \$700 for his services between October, 1900, and October 15, 1901.

"4th. Because the \$700 allowed by the Carter Fiscal Court at its January term, 1902, is in effect a judgment against Carter county on the claim filed by plaintiff in the Carter Fiscal Court of \$4,050, and is now binding on said county, and was allowed to plaintiff as a reasonable compensation for his services as health officer of Carter county from October, 1900, until the 15th day of October 1901.

"5th. Because plaintiff's petition against Carter county is not an appeal from any judgment or order of the Carter Fiscal Court.

"6th. Because the Carter Circuit Court has no jurisdiction to vacate or modify an order or judgment of the Carter Fiscal Court except on appeal taken to said court."

The court sustained the demurrer on the fifth and sixth grounds named, and dismissed the petition, and the case is here on appeal.

By section 2060, Kentucky Statutes, physicians appointed as health officers for cities, towns and counties shall receive reasonable compensation for their services, to be allowed by the councils, trustees or county courts of the cities, towns and counties, and to be paid as other town or county officers are paid.

The appellant alleges in his petition that as health officer he performed the services named, and presented his claim to the fiscal court, and the court failed to allow him anything thereon. The law as heretofore construed by this court required him to first present his claim to that court for an allowance, and if not allowed, or if the allowance was unsatisfactory, then the claimant had either of two remedies: First, to appeal from the action of the fiscal court; second, to bring his action.

In the case of Washington County Court v. Thompson, 13 Bush, 289, which was a case where a claim was presented to the court of claims for allowance and the court refused to allow it, and the claimant appealed from the order disallowing the claim. The county sought to dismiss his appeal, claiming he had no right to appeal, but should have brought his action and referred to the case of Garrard County v. McKee, 11 Bush, 234. The court in the first case referred to said: "In that case McKee had rendered professional services for the county of Garrard in resisting the enforcement of an alleged subscription for stock in the Kentucky River Navigation Co. He applied to the levy court for an allowance, which was refused. He then sued the county court in an action at law, and the judgment or order of the levy court was pleaded in bar of his action, and the only question for decision was whether he was bound to proceed by appeal. The court said *arguendo* that the act of 1887 did not apply to claims or demands against a county growing out of transactions founded upon a grant of power to the county in the character of a private corporation, and then decided the ques-

tion in point by saying that McKee 'was not bound to appeal from the order refusing him the allowance asked.' The clear inference from the decision actually made is that he had his election either to appeal or to resort to his action at law, and hence the order of the levy court did not amount to a bar. The Kentucky Statutes provide that 'any person presenting a claim before a county court of levy and claims for \$20,' etc., shall have the right to appeal from an order rejecting it; and we feel that it would be carrying the doctrine of stare decisis to a most unreasonable length to refuse to carry out the evident will of the legislature, because of an expression of opinion which was at most but a dictum. This conclusion will not operate to give claimants of the character under consideration an advantage over other county creditors. The remedy by appeal being merely cumulative, all county creditors may elect either to appeal or resort to their action."

In the case of *Wels v. Lawrence County*, 18 Ky. Law Rep., 975, was where the claimant, after the county court refused to allow his claim, resorted to his action. The case of *Turner v. Harrison County*, 17 Ky. Law Rep., 712, was a like case, and in the opinion the court used this language: "We are also of the opinion that the rejection of appellant's claim by the fiscal court of Harrison county is no bar to this action." To the same effect are the cases of *Stephens, County Judge v. Allen*, 19 Ky. Law Rep., 1707, and *Henderson County v. Dixon*, 23 Ky. Law Rep., 1204.

The appellant can not claim in this action for anything more than \$4,050, the amount of the claim alleged to have been presented to the fiscal court for allowance, as in the opinion of this court, the presentation of the claim to the fiscal court for its allowance is a prerequisite to any action; also he can not recover against the county for services and medicine rendered and furnished to persons who were able to pay for same. He can only recover for his services and medicines rendered and furnished to indigent persons (8 Ky. Law Rep., 265), and for services and general supervision rendered by him which was necessary, or reasonably necessary, to quarantine and keep the smallpox under control and prevent the spread of the disease, and for attention to those quarantined.

For these reasons the case is reversed and the cause remanded for further proceedings consistent herewith.

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BURGHARD, &c. v. FITCH, &c.

(Filed March 17, 1903—Not to be reported.)

Street improvements—An ordinance was adopted by the general council of the city of Louisville providing for the improvement of Grand avenue, from Twenty-eighth street to Thirtieth street, by grading same at the cost of the property owners. In this action against appellants, as property owners, to recover their share of the cost, they contend that the ordinance is void because not passed in accordance with the charter of the city. Held—That said ordinance is valid, and the property holders are liable for the cost of said improvement.

Lane & Harrison for appellants.

Wm. Furlong for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Nunn.

On the 19th day of April, 1898, the following ordinance was passed by the general council of the city of Louisville, and approved by the mayor, to wit: "An ordinance for improving a part of Grand avenue from the west line of Twenty-eighth street to the east line of Thirtieth street. Be it ordained by the general council of the city of Louisville that Grand avenue, from the west line of Twenty-eighth street to the east line of Thirtieth street, shall be improved by grading full width to the curb grade, in accordance with the plans and specifications on file in the office of the board of public works. Said work shall be done at the cost of owners of grounds as provided by law, and that all ordinances in conflict herewith be, and same are hereby, repealed."

It is agreed by the parties that Fitch, the contractor, graded the street in accordance with said ordinance, and that his work was approved by the board of public works and accepted by the city, and an apportionment made of the cost thereof as against the property owners as required by statute. The appellant, being one of the property owners, contends that his property is not bound for any part of the cost of said improvement, for the reason that the ordinance quoted was and is void. He says: "The act for the government of cities of the first class, approved July 1, 1898, provides that the cost of the improvement of the sidewalks, either by original construction or reconstruction, shall be apportioned against and paid for by the owners of lots fronting the improvement, in proportion to the number of feet owned by each—that the cost of the improvement by original construction of the street proper or carriageway shall be apportioned against and paid for by the owners of lots in the quarters of squares contiguous thereto, according to the number of square feet owned by each of such persons in said quarter squares; but whenever the general council, by ordinance, provide for the improvement of any public ways of such cities, such ordinance must determine what part of such public way, if any, is for the sidewalk, and what part, if any, is for the carriageways or street proper, and where an ordinance provides for the grading of a public way throughout its entire width, and between the terminals, as fixed by the ordinance, without designating what part is sidewalk or what part is carriageway, such ordinance is void, and the property owner can not be held liable for the cost of such improvement."

If the ordinance in question had required the construction of a street or carriageway and also a sidewalk, then the contention of appellant would be proper, because the cost of constructing a street or carriageway should have been apportioned to each fourth of a square as required by section 2838, Kentucky Statutes; but in the construction of sidewalks it would have been apportioned by the front foot as owned by the abutting property owners respectively as required by section 2835, Kentucky Statutes. But we do not understand that this was the character of construction contemplated by the ordinance. As we understand the ordinance, it only required the grading of the street, full width, to the curb grade. It did not require the construction of sidewalks, and the city may never require such construction. We are of the opinion that the ordinance was valid, and the cost of the improvement was properly apportioned.

Judgment affirmed.

HENDERSON v. COMMONWEALTH.

(Filed March 17, 1902--Not to be reported.)

1. Criminal law—Instructions—Appellant was indicted for murder and was convicted of manslaughter and sentenced to fifteen years' confinement in the penitentiary, from which he prosecutes this appeal, complaining that the court erred in giving instructions on voluntary and involuntary manslaughter. Held—That giving said instruction was not prejudicial to appellant.

2. Evidence—Intoxication—Dying declaration—Intoxication is no justification or excuse for the commission of a homicide, but upon a trial for murder it is competent to prove drunkenness as bearing merely upon the existence or nonexistence of malice. The dying declaration of the deceased was properly admitted in evidence as it was given under a sense of impending death, and was competent as bearing on the fact as to who committed the homicide.

G. A. Cassidy and J. D. Pumphrey for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was indicted, charged with the murder of Best (Lander) Barber. He was convicted of manslaughter and sentenced to fifteen years' confinement in the penitentiary. There was evidence to the effect that appellant had been drinking heavily, and was drunk at the time of the killing. The fatal shot was fired in the dark. Whether by appellant or another there is conflicting evidence. There was no testimony tending to show the state of feeling of appellant toward the deceased, or that there was any motive for the act.

The court in instructing the jury defined the crimes of murder, manslaughter and involuntary manslaughter (the last named being punishable by fine and imprisonment only). Appellant objects to the two last-named instructions because he says that there was no evidence to authorize them, nor did he ask for them, but, on the contrary, objected to them. His theory is that the question of his guilt of the crime of murder only should have been submitted. Intoxication is no justification or excuse for the commission of a homicide, but upon a trial for murder it is competent to prove drunkenness as bearing merely upon the existence or nonexistence of malice. Not that it excuses or mitigates the offense, because one offense can not justify or palliate another, but because, under the circumstances of the case, it may tend to show that the lesser and not the greater offense was committed. In *Wilkerson v. Commonwealth*, 88 Ky., 88, the court, commenting upon the effect of evidence of drunkenness of the accused, said: "It was competent to prove his condition, not because intoxication per se excuses crime, but because it, with other circumstances, may show an absence of malice. It is admissible in evidence merely as one fact bearing upon the existence or nonexistence of that deliberate intent essential to the crime of murder." (*Buckhannon v. Commonwealth*, 86 Ky., 110.)

The court is of opinion that the evidence justified the giving of the manslaughter instruction. The submission of an instruction on the subject of



involuntary manslaughter does not appear to the court to have been prejudicial to the accused, because the jury did not find under it. Besides, there was some evidence tending to show that the accused may have fired the shot recklessly and without intention of inflicting death or harm upon any person.

Another objection is that the court permitted the following dying declaration of the deceased: "I, Lander Barber, realizing the fact that I am shot and seriously wounded, and being in my right mind, state that on the 6th day of December, 1801, in Fleming county, Kentucky, I was shot by some unknown person to me at the time when Robert Hawkins put both hands on me and pushed me back. I also know that two men, namely, Allen Henderson and Jacob Adams, were standing just behind Hawkins, and I know that one of the two shot me."

That the statement was made under a due sense of impending dissolution was abundantly proved. The criticism of this statement is that the declarant does not state who fired the fatal shot, but that it amounts only to an expression of an opinion. Evidence had been admitted showing that the deceased shortly before his death had stated that Jacob Adams had fired the fatal shot, but it was in the dark, the parties were some distance apart, and it was clearly shown that it was almost impossible for the deceased to have known definitely and exactly which of the two men fired the shot. They were standing together. In view of the circumstances attending the occurrence, the court is of opinion that the statement was admissible, to be given such weight as the jury should deem it entitled to. It appears to be as much in favor of appellant as against him, and could not alone have materially influenced the finding of the jury. In the motion and grounds for a new trial, although fourteen different grounds are presented, the ruling of the court in admitting the dying declaration above named was not included as one of them. The other grounds mentioned in the motion for a new trial are not relied upon in argument on this appeal, nor do they appear from the record to have merit.

Upon the whole case we find no error, and the judgment must be affirmed.

#### CATLETT v. CATLETT'S ADM'R, &c.

(Filed March 17, 1803—Not to be reported.)

Infants—Judicial sales—Guardian ad litem—In this action by an administrator to settle his accounts and sell land belonging to the intestate to pay his debts an infant was made a party defendant and process served on him, but no affidavit was filed, as required by section 38 of the Civil Code of Practice, showing that he had no statutory guardian residing in this State. On the same day the clerk appointed a guardian ad litem, and a reference was had to the commissioner. A sale of the land was had at the price of \$880, and the statutory guardian became the purchaser. Exceptions were filed to the report of sale on the ground of irregularity in the appointment of the guardian ad litem; also on the ground of inadequacy of price. Held—That the sale should have been set aside as the statutory guardian was not a party to the proceeding, and it is reasonable to believe that an irregularity of this sort would have affected materially the saleable value of the property.

Gilbert, Peak & Gilbert for appellant.

F. R. Feland for appellees.

Appeal from Anderson Circuit Court.

Opinion of the court by Chief Justice Burnam.

This suit was brought on November 6, 1900, by R. B. Carlton, as administrator of Frank Catlett, to settle his accounts as administrator, and for a sale of enough of the real estate to pay the debts of the decedent. Charles Catlett, one of the defendants, is alleged in the petition to be an infant. He was duly served with process, and the same day the clerk appointed James Posey his guardian ad litem, notwithstanding the fact that the petition of the plaintiff was not verified, and that no affidavit, either of the plaintiff or his attorney, was filed in court, with the clerk, or presented to the judge during vacation, showing that the infant defendant had no statutory guardian, residing in this State, known to the affiant, as required by section 88 of the Civil Code. The cause was at once referred to the master commissioner to report debts, and at the April term his report was filed, showing debts aggregating \$539.87. Thereupon a judgment was entered directing the master commissioner to sell as a whole three separate tracts of land, aggregating 129 acres, belonging to the estate of decedent, subject to the occupancy of Charles Catlett until he became twenty-one years of age. At the sale made pursuant to this judgment the statutory guardian of the infant became the purchaser at the price of \$680, and executed bond therefor with the administrator as security. John W. Catlett, one of the heirs at law, excepted to the confirmation of the sale, both because plaintiff failed to conform to section 88 of the Civil Code, and because the land sold for a grossly inadequate price, and tendered with his exception a written agreement, with good security, to bid \$900 for the land if the sale should be set aside and a resale ordered. Upon the trial he testified that the tract was reasonably worth \$1,200; and that he expected to have been present at the sale and bid on the land, but had been prevented from doing so by unavoidable casualty.

It was held in *McMakin v. Stratton*, 82 Ky., 226, and *Gardner v. Letcher*, 16 Ky. Law Rep., 778, that the appointment of a guardian ad litem was not a reversible error, although no affidavit had been filed as required by section 88. But in both cases the statutory guardian was a party to the proceeding. In this case the statutory guardian was not made a party at all, and only appears in the record as a purchaser. Under this state of fact we think the chancellor erred in overruling the exceptions filed to the confirmation of the sale, as it is reasonable to believe that an irregularity of this sort would have affected materially the salable value of the property.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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WEBSTER, &c. v. BROWN.

(Filed March 17, 1903—Not to be reported.)

Wills—Under the will of S. appellee is entitled to the estate for life in 220 acres of land as against the claim of her daughter-in-law for allmony and the claim of a purchaser from her son. As her son had no estate out of which

alimony could be allotted, he could not vest a purchaser with title to any part of it.

M. Merritt and F. M. Hutcheson for appellants.

Lockett & Lockett for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, Lucy J. Brown, brought this suit against the appellants, Myrtle Webster, then Myrtle Robards, and J. W. Porter, on the 8th day of November, 1900, for the possession of 220 acres of land and the rents thereon, in which she claimed to have a life estate under the will of Almira E. Suggett. Myrtle Webster claimed 100 acres of land as alimony allowed her by a judgment of the Henderson Circuit Court out of the estate of her divorced husband, J. D. B. Robards, and the appellant, Porter, claimed the residue of the tract as vendee of Robards. We are asked to determine what interest J. D. B. Robards and his mother, Mrs. Lucy J. Brown, took under the will of Almira E. Suggett. The clauses of the will we are asked to consider read as follows:

"I give all the balance of my estate, real and personal, to James White and Henry H. Farmer, and their legal successors, \* \* \* in trust for the use and benefit of J. D. B. Robards, son of B. F. and Lucy Robards, the land not to be divided, but to descend to the children that may be born in lawful marriage to said J. D. B. Robards. But the property is given with restrictions to be mentioned below. B. F. and Lucy J. Robards have the privilege of a home on the land for themselves and any children they now have, or she may have, during their minority, or as long as any girl child of hers is unmarried. But one-fourth of the proceeds of the crop raised is to be appropriated by my trustees to the education of said J. D. B. Robards, with the view to his entering the Christian ministry as a Baptist or Presbyterian. The farm, land and proceeds are to be controlled by said trustees, and nothing raised on the farm is to be subject to any one's debts except as to my own as before mentioned, and all raised on the farm except the one-fourth appropriated as before mentioned is to be used by Lucy J. Robards for the benefit of herself and family, and B. F. Robards, should he be left a widower, so long as he may continue unmarried. But no child, except Lucy J. Robards', shall be raised on the place out of its proceeds. Should J. D. B. Robards die without children, then the land shall belong to the child of Lucy J. Robards, who shall have the use of it during her life, as directed in this will."

This will was probated in May, 1877, and the appellee, Lucy J. Robards, and her husband, B. F. Robards, and their son, J. D. B. Robards, lived on this tract of land until he married the appellant, Myrtle Webster, in December, 1894, he being at that time only seventeen years old. Both families continued to occupy the premises until J. D. B. Robards and his wife separated in May, 1899. B. F. Robards having died, Lucy J. Robards married A. A. Brown. The appellant, Myrtle Webster, appears not to have agreed with her mother-in-law after her marriage to Brown, and only consented to return to her husband on the condition that her mother-in-law and her husband should leave the premises, and apparently with a view of promoting

harmony in the family she did leave the premises in May, 1899. But the reconciliation between J. D. B. Robards and his wife was short lived. She again separated from him in the following August, and instituted a suit against him for a divorce and alimony, in which she was allowed 100 acres of land as alimony for the support of herself and infant child. She shortly afterwards married her present husband, Webster. In the meantime J. D. B. Robards and wife mortgaged his life interest in the land to the appellant, Porter, and this land was subsequently sold and Porter became the purchaser. In addition to the facts recited above both of the appellants relied upon the abandonment of the premises by Mrs. Brown in 1899 as an estoppel. No facts, however, are alleged to support this plea.

We are of the opinion that B. F. and Lucy J. Robards took a life estate in the tract of 240 acres of land under the will of Mrs. Suggett, subjected to a charge of one-fourth of the proceeds of the crop raised thereon for the education of their son, J. D. B. Robards. It appears from the testimony that appellee, Mrs. Lucy J. Robards, has no minor children, and her son, J. D. B. Robards, has finished his education and has now no valid claim to one-fourth the proceeds of the farm. It, therefore, follows that appellee is entitled to the use and occupancy of the farm during her life. At her death J. D. B. Robards has a life estate therein, and, at his death, it descends to his children born in lawful wedlock. As appellee was not a party to the proceedings in which the appellant, Myrtle Webster, was adjudged 100 acres of the land as alimony, and J. W. Porter a lien upon the residue to secure the payment of his debt, her interest is not in anywise affected by this judgment, nor is there any proof in the record to support the plea of estoppel. We think the trial court properly adjudged appellee entitled to the possession of the property, etc.

Judgment affirmed.

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WRIGHT v. SHIPP.

(Filed March 17, 1903—Not to be reported.)

Landlord and tenant—Forcible entry—Where the landlord made a lease of land for one year to be used for grazing purposes, and the tenant sells the grazing privilege for a limited number of cattle, the landlord can not take possession of the land on the ground that the tenant has by subletting the premises forfeited the lease, as the sale of the grazing privilege by the tenant was not a subletting as contemplated by the statute.

N. C. Fisher for appellant.

C. Arnsperger and Dennis Dundon for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Nunn.

Appellee rented ninety-eight acres of land belonging to appellant for the term of one year from March, 1901, to March, 1902. This land was all in grass, and was to be used for grazing purposes.

Appellee afterwards sold to one Redmond the grazing privilege, for a limited number of cattle, on this land. Appellant served notice on Redmond to vacate the premises, claiming that appellee had sublet the premises

to Redmond without his written consent, and thereby forfeited his lease. Redmond vacated and appellant then moved on and took charge of the premises. Appellee had issued a writ of forcible entry against the appellant, and upon the trial of this writ appellant was found guilty. He then filed a traverse thereof and took his case to the circuit court, and was again found guilty, and is here now on appeal.

The proof in the case clearly showed, and without contradiction, that the sale of the grazing privilege to Redmond by appellee was not a subletting as contemplated by the statute, and the lower court should have given a peremptory instruction to find appellant guilty of the forcible entry. For these reasons we do not deem it necessary to discuss the other questions raised by counsel for appellant in their brief.

Wherefore, the judgment of the lower court is affirmed.

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PERKINS' ADM'X V. EMBRY.

(Filed March 17, 1908—Not to be reported.)

**Fraud—Evidence—Damages—**This action was instituted to recover damages from appellee for deceit in the sale to the husband of appellant of seven and one-half shares of capital stock of the First National Bank of Fort Scott, in the State of Kansas. Held—That there was no evidence of fraud practiced by appellee on the intestate. Representations as to the value of stock did not constitute actionable fraud, and representations made by appellee as to the value of said stock made after the consummation of the trade was not competent evidence of fraud.

J. W. Alcorn and Robt. Harding for appellant.

W. G. Welch for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted by appellant, Columbia Perkins, as administratrix of the estate of her deceased husband, Wm. Perkins, in the Lincoln Circuit Court to recover of the appellee, S. J. Embry, damages for alleged fraud and deceit in the sale to her intestate of seven and one-half shares of the capital stock of the First National Bank of Fort Scott, in the State of Kansas. The facts upon which the recovery is sought are substantially set forth in the petition, as follows: Appellant's intestate, on September 24, 1898, sold and, together with his wife, conveyed by deed to appellee sixty-seven acres of land in Lincoln county at the price of \$3,489. Of this sum \$1,312 50 was paid in twelve and a half shares of the capital stock of the Lincoln County National Bank, at \$105 per share, \$750 in seven and a half shares of the capital stock of the First National Bank of Fort Scott, Kansas, at \$160 per share, and the remaining \$426.50 of the consideration was paid in cash.

It is averred in the petition that at the time of this transaction Perkins was sick of a disease of which he in a few months thereafter died, and that appellee fraudulently, and with the intent to deceive the intestate and induce him to take the stock of the Fort Scott Bank as of the value of \$100 per share, represented to him that it was then worth that sum, and was a

good dividend-paying stock; that appellee then knew that the stock was not worth exceeding \$50 per share, but that Perkins had no knowledge as to its value, and accepted the stock, relying upon appellee's statements.

The answer specifically denies the fraud and deceit complained of, and avers that appellee knew no more of the value of the bank stock than the general public, and that appellant's intestate had the means and opportunity of knowing as much about the value of the stock as he did. The trial resulted in a verdict for appellee, the jury having been directed to so find, upon a peremptory instruction given by the court at the conclusion of appellant's evidence, and a new trial was refused the appellant, of which she complains. Ordinarily representations of the value of an article sold, though exaggerated, or even untrue, do not constitute a warranty, nor will they support an action for fraud or deceit unless the representor sustains a relation of trust or confidence to the buyer, as in the case of attorney and client, trustee and cestui que trust, etc. Another exception to the rule stated is where the truth of the thing represented is unknown to the buyer, but is peculiarly within the knowledge of the representor, or he has peculiar means of knowing the truth. (Am. and Eng. Ency. of Law, volume 14, pages 124-125, *First National Bank v. Mattingly*, 92 Ky., 667; *Beach's Modern Law of Contracts*, sections 1486-37-39.)

The evidence in this case shows that Wm. Perkins was anxious to sell his land, and that he sent several messages to appellee, importuning him to buy it. The latter, however, seemed indifferent about the matter, but did finally go to Perkins' house and trade with him, upon the terms recited in the deed. No witness has testified to what was said at the time of the trade. Appellant does say that she objected to her husband taking the Fort Scott Bank stock, after the contract was made, and that appellee then represented the stock of that bank to be good and of the value of \$100 per share; but if such representations were then made by him, they could not have operated on the mind of her husband, who had already sold the land to appellee and agreed to accept the bank stock. Some stress is placed on the return of appellee to Perkins' house that evening with the deed, accompanied by the county clerk to take the acknowledgment of the grantors. This circumstance is not of itself sufficient to show fraud, his apparent haste to obtain the deed may have been, and doubtless was, occasioned by the knowledge that he and all his neighbors possessed, that Perkins was liable to die at any time of the disease with which he was afflicted, and as a prudent man appellee may have thought it necessary to have the transaction between them consummated at once. Although Wm. Perkins lived until April following the sale of the land, no complaint ever came from him that he had been mistreated or wronged by appellee, or that he ever regretted his acceptance of the Fort Scott Bank stock.

The conversations with appellee, to which the Carpenters testified, do not show any fraud in the transaction between him and Perkins. To the one he said before the land trade was made that he would be willing to pay Perkins Lincoln County National Bank stock for his land, and to the other after the trade he gave advice in regard to the bank stock that he had transferred to Perkins, saying that stock of the Lincoln County National Bank was gilt edged, and that of the Fort Scott Bank was "reliable." It also ap-

pears from the record that many persons in and around Stanford, the county seat of Lincoln county, owned stock in the Fort Scott Bank, and this fact was in all probability known to Wm. Perkins, as it seemed to have been generally known to others, and it can, therefore, hardly be said that he was wholly without means of ascertaining the value of the bank stock when and before he received it from appellee. It also appears from the record that the stock of the Fort Scott Bank paid a 4 per cent. dividend per annum for several years before its sale by appellee to Perkins, and that it likewise paid that dividend for two years after its transfer to him. The president of the bank, whose deposition was read on the trial, testified that its stock was worth \$75 per share at the time of its purchase by Perkins, instead of \$50, as claimed by appellant. The president also testified that he had never communicated to appellee the condition of the Fort Scott Bank, so though it be conceded that appellee represented the stock as worth its par value, there is nothing to show that he did not so regard it.

After a careful reading of the record we are unable to see that there was any evidence of fraud or deceit to go to the jury, and, besides, we are not inclined to brand as fraudulent a transaction of which appellant's intestate, the party most interested, was never known to complain. The rejection by the lower court of the testimony of George Carpenter, offered to prove a conversation between him and appellee, was not prejudicial to appellant, as the conversation occurred before appellee's purchase of the land, and related to another and different proposition from that accepted by Perkins, but so much of Carpenter's statements as related to the fact that Perkins had sent him to appellee to ask the latter to buy his land might, with propriety, have been admitted by the court.

For the reasons indicated herein the judgment is affirmed.

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CITY OF LEBANON, &c. v. KNOTT, &c.

(Filed March 17, 1903—Not to be reported.)

Municipal corporations—Mandamus—Reducing boundary—Res judicata—This proceeding was instituted by citizens of Lebanon to obtain a mandamus compelling the council to pass an ordinance striking designated territory from the boundary of said city in accordance with section 3453, Kentucky Statutes. Within two years prior to the application now made to the council to reduce the boundary of said city the circuit court had refused to grant an application to reduce said boundary. On this appeal the questions involved are, first, is the boundary here sought to be defined by ordinance the same boundary that was involved in the former suit? second, is the judgment dismissing the first suit a bar to the present one? Held—That the boundary involved in the former suit is not the same involved in this. The former suit is not a bar to this, for it appears from the record that there never was a trial of the action on its merits. A mandamus is ordered to compel the council to pass an ordinance providing for the reduction of the boundary as the council has no discretion in the matter upon the filing of the proper petition.

H. S. McElroy for appellants.

John McChord for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Settle.

Section 8488, Kentucky Statutes, provides a method of adding to, or striking from, the boundaries of cities of the fourth class. The language of the statute on this subject is as follows: "Whenever it shall be deemed desirable to annex any territory to a city in this class, or to reduce the boundaries thereof, the same may be done in the following manner: The board of council of such city shall by ordinance accurately define the boundary of the territory proposed to be annexed or stricken off, either upon their own motion, or, if requested to do so by a written petition of at least twenty-five voters and resident taxpayers of the city, or residing within the boundary to be added or stricken therefrom, shall pass the ordinance in conformity with the request of such taxpayers. \* \* \* Within thirty days after the adoption, publication and advertisement of such ordinance a petition shall be filed in the circuit court of the county within which said city may be situated in the name and on behalf of the city, or in the name of one or more of said petitioning taxpayers, setting forth the passage, publication and advertisement of such ordinance, the object and purposes thereof, together with an accurate description, by metes and bounds, of the territory proposed to be annexed to, or stricken from, the city, and praying for a judgment of the court to annex said territory to, or strike same from, the city as the object may be." \* \* \*

The remaining portions of the section provide the manner in which the subsequent proceedings as to the trial in the circuit court shall be conducted, and authorize any one or more of the resident voters of the territory proposed to be annexed or stricken off to file a defense in the proceedings, setting forth such reasons as may properly be urged in resistance thereof.

It appears that the appellees, J. N. Knott and others, pursuant to the statute mentioned, presented to the Lebanon Board of Councilmen, on July 4, 1901, a petition signed by more than twenty-five voters and resident taxpayers of the city, asking of it the passage of an ordinance and publication of same, defining a portion of the corporate limits of the city, described in the petition by metes and bounds, which was proposed by the petitioners to be stricken from the boundary thereof. For some reason best known to its members the council delayed action upon the petition, and demand was again made for the enactment of the ordinance, which was refused. Thereupon appellees instituted this action in the Marion Circuit Court for a mandamus to compel the council to comply with appellees' petition and request. The answer filed by the board of councilmen contains three paragraphs, the first being a traverse of the petition, and an averment that it does not conform to the statute. The second paragraph avers that the city has a large bonded indebtedness, incurred for waterworks, and that many of the petitioners for the passage of the ordinance received special privileges for the use of water, and that the bonds for the construction of the waterworks were issued at the request of many of the petitioners. The third paragraph avers that within two years last past the city council, at the in-



stance of appellees, duly enacted an ordinance accurately defining a boundary to be stricken from the city, in which boundary it was sought by the petitioners to strike from the city limits all, and the same, territory that is now sought to be stricken out in this action by the ordinance asked for in the petition. That suit was then filed in the circuit court by the petitioners in that proceeding, to obtain a decree for the striking out of said boundary from the corporate limits of the city; that the city and its council being parties to that suit, made defense therein, whereby they successfully resisted and prevented the striking out of the boundary sought to be taken from the city, and that the judgment rendered by the circuit court was adverse to the proposed change, and has never been appealed from or reversed; that judgment is pleaded and relied on as a bar to the present action in view of a provision of the statute, *supra*, which declares that "if the judgment of the court is adverse to the proposed change, no further effort to annex or strike off the territory so proposed shall be made within two years after the entering of the judgment."

The court properly, as we think, sustained a demurrer to the second paragraph of the answer, and appellees then filed a reply, which specifically denies the affirmative allegations contained in the first and third paragraphs of the answer.

It further appears from the record that the answer was filed by the then acting mayor and council of the appellant city, and on December 13, 1901, they filed in the name of the city an amended answer, in which it was averred that they were then no longer members of the council, that their successors had been duly elected at the regular November election, 1901, and that the old or outgoing board had no power to pass the ordinance sought in this action. As a precautionary measure appellees went before the new council with the petition of the taxpayers desiring the change of boundary, and renewed the motion and application to enact the ordinance, which the new board of council failed or refused to do. Thereupon appellees filed in the lower court an amended petition, summons upon which was served on the mayor and each member of the new council. The amended petition merely sets out the application and demand for the enactment of the ordinance that was made of the new council and their failure to enact same. To the petition, as amended, the new council filed answer, denying that they refused to pass the ordinance, and adopting the third paragraph of the original answer as a further defense. The averments of the last answer are also controverted by reply. We find, therefore, that there are but two questions to be considered on this appeal: First, is the boundary here sought to be defined by ordinance the same boundary that was involved in the former suit? second, is the judgment dismissing the first suit a bar to the present one?

It appears from the record that the corporate limits of the city of Lebanon are embraced in a circle, extending three quarters of a mile in every direction, with the courthouse as the center. The proof seems to fairly establish the fact that the boundary involved in the former action included several residences that are not included in the present boundary proposed to be defined, and that the present boundary is, while including a part of the former boundary, almost exclusively composed of farming lands, rather remote

from the business part of the city. We are inclined to suspect that as since the adoption of the present Constitution all lands within the corporate limits of cities, regardless of benefits received, are subject to taxation, the real purpose of this proceeding is to obtain relief from that burden. We are of opinion that the former suit is not a bar to this proceeding, for it appears from the record that there never was a trial of that action upon its merits, it having been dismissed by the lower court upon the motion of the city of Lebanon because of the failure of the petitioners to file as a part of their petition one or more affidavits showing publication or advertisement of the ordinance proposing the reduction of the city limits. The necessity for the filing of such affidavits is obvious from the following language of the statute: "The circuit court shall have no jurisdiction of such proceedings unless the required publication, or advertisement of the ordinance proposing the extension, or reduction of the limits of the city, is proven by one or more affidavits filed as a part of the petition in said action."

This is not an action to obtain the judgment of the circuit court changing the boundary of the city of Lebanon, but it is one to compel, through the judgment of the court, the enactment by the council of an ordinance defining the boundary sought to be changed or stricken out. Under the statute the change of boundary can only be secured through the judgment of the circuit court, by the institution of an action in that court after the ordinance shall have been enacted by the council. In *City of Lebanon v. Creel, & Co.*, 23 Ky. Law Rep., 865, which was an action similar to the one at bar, this court, in construing the statute supra, said: "The act being valid, it was the duty of appellants, the councilmen of the city, to pass the ordinance fixing the boundary of the proposed reduction, and to advertise same to the end that the action might be instituted in the circuit court. Upon failure or refusal the court was authorized to direct by mandamus that such action be taken, as the council upon the filing of the required petition had no discretion in the matter." \* \* \*

We are of opinion that the circuit court did not err in granting the mandamus asked by the appellees, and the judgment is, therefore, affirmed.

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WALLINGFORD, JR. v. AITKINS, & C.

(Filed March 17, 1903—Not to be reported.)

**Damages—Breach of contract**—This appeal is prosecuted from a judgment for \$400 damages for breach of contract, by which appellee sold to appellant a house and several lots, his good will as a physician, and also agreed to relinquish his office for the practice of medicine and surgery to appellant for the sum of \$3,500, which was to take effect March 1, 1901. On the last day of February, 1901, appellant went to the office of appellee to make arrangements for taking possession on the following day, and found that G., partner of appellee, was in possession of the rooms which were rented from another party, and appellant being unable to make a satisfactory trade with G., by writing, notified appellee that he refused to comply with his contract. **Held**—That the court, by its instruction, properly interpreted the contract and prescribed the measure of damages, and the verdict is not palpably against the evidence.

W. G. Dearing and A. S. Kendall for appellant.

John P. McCartney and J. H. Power for appellees.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Fleming Circuit Court for \$400 in damages in favor of appellee against appellant for the violation of a written contract made between the parties, by which appellee, C. W. Aitkins, sold to appellant a house and several lots in the town of Flemingsburg, his good will as a physician, and also agreed to relinquish his office for the practice of medicine and surgery to the said Doctor A. M. Wallingford, Jr., for the sum of \$3,500. This contract was dated November 21, 1900, and was to take effect the 1st day of January, 1901, but by a subsequent mutual agreement the time was extended to March 1, 1901.

This litigation grew out of this clause in the contract: "The said Chas. W. Aitkins, of the first part, agrees to relinquish his office, for the practice of medicine and surgery, to the said Dr. A. M. Wallingford, Jr., of the second part, on January 1, 1901."

There is not much difference between the parties as to the facts of the case. Dr. Aitkins, appellee, did not own the office in which he was situated, and Wallingford, appellant, knew this fact. Appellee and one Dr. Garr, as partners, had rented, and had for several years occupied, three rooms over W. S. Fant's bank in the town of Flemingsburg, and appellant understood this also. Consequently appellant knew that appellee could only relinquish the office to him, but he must have understood that to be able to hold the office it was incumbent upon him to contract with the owner thereof. It can not, by any reasonable construction of the contract, be construed that Aitkins was to rent and pay the rent to the owner of the office for appellant. Before appellant entered into this contract he saw Dr. Garr for the purpose of ascertaining whether or not it would be agreeable to Garr to have him, appellant, as an associate in the practice of medicine, and to occupy the office which appellee was occupying. Garr expressed himself satisfied with the change. On the last day of February, 1901, appellant went to the office of appellee to arrange about taking possession on the next day, as agreed, and first went into the room of Dr. Garr, and he presented to appellant a contract for his acceptance and signature, in substance stating that he, Garr, had rented from W. S. Fant the three office rooms before occupied by Garr & Aitkins at \$125 per year, the two rooms consisting of a reception room and one on each side, north and south; and Garr, by the consent of W. S. Fant, subrented to Dr. Wallingford the south private consulting room, and the use of one equal half of the reception room, each to pay half of all expenses to keep the rooms in order, each to pay half the rent and all expenses. The contract was to be terminated at any time during the year by Wallingford by giving Garr thirty days' notice of his intention to vacate the office. Garr reserved the right to terminate this contract at any time by giving Wallingford thirty days' notice to vacate.

Appellant at once expressed himself dissatisfied with the contract, as it made him a subtenant under Garr, and gave Garr the privilege of turning him out at any time on thirty days' notice. He then said to Garr: "I am

looking to Dr. Aitkins to put me in possession of the office, and I do not look to you." Appellant then went to the room of appellee with the contract drawn by Garr and showed him the contract, and he (appellee) expressed surprise at the turn of the affair, and told appellant to again see Dr. Garr and try to arrive at some satisfactory understanding. Appellant did not do this, but left for home, and the next day wrote appellee a letter stating, among other things, that as Dr. Garr had rented the office from Fant, and that appellee could not deliver him the office, he would decline to have more to do with the contract.

Appellee sued appellant, and claimed \$500 damages for breach of contract. A trial was had, and on the trial there was incompetent evidence introduced without objection or exception. The appellant contends that the court erred to his prejudice in refusing to allow certain testimony offered by him. We are of the opinion that the court was right in excluding these statements of the father and mother of appellant with reference to what they claimed J. H. Power, the agent of appellee, said to them at their home, to wit: "Dr. Aitkins had not complied with his contract; that it was not the fault of Dr. Aitkins, but of Dr. Garr." J. H. Power, as shown by this record, did not have anything to do with the making of the contract, nor was he present at any time when the contract was under discussion, and a statement by him as to who was in fault amounted only to an expression of an opinion on the subject, and was clearly incompetent. The appellant also contends that the court erred in its instructions to the jury, which were three in number, as follows:

"1st. The court instructed the jury that when the defendant, Wallingford, mailed to plaintiff Aitkins the letter in evidence, declaring that he declined to have anything more to do with the contract, then the plaintiff had nothing further to do in the premises; this was a renunciation of the contract upon which the suit is founded. And the plaintiff is entitled to such damages as the jury may believe from the evidence he has sustained by reason thereof, not exceeding the sum of \$500, the amount claimed in the petition.

"2d. The court instructs the jury that the language of the contract, to wit: 'The said Chas. Aitkins agrees to relinquish his office for the practice of medicine and surgery to the said Dr. A. M. Wallingford, party of the second part,' simply means that he was to vacate said office and leave the same to the use of the defendant, Wallingford, if he chose to occupy it; and if the jury believe from the evidence that said Aitkins was able, ready and willing to so relinquish, then the law is for the plaintiff, and the jury will so find.

"3d. The court instructs the jury that the measure of damages in this cause is the difference between the contract price of \$3,500 to be paid plaintiff by defendant, Wallingford, under the contract, and the market value of said property at the time of the breach of said contract March 1, 1901, and when sold by plaintiff in March, 1901, not exceeding \$500, the amount claimed in the petition."

We think the instructions were proper, and covered the law of the case. When appellant announced by the letter of date March 1, 1901, that he would not comply with his contract, this was a renunciation of the contract, and appellee then had the right to sue him for a breach of it. It was the duty

of the court to construe the contract in its instructions to the jury, and the construction given in instruction No. 2 was right and proper, considering the whole contract and the agreed facts as to the ownership of the office, and that Garr was in possession thereof jointly with appellee, and appellee had no interest therein except as a renter. Appellant's loss was caused by his failure to deal or trade with W. S. Fant, the owner of the office, or Dr. Garr, and by contract have secured the right to remain in the office after it was relinquished to him by the appellee. It is not stated in the contract, nor attempted to be shown by the pleadings or evidence, that appellee contracted with appellant to keep him in the office after he relinquished it to him. The instruction on the measure of damages was correct. The amount of the verdict was large, considering all the facts as shown by the record, but it was the province of the jury to fix the amount. We do not feel authorized to disturb their finding.

Therefore, the judgment of the lower court is affirmed.

#### GILBERT v. CITY OF PADUCAH, &c.

##### CROW v. SAME.

(Filed March 18, 1903.)

Municipal government—Office and officers—Change of city from one class to another—Constitutional law—Prior to the 21st day of March, 1902, Paducah was a city of the third class, and on that day, by an act of the general assembly, it was transferred to the class of cities of the second class in pursuance of section 156 of the Constitution, and of section 8264, Kentucky Statutes. Prior to the date of the passage of this act, appellant G. was prosecuting attorney of the police court, receiving 30 per cent. of all fines imposed by the police court as his compensation. Appellant C. was marshal of said city, receiving compensation which should not be changed during his term of office. After the act of transfer took effect the council passed an ordinance fixing the salary of the prosecuting attorney at \$100 per month, which he refused to accept. Under the charter of second class cities the duties of marshal are devolved upon the chief of police. These appeals present the question as to the rights of appellants since the transfer of the city of Paducah to the second class. Held—That by the passage of said act the prosecuting attorney of the city court and the marshal are legislated out of office, and they can not complain as they accepted their offices with knowledge that the legislature reserved the right to transfer the city to another class. The provision of the Constitution prohibiting a change in the salary or compensation of officers during their term must be read in connection with the section authorizing the transfer of cities to different classes. But appellants should be permitted to discharge the duties of their offices without change in their compensation until after the November election in 1903, when their successors shall be inducted into office.

Bloomfield & Crice, Reed & Berry and W. S. Pryor for appellants.

J. M. Worten for appellees.

Appeals from McCracken Circuit Court.

Opinion of the court by Judge Hobson.

By the act of September 30, 1892 (Kentucky Statutes, section 2740), Paducah was assigned to cities of the third class. At the regular election in November, 1901, it elected various city officers as provided by the laws governing third class cities. At this election appellant Gilbert was elected prosecuting attorney of the police court and appellant Crow was elected marshal, each for a term of four years (Kentucky Statutes, sections 3269, 3338). Each of them qualified and entered upon the discharge of his duties. By section 3378, Kentucky Statutes, the prosecuting attorney of the police court receives as his compensation 80 per cent. of all fines and forfeitures recovered in the court; by section 3349 the marshal receives such compensation, in the way of salary, commissions and fees, as are prescribed in the statute or by ordinance, which shall not be changed during his term of office. While they were discharging their duties the general assembly, by an act approved March 21, 1902, struck out Paducah from the list of cities of the third class and added it to the list of cities of the second class; but the act is silent as to how the transfer is to take effect or what shall become of the officers of the city elected and holding under the charter as a third class city, nothing further being provided than that the city shall be transferred from the third class to the second class. (Acts 1902, page 115.) By the charter of the second class cities the office of city attorney is created, corresponding to the office of prosecuting attorney of the police court, and he is paid such a salary as the general council shall deem proper. (Kentucky Statutes, section 3165, 3167.) After the transfer of the city to the second class the general council passed an ordinance fixing appellant Gilbert's salary at \$100 a month. This he declined to receive. There is no such office as marshal in second class cities. The duties of marshal in the third class cities are imposed upon the chief of police in second class cities. (Kentucky Statutes, section 3168.) A chief of police was appointed, and appellant Crow was dropped. (Kentucky Statutes, section 3138.) Appellants, Gilbert and Crow, filed these suits to restrain the city from interfering with them in the discharge of their official duties or depriving them of the compensation attached thereto during the term for which they were elected. Their petitions were dismissed, and they have appealed.

Section 156 of the Constitution, among other things, provides: "The general assembly shall assign the cities and towns of the Commonwealth to the classes to which they respectively belong and change assignments made as the population of said cities and towns may increase or decrease, and in the absence of other satisfactory information as to their population, shall be governed by the last preceding Federal census in so doing; but no city or town shall be transferred from one class to another except in pursuance of a law previously enacted and providing therefor."

It is insisted that the act of March 21, 1902, is invalid under this provision for the reason that no law had been previously enacted providing for the transfer of cities from one class to another. The general assembly in the act of June 14, 1892, made a general law providing for the transfer of cities of the third class. (Kentucky Statutes, section 2264.) It is in these words: "When the population of any city of this class, as ascertained by the last Federal census, or by a census taken pursuant to an ordinance of said city, authorizing it to be placed in a class other than that in which it is, the

council of such city may enact an ordinance, setting forth the population of the city, and how ascertained, the class it is then in, and the class which it is entitled to be in, and may file a petition in the circuit clerk's office of the county, declaring the facts with reference to its population and the class it desires to become a member of, and such other facts as may be thought proper, and shall file with such petition a copy of the ordinance, and shall cause notice of the filing of such petition, and the object thereof, to be published in at least six issues of a daily or two issues of a weekly paper, of general circulation, published in the city, or in the county, if none be published in the city; or if no paper be published in the city or county, by notices posted up for at least ten days, at four public places in said city. On the second day of the next regular term of the court the court shall, if the proper notice has been given, or publication made, and no defense is interposed, enter a judgment assigning such city to the class to which it belongs, as appears from the petition and exhibits, and thereafter such city shall be governed by and under the general laws relating to the class to which it has been assigned, but the transfer from one class to another shall not in anywise impair or affect any ordinance or by-law theretofore enacted by such city, unless the same is in conflict with the general laws relating to cities of the class to which it has been assigned, and to such extent only shall any ordinance or by-law be repealed by the transfer, nor shall the powers, rights, duties or obligations of the city be in anywise affected by the transfer of any officer or employee thereof, or any debtor or creditor of the city. Defense may be made to the petition by any inhabitant of the city; and if defense is made the court shall hear and determine the same, and render a judgment transferring, or refusing to transfer, the city to another class, as may seem proper. The pleadings and practice shall be the same as in equity cases, except as herein provided; but if the court shall be satisfied that the population of the city entitles it to be transferred to another class, it shall so adjudge if the proper notice or publication has been made; and no appeal shall lie from the judgment."

Similar provisions were attempted to be made as to other cities and towns by sections 8661-8663; but so much of these sections as authorizes the court to assign or transfer a town or city from one class to another was held unconstitutional in *Jernigan v. City of Madisonville*, 108 Ky., 818. Yet in that case the court said: "So much of said sections, however, as provide means for taking the census or determining the population of any such city or town are constitutional and valid, and when the population of a town is ascertained pursuant to the provisions of said sections the legislature will be authorized to make the proper transfer of such town or city."

The same rule must necessarily be applied to section 3264. A census was taken by the city of Paducah, showing that it had the required population, and an ordinance of the city was then passed setting forth the population of the city and how ascertained, the class it was in, and the class in which it was entitled to be, and these facts being laid before the legislature, the act in question was passed. We are of opinion, therefore, that under the rule heretofore laid down by this court, from which we are unwilling to depart, the act of March 31, 1903, was not invalid because no previous law had been passed providing for such transfer, for if we reject all that part of the sec-

tion relating to the judicial proceedings for the transfer as unconstitutional, we have left not only that relating to the census, but the following: "And thereafter such city shall be governed by and under the general laws relating to the class to which it has been assigned, but the transfer from one class to another shall not in anywise impair or affect any ordinance or by-law theretofore enacted by such city, unless the same is in conflict with the general laws relating to cities of the class to which it has been assigned, and to such extent only shall any ordinance or by-law be repealed by the transfer, nor shall the powers, rights, duties or obligations of the city be in anywise affected by the transfer of any officer or employe thereof or any debtor or creditor of the city."

Under the principles laid down in the case referred to this part of the section must be held in force, no less than that part of it relating to the taking of the census. It is no doubt true that if a city is transferred from one class to another without any provision saving the rights of the officers, they would have only such rights as are conferred by the law governing the city in the class to which it is assigned, as they take their offices subject to the right of the legislature to transfer the city from one class to another as provided in the Constitution. If the legislature abolishes a municipal corporation the rights of its officers cease with its existence, for they take their offices subject to the power vested in the legislature to abolish them, when such power exists. Although it is provided in section 161 of the Constitution that the compensation of no municipal officer shall be changed after his election or during his term of office, this section must be read in connection with 156, and does not impair the power of the legislature to abolish the municipality or abolish the office by assigning the city to a different class, which is in effect to create a new municipal entity. A city of the second class is governed by different officers and with different powers from a city of the third class. Appellants, therefore, by the transfer of the city from one class to the other were legislated out of office, except so far as their rights were saved by the provision quoted from section 8264, Kentucky Statutes. But that section must be read in connection with the other provisions of the act for the government of cities of the second class. By the first section of that act (Kentucky Statutes, section 8088) the cities of Covington, Newport and Lexington are declared to be cities of the second class, "and the inhabitants thereof, and of such other cities as may hereafter be declared cities of the second class, respectively, are created and continued bodies-corporate and politic within their respective limits."

By section 8172 it is provided as follows: "All offices created by laws in force prior to this act taking effect, not herein expressly provided for, shall be, and they are hereby, abolished upon the expiration of the terms for which present incumbents may have been respectively elected; but the general council shall have the power, by ordinance, to recreate such of said offices, and to prescribe the terms and duties thereof, as may be needed to effect the corporate purposes. At the regular election in 1895, and for four years thereafter, there shall be elected by the qualified voters of the city a mayor, city clerk, city treasurer, city attorney, city solicitor, if there be such officer, and civil engineer and assessor and city jailer, who shall hold office for a period of four years, and until their successors are elected and



qualified; also members of the board of aldermen and members of the board of councilmen, who shall hold office as hereinafter provided, and until their successors are elected and qualified. At the general election in 1897, and every four years thereafter, there shall be elected a judge of the police court. All officers elected under this act shall assume the duties of their several offices on the first Monday in January succeeding their election."

In the cities of the second class officers were elected in November, 1893, for the four years. Subsequently the act for the government of cities of the second class was passed on March 19, 1894, and it was held that the officers elected in 1893 for four years must give way to those elected under the act at the November election, 1895. In other words, the holding over of the old officers was confined to such a period as was necessary to set in motion the machinery of the municipal government under that act, and it was held that after the regular election of officers under the new act, and they entered upon the discharge of their duties pursuant thereto, the old officers must give way. This ruling was made upon the idea that neither the Constitution nor the act contemplated that the city should be left without officers for any time, or that it should have two sets of officers at the same time. (*Lexington v. Wilson*, 92 Ky., 707; *Rhinock v. Evans*, 17 Ky. Law Rep., 489; *Newport v. Brown*, 17 Ky. Law Rep., 489; *Duncan v. Simrall*, 19 Ky. Law Rep., 1672.)

We are, therefore, of opinion that, construing the acts together as must be done, the same rule must be followed now in the case of a city coming into the second class as was applied to the cities originally in that class when the act took effect; and that appellants are entitled to discharge the duties of their offices until the induction into office of the city officers elected in November, 1904; and that in the meantime their powers, rights and duties are in nowise affected by the transfer of the city from the third to the second class. They are, therefore, entitled to discharge their duties until then, and to receive the same compensation as before the transfer was made. In the meantime the city shall be governed by and under the general laws relating to the class to which it has been assigned, not to affect the powers, rights, duties or obligations of the city or any officer or employe or debtor or creditor thereof. Second class cities have provided for them offices unknown to cities of the third class. These may be filled. For example, a board of aldermen, police and fire commissioners are provided for second class cities, but not for those of the third class. The office of marshal of third class cities and chief of police of second class cities include the same duties. The marshal in this case will be treated as chief of police until the appointment of a chief of police is made by the new regime after the election in November, 1903, unless a vacancy sooner occurs.

Judgment reversed and cause remanded for further proceedings consistent herewith.

Whole court sitting.

HUGHES V. ROBERTS, JOHNSON & RAND SHOE CO. 2003

HUGHES v. ROBERTS, JOHNSON & RAND SHOE CO.

(Filed March 18, 1903—Not to be reported.)

Guaranty, Notice—Appellant having signed a guaranty authorizing credit to a designated person to the amount of \$1,000, expressly waiving notice of acceptance of the guaranty, when sued on same, can not be relieved from liability on the ground that he had no notice of its acceptance. A guarantor has the right to waive notice of acceptance of a guaranty in advance of any liability on same.

Geo. W. Reeves and F. L. Turner for appellant.

I. E. Conley for appellees.

Appeal from Ballard Circuit Court.

Opinion of the court by Chief Justice Burnam.

Appellees, Roberts, Johnson & Rand Shoe Co., brought this suit against the appellant, H. Hughes, alleging in substance that they sold and delivered to J. L. Hughes merchandise of the value of \$1,834.45, beginning on the 29th of December, 1898, on which he paid at various times sums aggregating \$800, leaving a balance due them of \$534.45; and that to enable J. L. Hughes to buy these goods on credit, J. L. Hughes and H. Hughes executed and delivered the following written guarantee to them:

"Roberts, Johnson & Rand Shoe Co.,

"St Louis, Mo.:

"Gentlemen—In compliance with your request for a guaranty of the tenor following to establish with you credit for J. L. Hughes, of Wickliffe, Ky., and in consideration of \$1 to us in hand paid by you, the receipt and sufficiency of which is hereby acknowledged, we hereby unconditionally, jointly and severally guarantee payment of whatever said party shall at any time be owing you, whether heretofore or hereafter contracted. The guaranty is to take effect without notice of its acceptance (which is hereby waived), and is to be an open guaranty and is to continue in full force, notwithstanding any renewals or extensions granted by you, without obtaining our previous consent thereto, and until expressly revoked by notice to that effect in writing from us to you. Notification of said party's default is hereby waived, but our liability hereunder is not to exceed the sum of \$1,000 at any one time. It is mutually understood that this guaranty is to bind the party who signs it, whether the same be signed by any other party or not.

"Dated this 29th day of December, 1898.

"J. L. HUGHES,

"H. HUGHES."

The defendant, H. Hughes, in his answer says that he has no knowledge or information sufficient to form a belief as to whether the account sued on is correct, and, therefore, denies that J. L. Hughes bought the goods sued on; second, he alleges that if they were purchased, as set out in plaintiff's petition, that they had been fully paid for; third, he denies his liability for the balance alleged to be due. The affirmative averments of the answer were denied by reply, and a trial before a jury resulted in a verdict, pursuant to a peremptory instruction, in favor of the plaintiff for the balance alleged to be due. Upon the trial J. L. Hughes testified that he had pur-

chased from plaintiff about \$700 worth of goods before the guaranty sued on was executed, and that after that date he bought the goods set out in the itemized statement filed with plaintiff's petition; that he had received credit for all the payments made by him, and that he still owed the plaintiff a balance of \$584.45. The only grounds relied on for a reversal of the judgment rendered pursuant to the verdict of the jury is that the testimony did not show any notice of the acceptance of the guaranty by appellee before credit was given to J. L. Hughes.

The rule in this State as to ordinary guarantees by one person of the credit of another is well stated in *Jones v. Beckwith*, 53 Ky., 184, in these words: "Notice to the guarantor of its acceptance and an intention to act under it in pursuance of its terms is necessary, because it is in the nature of a proposition where the party addressed may accept or reject at his option, and until acceptance does not constitute a contract between the parties." (*Ford, Eaton & Co. v. Harris*, 19 Ky. Law Rep., 1286; *Geer Machine Co. v. Sears*, 28 Ky. Law Rep., 2085.)

But the guaranty sued on in this proceeding is far more sweeping in its terms than those in any of the cases in which this rule is announced. It expressly stipulates that notice of its acceptance is waived, and that it was to continue in full force until expressly revoked by notice to that effect in writing. The only limitation upon appellant's liability is that it should not exceed \$1,000 at any one time. There is no suggestion that appellant is not *sui juris*, and no legal reason given why he could not agree to dispense with notice of the acceptance of his guaranty. We are, therefore, of the opinion that the trial court did not err in its peremptory instruction to find for the plaintiff.

Judgment affirmed.

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MONTGOMERY v. CONSOLIDATED BOAT STORE CO.

(Filed March 18, 1903.)

Foreign judgment—Pleading—In an action on a judgment of another State it is sufficient to allege in the petition that the court which rendered the judgment was one of general equity and common law jurisdiction. It was not necessary to set forth the statute in *hæc verba*. It may be pleaded according to its effect. As the foreign law must be proved as any other fact, it may also be pleaded as any other fact. The defense that the transcript of the judgment is not of the entire decree is not available on appeal where such defense was not made in the lower court; besides, the transcript seems to be regular and to be certified in due form.

M. M. Durrett for appellant.

Myers & Howard for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

Appellee filed this suit to recover the amount of a judgment rendered in its favor against appellant in the Superior Court of Cincinnati, Hamilton county, Ohio, and judgment having been rendered in favor of appellee, a reversal is sought on two grounds:

COMMONWEALTH, BY, &C. V. RILEY'S CURATORS. 2005.

1st. It is urged that the petition is not sufficient, in that it fails to state facts showing that the Ohio court had jurisdiction of the subject-matter and of the person of the defendant when it rendered the judgment. *Gebhard v. Garnier*, 75 Ky., 321, and *Ladley v. Cummins*, 83 Ky., 606, are relied on. The last case seems to have no application, as that involved a judgment of a district court of the United States, and it was held that this court would take judicial notice of acts of congress, defining the powers of the district court. In the other case suit was filed on a judgment of the circuit court of Dearborn county, Indiana, but no facts were alleged showing what the jurisdiction of that court was. It was not alleged that it was a court of general equity or common law jurisdiction. But in this case it is alleged that appellant appeared personally in the court and filed answer. It is also alleged that the court was one of general equity and common law jurisdiction. The general averment of a fact of this character is sufficient. It would be needless prolixity to require the statute of Ohio to be set out in *hæc verba*. It may be pleaded according to its effect; as the foreign law must be proved as any other fact, it may also be pleaded as any other fact.

2d. It is also insisted that the transcript of the judgment is not of the entire decree. We do not see anything in the record to sustain this idea. No such defense was made in the trial court. The forms of procedure vary in the different States in matters of detail, and while the form of this judgment is not that in use in Kentucky, we think it is the entire judgment in the matter, and was properly treated as such by the circuit court. We can not understand why the execution issued upon it if it was not intended as a judgment. It is certified according to the acts of congress, by which the courts of this State are required to give such faith and credit to the judgment as it would have at the place whence the records come. (U. S. Statutes, sections 905-909.)

Judgment affirmed.

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McINERNEY v. TARVIN, JUDGE.

(Filed March 18, 1908—Not to be reported.)

F. M. Tracy for appellant.

J. P. Tarvin for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

In view of the important public interests affected by this case its determination should not be delayed further than is unavoidable. But considering the short time elapsing since the record was completed, and being satisfied the learned circuit judge will duly dispose of the case, the court is of opinion that the motion for the writ should be denied.

Motion overruled.

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COMMONWEALTH, BY, &c. v. RILEY'S CURATORS.

(Filed March 18, 1908.)

Taxation—Assessment—Estate in hands of curators—This appeal involves the sufficiency of an information filed by an auditor's agent to assess estate

## 2006 COMMONWEALTH, BY, &C. V. RILEY'S CURATORS.

in their hands for taxation for 1897 under section 4241, Kentucky Statutes. The information described the property as "money, notes, bonds, mortgages, certificates and national bank stock of the value of \$80,000." A demurrer was sustained to the information in the lower court on the ground that the property was not sufficiently described. Held—That the court improperly sustained a demurrer to the petition. Such objection could be reached only by motion to make more specific. It is no defense to the liability of the curators to show that they failed to assess the property in their hands at the proper time, and afterwards distributed same.

G. A. Cassidy for appellants.

L. W. Robertson, Garrett S. Wall, E. L. Worthington and W. D. Cochran for appellees.

Appeal from Mason Circuit Court.

[ Opinion of the court by Judge Nunn.

On the 31st day of October, 1901, F. S. Watson, auditor's agent for Mason county, Kentucky, filed in the county court of Mason county a statement, alleging that certain property in the hands of appellees, as curators of George Riley, deceased, amounting to \$80,000, was by them omitted to be assessed or listed for taxation for the year 1897, and charged that they had this property in their possession as such curators, on and after the 15th day of September, 1896, and that they afterwards distributed said estate without ever having listed or paid any tax thereon.

It appears that the demurrers to the information and statement were sustained by the lower court upon the grounds that the statement did not describe the property sought to be assessed as is required by section 4241 of the Kentucky Statutes. With reference to the description of the property by the auditor's agent in his statement it is, in substance, alleged that the curators, Benjamin Longnecker and J. D. Riley, failed, omitted and neglected to list moneys, notes, mortgages and certificates of deposit to the extent of \$80,000, all of which was subject to assessment and should have been listed, but was not listed with the assessor or the board of supervisors of the county, all of which was subject to taxation, but was not assessed and escaped taxation although subject to revenue taxes for State purposes for that year.

Section 4241 of the Kentucky Statutes reads as follows, to wit: "It shall be the duty of the sheriff or auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted, by the assessor, board of supervisors, board of valuation and assessment, or railroad commission, for any year or years. The officer proposing to have such property assessed shall file in the clerk's office of the county in which the property may be liable to assessment a statement, containing a description and value of the property proposed to be assessed, \* \* \* and the name and residence of the owner, his agent or attorney or person in possession of the property, and the year or years for which the property is proposed to be assessed. \* \* \* On the filing of this statement the clerk of the court shall issue a summons against the owner to show cause \* \* \* why such property, if any, shall not be assessed at the value named in the statement filed. \* \* \* If it shall appear to the court that the property is liable for taxation, and has not been assessed, the court shall enter an order fixing the value thereof

at its fair cash value, estimated as required by law; if not liable, he shall make an order to that effect. From so much of the order of the court deciding whether or not the property is liable to assessment, either party may appeal as in other civil cases." \* \* \*

Appellees contend that the description of the property in the information filed is insufficient, to wit: "Money, notes, bonds, mortgages, certificates and national bank stock of the value of \$80,000." And also that their demurrer was properly sustained. They contend that the information should have stated how much of the \$80,000 was money, how much was notes, and how much of each. Even if they were correct in this, the proper way to have reached it would have been by motion to make the information more specific, and not by demurrer. By their demurrer they admitted that they had in their possession, as such curators, property of the decedent, Riley, which was subject to taxation, and was not taxed for the year 1897, of the value of \$80,000. They were in a better position to know the truth or incorrectness of this allegation; and the kind and character of such property and the amounts of each, if any, than the appellant.

Under section 4053 of the Kentucky Statutes it was their duty to list with the assessor all the estate of every kind that they had in their hands, as such curators, on the 15th day of September, 1896. They were bound for the taxes, notwithstanding they may have parted with the property.

In the case of the Commonwealth, By, &c. v. Singer Mfg. Co., 14 Ky. Law Rep., 733, in discussing section 4341 of the Kentucky Statutes, the auditor's agent act, the court, by Judge Hazelrigg, said: "The information on which the court is expected to act under this law must be, from the nature of the case, somewhat general. The citation is rather to search the conscience of one who is presumably evading the taxgatherer. It is the duty of each citizen to help bear the burden of taxation in common with his fellow, and equally with him, and even upon slight information that he is violating this duty the court should give him an opportunity to perform it."

Appellees further contend that they are not bound for the tax because after the 15th day of September, 1896, and before the beginning of the year 1897, they had parted with the possession of the property.

The case of Baldwin v. Shine, &c., 84 Ky., 507, was where one Robert B. Bowler, of Hamilton county, Ohio, died intestate, being then the owner of a large estate in both that and this State; administration was granted in both States; Eli C. Baldwin became the administrator of his estate in the State of Kentucky. He acted as such administrator for several years, and it appears that large amounts of property and money came into his hands as such administrator. The auditor's agent filed in the Kenton County Court an information against Baldwin, as the administrator of Bowler, in which it was stated that from 1865 to 1888, inclusive, the latter had in his hands each year a certain amount (naming it and the year) of assets which were subject to taxation under the revenue laws of this State. He filed a response setting up his settlement, the distribution and discharge from the trust, and it appearing that he had settled with the county court and distributed the estate among the distributees and been discharged from the trust. The court in that case, after referring to the section of the statute above quoted, used this language: "The assessment is made as of a cer-

tain day of each year. The liability is fixed as of that day, and the owner or possessor of the property upon that day is bound for the tax, although he may subsequently part with it. While the law contemplates that the owner (or possessor) will be called upon by the assessing officer for his list, and makes it the duty of the latter to do so, yet it equally contemplates that all property liable to taxation shall be assessed. \* \* \* It is manifest from these statutory provisions that it was not intended that property should escape taxation by the government which protects it either because the assessor fails to call upon the owner or possessor for his list, or because the latter parts with it before he is proceeded against, but after the time when the liability becomes fixed." The court in this case held the administrator liable for the taxes for the several years, although he had made a final settlement with the county court and distributed the estate among the several distributees. We are of opinion that the lower court improperly sustained appellee's demurrer.

For these reasons the case is reversed and the cause remanded for further proceedings consistent herewith.

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WESTERN UNION TELEGRAPH CO. v. PARSONS.

(Filed March 18, 1908—Not to be reported.)

1. Telegraph companies—Negligence—Instructions—A telegram was sent from Jellico, Tenn., to Greenwood, Ky., a distance of twenty-two and one-half miles, directed to appellee, notifying her of the death of her son, but was not delivered to her in time to enable her to attend the funeral or burial of her son. The message was sent between 6 and 7 o'clock on the morning of May 24, 1901, and did not reach Greenwood until about 8:30 o'clock on the morning of May 25, 1901, and was not delivered to appellee until about 10 o'clock that morning, although she resided only about two hundred yards from the office. The jury, under an instruction of the court which assumed that appellant was guilty of negligence in delaying the delivery of the telegram, rendered a verdict in favor of appellee. On appeal it is insisted that said instruction was erroneous. Held—That said instruction was proper, as it was the duty of appellee to transmit and deliver the message within a reasonable time, and the delay was unreasonable. It is no defense that the agent at Greenwood had no porter or messenger by whom he could have delivered the message to appellee, and that he was prohibited by the rules of the company from leaving the office. It is the duty of a telegraph company to deliver messages, and it can not shield itself from this duty by providing that the agent must not leave his office. If the message is received at the office during business hours it is the duty of the company to deliver it without delay.

2. Pleading—A petition which contains defective allegations of negligence is cured by the answer denying negligence and the conduct of the trial on the theory that the issue as to negligence is properly raised.

Richards & Richards and O. H. & R. B. Waddle for appellant.

W. S. Pryor and V. P. Smith for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Hobson.

Plaintiff, Mandy Parsons, who resides at Greenwood, Ky., was the mother

of George Parsons, who resided at Jellico, Tenn. George Parsons died on the evening of May 23, 1901, about 9 o'clock. On the next morning between 6 and 7 o'clock his wife, Julia Parsons, sent the following telegram to his mother:

"Jellico, Tenn., May 24, 1901.

"Mandy Parsons,

"Greenwood, Ky. :

"George died yesterday. Body can't be shipped. Burial at Jellico.

"JULIA PARSONS."

The distance from Jellico to Greenwood is only about twenty-two miles; but the message was sent to Louisville from Jellico and forwarded from there. It did not reach Jellico until about 8:30 a. m. on the morning of May 25, and was not delivered to Mrs. Parsons until 10 o'clock that morning. She lived in Greenwood, and, according to her testimony, about two hundred yards from the telegraph office, or, according to the testimony of the agent, about five hundred yards from it. In the meantime however, Julia Parsons having heard nothing from the mother, and the body being in bad condition, buried her husband about 4 o'clock on the evening of May 24. Mrs. Mandy Parsons filed this suit to recover damages for the neglect in the delivery of the message. It was agreed on the trial that if the message had been delivered promptly she could not have taken any train that would have carried her to Jellico by 4 o'clock that evening, the time when the funeral took place. But it was also shown that there was a fair road between the two places, and that on her last visit to her son she had returned home by this road by private conveyance. It was also shown that the reason that the burial took place at 4 o'clock on May 24 was that Mrs. Parsons had not come; they had not heard from her; the condition of the corpse was getting bad, but they could have delayed until the next day, and would have done so but for the failure to hear anything from her. Mrs. Parsons testified that when she got the message she did not observe at first that it was dated the day before, and she began getting ready, evidently with a view of taking the train, but when she saw the date of the message thought it was too late to go. If she had gone on the next train she would have reached Jellico some time that night. The court instructed the jury as follows: "If you believe from the evidence that the message read in evidence was delivered to and accepted by the defendant at Jellico, Tenn., on May 24, 1901, at about 6:30 a. m., which it undertook to transmit and deliver to the plaintiff at Greenwood, Ky., and that said message was not transmitted and delivered to the plaintiff until about 10 o'clock a. m. on May 25, 1901, and if by the delay of the defendant in transmitting and delivering said message plaintiff was prevented from being present at the funeral or burial of her son, you will find for the plaintiff such a sum in damages as you may believe from the evidence will fairly compensate her for the mental anguish to her, if any, caused by the failure to deliver the message, provided your finding will not exceed \$1,500; and unless you so believe from the evidence you will find for the defendant."

It is objected that the instruction assumed the defendant's negligence; that it submits an issue not raised by the pleading, and that it was erroneous



in submitting to the jury whether the plaintiff by the delay was prevented from being present at the funeral or burial of her son.

It was the duty of the defendant to transmit and deliver the message in a reasonable time. If it failed to do so, *prima facie*, it was guilty of negligence. If the delay was due to the act of God or the fault of the sender of the message, or other matters beyond its control, the burden was on the defendant to show these things, and when it failed to do so the court properly told the jury that if there was a delay of something like twenty-seven hours in transmitting the message, the defendant was liable, for such a delay is unreasonable. It is urged that the petition did not charge negligence in transmitting the message from Jellico to Greenwood, but only charged negligence in delaying to deliver it after it reached Greenwood. It is unnecessary to determine now what is a proper construction of the petition, for the defendant by its answer, after denying the allegations of the petition, added this: "It denies \* \* \* that it was guilty of any negligence or carelessness in the transmission or delivery of said message," and on the trial of the case and in its preparation both parties treated the issue as made, whether there was any negligence on the part of the defendant in the transmission of the message to Greenwood, or in its delivery after it reached there.

It was held by the Court of Appeals of Texas, in *Western Union Telegraph Co. v. Hendrick* 63 S. W., 841, that where a message was sent to a the son father announcing the sickness of his son, and he could not have reached before he died if the message had been promptly delivered, a delay in delivering the message would not warrant a recovery of damages for the failure to reach the son before his death. It was also held by this court, in *Taliaferro v. Western Union Telegraph Co.*, 91 Ky. Law Rep., 1290, that where a new agency must have acted if the telegram had been delivered damages could not be recovered for things dependent upon the action of such new agency. But neither of these decisions seems to us in point here. The death of the son in the Texas case was the act of God, and it turning out that in no event the plaintiff could have reached his son before death, damages were properly refused for his failure to reach his son because the delay in the message was not the proximate cause of this. In this case, if the message had been delivered in time, there was no new agency to act. The message was to Mrs. Parsons. When it was not delivered to her promptly she was deprived of all opportunity to act, either by going to her son by private conveyance or by telegraphing for them to wait for her coming. If she could reasonably have gotten to her son before the burial, if the message had been promptly delivered, it was proper for the court to submit to the jury whether she was deprived of this privilege by the defendant's delay in transmitting the message.

In the *Taliaferro* case the telegram was of mere inquiry, but in this case the message bore information of the greatest importance to a mother, and it might as plausibly be argued that there could be no recovery in any case like this where the message was not delivered in time, because it could never be known what the receiver of the message would have done if the message had been promptly delivered. The testimony taken by the appellant, and read by the appellee on the trial, which is uncontradicted, shows

that the body could have been retained until appellee arrived, so that she might be present at the burial.

The appellant took the depositions of Julia Parsons and C. G. Lambdin, who sent the message for her, and after appellee announced through on the trial, but before anything further was done, she asked leave to read these depositions on her behalf. The court allowed this to be done. If the testimony had been offered before appellee announced through no question would probably be made as to its admissibility; and it was discretionary in the court to allow other testimony to be given after the plaintiff announced through and before anything else was done.

The defendant offered to prove by the agent at Greenwood that he had no porter; that by the rules of the company he was not allowed to leave his office, and that the delay in delivering the message after he had received it, from 8:30 to 10 o'clock, was due to this. This evidence was properly refused. It is the duty of a telegraph company to deliver messages, and it can not shield itself from this duty by providing that the agent must not leave his office. When it receives messages to be delivered at a certain office it must furnish reasonable facilities for delivering the messages. It was held in *Western Union Telegraph Co. v. Crider*, 21 Ky. Law Rep., 1386, that a company might make reasonable rules for the conduct of its business in accordance with the volume done, and that it was not bound to keep night offices open in small places where the business would not justify it. But this can not be extended so as to excuse the company for the failure to deliver promptly messages during business hours and when its office is kept open. It appears from the testimony of the agent of the defendant who received the message that he was told by the sender that Greenwood was on the Cincinnati Southern R. R., and the agent wrote the message out. If he failed to put on the message a sufficient direction, or to send it to the proper place, it was not the fault of the sender. There are two places called Greenwood in Kentucky; one in Warren county and the other in Pulaski county, on the Cincinnati Southern R. R. The agent was told when the message was delivered to him, according to his own statement, that the latter was the place the message was to go, and it was his own fault if he did not send it correctly, or so send it that it would reach the point he was told it was destined for. There was, therefore, nothing in this to submit to the jury. The verdict is large, but not so palpably excessive or against the evidence as to justify us in disturbing it.

Judgment affirmed.

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WILHOIT v. MUSSELMAN.

(Filed March 18, 1903—Not to be reported.)

1. Fraudulent conveyances—Notice—Limitation, statute of—A. bid in a tract of land at a judicial sale in the name of B. and the title conveyed to him. Several years thereafter, it was conveyed to appellant, the son-in-law of A., who occupied same until within one year before appellee, a creditor, instituted this action to set aside said conveyance as a fraud on the rights of appellee. The statute of limitation was interposed as a bar to the relief sought, the answer alleging that the conveyance was made more

than five years, and less than ten years, before the institution of this action. On the trial it was proven that the deed was admitted to record more than five years before the institution of the action, and it is insisted that this was notice to appellee. Held—That as to creditors the record of a deed is not constructive notice, and that the other evidence was insufficient to charge appellee with notice of the conveyance, and he was entitled to the relief sought.

2. Pleading—Although the petition may be defective in charging only that he did not discover the fraud until within a year before the institution of the suit, yet the defect was cured by the answer that appellee could have discovered the fraud complained of within fully five years.

Wm. Carnes and C. C. Cram for appellant.

W. W. Dickerson for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Paynter.

The question for review is whether the court properly adjudged that the 123½ acres claimed by the appellant, Reuben Wilhoit, should be subjected to the payment of the appellee's debt against Dudley Starnes. The question discussed by counsel is as to the statute of limitation.

The land was bought at judicial sale and bid in by Starnes in the name of one Allphin. Subsequently the property was conveyed to Wilhoit. Less than ten, but more than five, years had elapsed after the conveyance to Wilhoit before the institution of the action by the appellee to set aside as fraudulent, the deed made to him. The plaintiff averred in his petition that he did not discover the fraud until within the past year, but he failed to aver that he could not have, with the exercise of reasonable diligence, discovered it sooner. If there was any defect in the petition it was cured by the answer, because it is therein averred that "plaintiff, by reasonable diligence, could have discovered said fraud more than five years before the institution of plaintiff's action." Besides, the plaintiff denied in his reply that he "could by ordinary or any reasonable diligence have discovered the fraud herein complained of in said conveyance," etc. It is also averred in the reply that plaintiff was eighty years of age and was unable to give personal attention to his business, etc., and he alleged that Wilhoit was never in possession of the land, but William Starnes kept, used and cultivated it, and thus misled plaintiff until within a year before the suit was instituted.

The substance of plaintiff's pleadings is that he did not discover the fraud until within a year before the suit was instituted, and that he could not have discovered it sooner by the exercise of reasonable diligence. The averments in plaintiff's pleadings, to which we have referred, are sufficient. (*Fritschler, &c. v. Koehler, &c.*, 83 Ky., 80; *Cavanaugh v. Britt*, 90 Ky., 278.)

Counsel for appellee relies upon *Fritschler v. Koehler*, because the court held the facts stated by the plaintiff in that case were not sufficient to avoid the statutory bar of five years, as the plaintiff held the note which was the basis of the action as assignee, and, therefore, the averment that he did not discover the fraud within five years before the commencement of the action, or could not have done so by the exercise of ordinary diligence, was not sufficient, because "the cause of action might have accrued by reason of the

discovery of his assignee of the alleged fraud before he assigned the note to plaintiff."

Counsel for appellant relies upon *Cavénaugh v. Britt*, wherein it was held that the averment in the reply, that he did not discover the fact until within five years before the bringing of the action, was insufficient." It was then held that it was incumbent upon him to make the additional averment that he could not have made the discovery by the exercise of reasonable diligence. Where a person fraudulently conveys his property to another the deed which is made and placed upon record is not constructive notice to creditors. (*Chinn, &c. v. Curtiss*, ante, 1563.)

In this case Wilhoit never lived upon the land or exercised ownership over it until within less than a year before the institution of the suit. Title had been taken to Allphin, who conveyed it to Wilhoit, and there was nothing to put the appellee on inquiry. We think, under all of the circumstances in this case, that it should be held that appellee could not by the exercise of reasonable diligence have sooner discovered that Starnes had paid for the land, and had the deed made to his son-in-law, Wilhoit.

Judgment is affirmed.

#### MURRAY v. ROACH, &c.

(Filed March 18, 1908—Not to be reported.)

Fraud—Conveyance—Appellant, an old woman, having some money to invest in property, procured appellee, her brother-in-law, in whom she had great confidence, to make the investment for her. A lot was found for sale the price of which was more than appellant had money to pay for. It was agreed that appellant should take one-half of the lot and appellee the other half on which was situate a small house. Appellee went with appellant before the purchase to look at the property, and they found a stable and a privy vault about the center of the lot, which appellee assured appellant would be used by them jointly, and that the line would run so as to divide them equally. The deeds were prepared and the trade consummated, but the deed to appellant was so drawn as to exclude her from the joint ownership of the stable and the privy, it being described as running back only 78 feet instead of 88 feet, which would have conformed to the agreement made. Afterwards appellee tore down the stable and used the lumber in the construction of another stable on his lot; also prohibited appellant from using the privy. This action was brought to reform the deed to correspond with the true contract; also to recover the value of one-half of the lumber of the stable converted by appellee to his own use. Held—That appellant is entitled to the relief prayed for. The relation of confidence existing between the parties, together with other facts, show conclusively that appellee committed a fraud on appellant in procuring the deed to be made to him which excluded her from the joint ownership of the stable and privy.

T. J. Hanlon and J. L. Ellison for appellant.

Byrne & Reed for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Ann E. Murray, who is a widow of some seventy years of

age, residing in the city of Covington, Ky., having some money to invest, entered into negotiations with her brother-in-law, the appellee, John Roach, with a view of obtaining his assistance in the purchasing of a home. Appellant seems to have had great confidence in appellee, and to have relied on his friendship and advice. In compliance with her request he undertook to assist her in the investment of her money.

In furtherance of her interest appellee went to see Logan E. Wood, a real estate agent of Covington, in regard to the purchase of the lot involved in this action. This property, being lot No. 62 in Johnson's subdivision, fronts 25 feet on the north side of Fourth street, and runs northwardly, in parallel lines, 146 feet to Beach street; it belonged to the estate of Mrs. Natalie Hackmann, deceased, of which estate Charles Mahlman, Jr., was the executor.

Appellant claims that the appellee was very anxious for her to buy the property, and used all his influence with her to that end. The purchase price appears to have been \$1,650, and upon appellant's declaration that she did not have so much money, appellee offered to take the Beach street end of the lot upon which there was a cottage, at the price of \$425, leaving the Fourth street end for appellant, at the price of \$1,225.

Appellant claims that it was agreed between her and appellee that she should buy the whole property, and then resell to him the Beach street end at the price stated. This appellee denies, and it seems to be quite immaterial. As a matter of fact the purchase of the lot was finally consummated, two deeds being executed therefor, one to appellant, conveying to her that portion fronting on Fourth street and running northwardly 73 feet, for the sum of \$1,225; the other conveying to appellee that portion fronting 25 feet on Beach street and running southwardly 73 feet, for the sum of \$425; and each party took possession of the property thus conveyed. There was on the lot near the middle a stable and a double privy vault, which seems to have been designed for, and always used by, the occupants both of the cottage fronting on Beach street and the house fronting on Fourth street. This privy vault was from six to ten feet south of the middle line of the lot, and the largest portion of the stable was on the Beach street half of the lot, although it extended about two feet over the middle line.

Appellant claims that before the purchase of the lot she went upon it with appellee, for the purpose of inspecting it and the buildings thereon; that he pointed out to her the double privy vault near the center of the lot, and told her that it was on the center line, and would be for the use of the occupants of both houses; that the stable was also on the center line, and would belong to them jointly. After taking possession of the property conveyed to her appellant and her family continued to use the privy for a considerable period of time. The stable was pulled down by appellee, and a part of the old material was used in building a fence across the center line of the lot, but leaving an opening through which appellant and her family could pass to the privy vault. Subsequently appellee undertook to prevent appellant's using the vault entirely, whereupon she instituted this action. In her petition she alleges the facts of the purchase of the lot, claiming that, in the agreement between her and appellee, she was to have 25 feet front on Fourth street, running back 88 feet, so that she should own one-half of the privy vault and one-half of the stable; that appellee was acting

for her, as her agent, and that he fraudulently procured the deed to be made so as to convey to her only 25 by 78 feet, thereby excluding her from any ownership in the vault in question, and praying that the deed to her be reformed; and that appellee and his wife, Minnie Roach, be required to execute a quit-claim deed to her of the ten feet of the southern end of their lot, so as to make appellant's lot 35 by 83 feet, and thus give to her the ownership of one-half of the privy vault in question.

Appellant also claimed damages for her half of the old material in the stable, which was torn down, and which, she says, was appropriated by appellee and converted to his own use to her exclusion. Appellees, by their answer, put in issue all the material allegations of the petition. There was a good deal of evidence taken on both sides, and, as is usual in such cases, it is conflicting. We have no doubt from the evidence that appellant expected to have the use of the privy vault, and that both she and appellee believed that it was upon the center line of the lot in question; that appellant would have agreed to take the lot if she had known that an equal division would result in placing the vault entirely on appellees' lot is difficult to believe. Appellant, her daughter and granddaughter all testified positively to the fact that appellee went upon the lot with them before the purchase, and pointing with his foot to the middle of the double privy, said, substantially, this is where the middle line of the lot will come, and one-half of this vault will be for your use and one-half for mine. This testimony is denied by appellee, and he has introduced some evidence which tends to corroborate him.

We do not think that the fact that appellant, who is an old, somewhat infirm, and almost illiterate woman, heard the deed read, in which the property was described by metes and bounds, without objection, militates in anywise against her contention, that she believed she was getting sufficient depth of property to include one-half of the privy vault. If her statement be true, that she had gone upon the premises with appellee, and that he pointed out to her where the middle line would run with reference to the vault, we do not believe that the mere reading of the description of the lot, being 25 feet front by 78 feet in depth, would have any tendency to convey to her the information that this boundary left the entire vault on appellee's lot. We think that the great weight of the testimony in this case conduces to establish the truth of appellant's statement with reference to what took place between her and appellee, John Roach, as to the property in question; he was acting for her as well as himself; he conducted all of the negotiations for the purchase of the lot with the agent, Logan E. Wood, and the executor, Mahlman, and directed them as to how the deeds should be made, and they were made in pursuance of his wishes, and in accordance with his directions.

We think that good faith towards appellant required appellee, in so important a matter as that herein involved, that he should see to it that she understood all of the facts. The ten feet in depth added to the lot is not of material consideration, except for the fact that it carried with it the use of the vault involved in this action. We think the evidence shows that it was the understanding and agreement between appellant and appellee that she should have so many feet in depth of the southern end of the lot, No. 62, as would include one-half of the stable and one-half of the vault. The prayer

of the petition, so far as the reformation of the deed to appellant have been granted, that is, the appellees should have been required to claim so much of the rear end of their lot as would give to appellant half of the vault in question, she is likewise entitled to one half the value of the old lumber taken from the stable torn down by appellees.

Wherefore, the case is reversed for proceedings consistent with this opinion.

### CLAY, JR. v. CLAY'S GUARDIAN, &c.

(Filed March 18, 1903—Not to be reported.)

Husband and wife—Conveyances—C., by his will, devised to his daughter estate to the value of over \$5,000, to be invested in land for her benefit during her life, with remainder to the heirs of her body if living at her death. The granddaughter married appellant and the executors sold the said funds in a tract of land worth more than \$8,000, with the agreement on the part of appellant that he would pay the consideration in excess of the funds in the hands of the executors, and by his consent the deed was given to the wife the life estate in the land, and the habendum clause cited that the property should be for her sole and separate use and enjoyment during her life and at her death to the heirs of her body. After the death of his wife appellant instituted this action to enforce a lien on said land in his favor to the extent of \$3,050, paid by him on the purchase money, claiming that he was entitled to this under an agreement with his wife that the same should be paid to him. Held—That the deed having been made by appellant, and he having voluntarily paid part of the purchase money, it will be presumed that it was done as a gift or advancement to his wife and child. Under section 2353, Kentucky Statutes, no trust results where the purchase money shall be made to one person and the consideration shall be paid by another. The proof fails to show any agreement on the part of the wife to receive part of this purchase money to her husband, besides, as she owned only a life interest in the land, she could not, by any agreement, bind the infant child for the repayment of this money.

H. C. Howard for Brutus J. Clay, Jr., appellant.

C. M. Thomas for appellees.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Paynter.

Under the will of Cabell Chenault, of Madison county, his granddaughter Estelle Chenault, was a beneficiary of certain funds, aggregating \$5,000. It was in the hands of the executors of the will, who by its terms were directed to invest it in land for the use and benefit of the granddaughter during her life, with remainder to the heirs of her body if living at her death; if none living at her death, it was to go to testator's heirs, according to the laws of descent and distribution. The granddaughter intervened with the appellant, Brutus J. Clay, Jr., to whom was born on February 18, 1894, the appellee, Nannie Clay. The mother died on the 22d day of March, 1899. In March following the birth of the child the deed that is hereinafter interpreted was made under the following circumstances:

"The executors had taken up the question of investing the money directed by the will. As the appellant and his wife lived in B...

county, it was desired by them that the money should be invested in lands in that county. The appellant entered into a contract with Ray Cunningham and others with reference to the purchase of 122 acres, 2 rods and 10 poles of land. It was called to the attention of the executors with a view of having them put Mrs. Clay's money in the land. It seems that two persons interested in the land were minors, and it required a proceeding in court to perfect the title to it. Parties interested in it could convey thirteen fifteenths of it. The agreed price was \$70 per acre, and the consideration amounted to something over \$8,500. The money in the hands of the executors was not sufficient to pay the purchase money by \$3,050, and the appellant agreed with the executors that if they would invest his wife's money in the land he would pay the balance of the purchase money. The parties met to consummate the agreement. The appellant was not present when the preparation of the deed began; however, he arrived in time to hear it read and agreed to its terms. He was advised as to the import of the deed and knew as to the effect of its provisions, and directed it to be so made. The habendum of the deed is in the following language:

"To have and to hold unto said party of the second part for her sole and separate use and benefit during her life and at her death to the heirs of her body, if living at her death, and if none be living at her death, to revert to the heirs of Cabell Chenault (to the extent of the purchase money paid as hereinbefore recited by the executors of said Cabell Chenault and the purchase money hereof which shall hereafter be paid by said executors in the execution of the trust confided to them by the said will of Cabell Chenault), according to the laws of descent and distribution, in conformity with the provisions of said will."

The land was sold one-third cash and the balance on six and twelve months. The executors subsequently paid the first note maturing and part of the last one. It is urged by counsel, first, that Nannie Clay only took the remainder in fee to the land in so far as the funds in the hands of Cabell Chenault's executors paid for it; second, that as the appellant paid the \$3,050, he has a lien for the purchase money on the land therefor.

Before entering into the consideration of these questions it may be stated that at first it was contended upon behalf of the appellant that Mrs. Clay made an agreement with her husband to reconvey to him enough of the land to reimburse him for the money which he paid out in its purchase, but that claim is now abandoned. Counsel for appellant invokes a canon of construction universally accepted, that where there is repugnancy between the conveying clause of the deed and the habendum, the latter must control. In support of that rule a number of cases are cited. If there is no repugnancy between the two clauses of the deed, then there is no occasion to invoke the rule in question. The deed only purports to give the use and benefit of the land to Mrs. Clay during her life. When her estate ceases by death it is to go to the heirs of her body living at that time. The daughter, Nannie, was living at her mother's death, and under this clause of the deed it went to her.

It is true that there is another clause which provides for a condition which might have existed at her death. If there were no bodily heirs living at her death, then it was to go to the heirs of Cabell Chenault, but as the child



of the petition, so far as the reformation of the deed to appellant should have been granted, that is, the appellees should have been required to quit claim so much of the rear end of their lot as would give to appellant one-half of the vault in question, she is likewise entitled to one half of the value of the old lumber taken from the stable torn down by appellee.

Wherefore, the case is reversed for proceedings consistent with this opinion.

CLAY, JR. v. CLAY'S GUARDIAN, &c.

(Filed March 18, 1908—Not to be reported.)

Husband and wife—Conveyances—C., by his will, devised to his granddaughter estate to the value of over \$5,000, to be invested in land for her benefit during her life, with remainder to the heirs of her body if living at her death. The granddaughter married appellant and the executors invested said funds in a tract of land worth more than \$8,000, with the agreement on the part of appellant that he would pay the consideration in excess of the funds in the hands of the executors, and by his consent the deed was drawn, giving to the wife the life estate in the land, and the habendum clause recited that the property should be for her sole and separate use and benefit during her life and at her death to the heirs of her body. After the death of his wife appellant instituted this action to enforce a lien on said land in his favor to the extent of \$3,050, paid by him on the purchase money, insisting that he was entitled to this under an agreement with his wife that same should be paid to him. Held—That the deed having been made by consent of appellant, and he having voluntarily paid part of the purchase money, it will be presumed that it was done as a gift or advancement to his wife and child. Under section 2353, Kentucky Statutes, no trust results when a deed shall be made to one person and the consideration shall be paid by another. The proof fails to show any agreement on the part of the wife to refund any part of this purchase money to her husband, besides, as she owned only a life interest in the land, she could not, by any agreement, bind the infant's land for the repayment of this money.

H. C. Howard for Brutus J. Clay, Jr., appellant.

C. M. Thomas for appellees.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Paynter.

Under the will of Cabell Chenault, of Madison county, his granddaughter, Estelle Chenault, was a beneficiary of certain funds, aggregating \$5,529.36. It was in the hands of the executors of the will, who by its terms were directed to invest it in land for the use and benefit of the granddaughter during her life, with remainder to the heirs of her body if living at her death; if none living at her death, it was to go to testator's heirs, according to the laws of descent and distribution. The granddaughter intermarried with the appellant, Brutus J. Clay, Jr., to whom was born on February 14, 1894, the appellee, Nannie Clay. The mother died on the 22d day of June, 1899. In March following the birth of the child the deed that is here for interpretation was made under the following circumstances:

"The executors had taken up the question of investing the money as directed by the will. As the appellant and his wife lived in Bourbon

county, it was desired by them that the money should be invested in lands in that county. The appellant entered into a contract with Ray Cunningham and others with reference to the purchase of 123 acres, 2 roods and 10 poles of land. It was called to the attention of the executors with a view of having them put Mrs. Clay's money in the land. It seems that two persons interested in the land were minors, and it required a proceeding in court to perfect the title to it. Parties interested in it could convey thirteen fifteenths of it. The agreed price was \$70 per acre, and the consideration amounted to something over \$8,500. The money in the hands of the executors was not sufficient to pay the purchase money by \$3,050, and the appellant agreed with the executors that if they would invest his wife's money in the land he would pay the balance of the purchase money. The parties met to consummate the agreement. The appellant was not present when the preparation of the deed began; however, he arrived in time to hear it read and agreed to its terms. He was advised as to the import of the deed and knew as to the effect of its provisions, and directed it to be so made. The habendum of the deed is in the following language:

"To have and to hold unto said party of the second part for her sole and separate use and benefit during her life and at her death to the heirs of her body, if living at her death, and if none be living at her death, to revert to the heirs of Cabell Chenault (to the extent of the purchase money paid as hereinbefore recited by the executors of said Cabell Chenault and the purchase money hereof which shall hereafter be paid by said executors in the execution of the trust confided to them by the said will of Cabell Chenault), according to the laws of descent and distribution, in conformity with the provisions of said will."

The land was sold one-third cash and the balance on six and twelve months. The executors subsequently paid the first note maturing and part of the last one. It is urged by counsel, first, that Nannie Clay only took the remainder in fee to the land in so far as the funds in the hands of Cabell Chenault's executors paid for it; second, that as the appellant paid the \$3,050, he has a lien for the purchase money on the land therefor.

Before entering into the consideration of these questions it may be stated that at first it was contended upon behalf of the appellant that Mrs. Clay made an agreement with her husband to reconvey to him enough of the land to reimburse him for the money which he paid out in its purchase, but that claim is now abandoned. Counsel for appellant invokes a canon of construction universally accepted, that where there is repugnancy between the conveying clause of the deed and the habendum, the latter must control. In support of that rule a number of cases are cited. If there is no repugnancy between the two clauses of the deed, then there is no occasion to invoke the rule in question. The deed only purports to give the use and benefit of the land to Mrs. Clay during her life. When her estate ceases by death it is to go to the heirs of her body living at that time. The daughter, Nannie, was living at her mother's death, and under this clause of the deed it went to her.

It is true that there is another clause which provides for a condition which might have existed at her death. If there were no bodily heirs living at her death, then it was to go to the heirs of Cabell Chenault, but as the child

was living, the contingency did not happen which would have given the land to the heirs of Cabell Chenault. The clause in the deed which provided for that contingency did not in the least affect the preceding clause of the deed, which gave it, without restriction or qualification, to her bodily heirs living at her death. So we conclude that Mrs. Clay took a life estate in the land and the infant child, Nannie, the remainder in fee. Had Mrs. Clay died without bodily heirs living at her death, then a question would have arisen as to who would have taken the fee in the land other than that represented by the investment which the executors had made in it.

When the appellant agreed to furnish the balance of the money, and consented to the deed, the presumption is that he was endeavoring to provide for his wife and child. The mere fact that he executed his note for the balance of the purchase money does not affect this presumption. The agreement did not import that he was to pay the money for his wife and child, but that he made it his debt and paid it for himself. The effect of the subsequent payment is exactly the same as if it had been a cash one.

In *King's Heirs v. Morris & Snell*, 9 B. Mon., 99, the court said: "But there is still another ground which we regard as decisive against the claim of Morris, which is, that the wife can not be presumed to be a trustee for her husband, and if he purchase an estate in her name, it shall be presumed, in the first instance, to be an advancement and provision for her (1 Cruise's Digest, side page, 479); and so if she, while sole, purchase an estate in her own name, taking the title, and he pay the price after marriage, it must, on the same principle, be regarded as an advancement and provision for her. We are inclined to think, however, that there was in this case no effectual election before marriage, to take the land, which would have bound the wife *dum sola*, or could have been enforced against her, and that the election and purchase having been made after the marriage, was a purchase by the husband in the name of the wife, and, therefore, coming directly within the rule laid down by Cruise, must be deemed an advancement for her benefit, for which no charge arises against her or her estate; and even if she made an effectual election before marriage, and was indebted *dum sola* for the price, it was the duty of the husband to pay it, and especially as he had her property, of greater value than the debt, and he should be presumed to have paid it as husband and for her benefit, and no equity arises in his favor for the remuneration."

No trust could have resulted in favor of the husband because he paid part of the purchase money, as section 2353, Kentucky Statutes, expressly provides that no trust shall result "when a deed shall be made to one person and the consideration shall be paid by another." The court has several times so interpreted the statute. But it is urged that Mrs. Clay had agreed with her husband to either refund the money which he paid or convey him some of the land. No one testifies, except the husband, that she made such an agreement with him, and, of course, his testimony is not competent under section 606, Civil Code of Practice. Four witnesses were introduced who testified that after this deed had been made that Mrs. Clay told them she intended to pay the appellant the money which he had paid for the land or convey it to him. They do not testify to the fact that she had made any agreement with her husband to repay him for the money which he had put

in the land, and if the contract were enforceable, we do not think a state of facts was made out to justify its enforcement.

Mrs. Clay only had a life estate in the property. When she died she left no interest in it that could be subjected to the payment of any debt which she owed, nor did she leave any interest that could be seized under any equitable right as against her or her estate. As the remainder in fee was in the daughter, Nannie, at the death of the mother, she was the absolute owner of the interest conveyed by the deed. The mother could make no admissions or declarations which would affect the rights of the infant child, and its interests alone would be affected if the appellant should succeed in establishment of the lien which he claims.

If the husband could have at any time looked to the interest of the wife in the land for repayment of his money, it was only in the life estate, because the appellant voluntarily had a remainder in fee conveyed to the child, and it was beyond his or its mother's power to recall. This would be a sufficient answer to the argument of counsel for the appellant to the effect that, as appellant had paid the \$3,060 in the purchase of the land, he is entitled to be substituted to the lien of the vendor upon it. The infant child was never obligated for this purchase money; on the contrary, the father voluntarily assumed responsibility for it, and had the land conveyed to the child. Therefore, the interest which she took in the land was not, and could not, have been incumbered on account of any money which the father may have paid in its purchase. Besides, there is a reason why it could not have been asserted against the wife, because the doctrine of equitable substitution has no application to the facts of this case, as Mrs. Clay was never obligated for the purchase money, and she was not bound to pay the notes which the husband executed for it. The husband did not pay the money for her, but for himself, as he agreed with the executors that if they would invest the money in their hands for the use of his wife in Bourbon county, he would pay the balance of the purchase money. Certainly the executors never would have invested the funds for the benefit of Mrs. Clay in land that was to remain incumbered by a claim for \$3,060 in favor of the husband.

All of the facts and circumstances attending the transaction are against the claim that such was the intention of the parties to it. We have not overlooked the authorities which the counsel for appellant cites upon this question, but our opinion is that they have no application to the facts of this case. Besides, we are of the opinion, without going into the details of the matter, that the appellant received from the rent of the land in question and money belonging to his wife enough to reimburse him for all the money he paid in the purchase of the land, and these sums could not have been diminished by reason of the fact that he expended money in an effort to restore her to health or to pay her travelling expenses, physicians' bills, etc., because he was under moral and legal obligation to pay such expenses independent of her estate or any expressed desire upon her part to relieve him as far as possible of it. His marital obligations required him to support her in "sickness and in health."

Besides that, in consideration that she relinquish her potential right to dower in a tract of land which the appellant had inherited from his father, he agreed to build a house upon the land in question costing \$1,200, but the

wife died shortly afterwards and he never incurred that expense. We are of the opinion that the court below properly refused to set aside the deed which the master commissioner made to Mrs. Clay for the two-fifteenths of the land. This deed vested her with fee to it, and, of course, the husband takes an interest in that fractional part of the land, but it is unnecessary to state here what his interest is.

Judgment is affirmed.

ROBERTSON, &c. v. ROBERTSON, &c.

(Filed March 18, 1903—Not to be reported.)

Decedents' estates—Married women.—A testator, by his will, directed that his estate be invested in land for the benefit of his daughter for her separate use and then to her children, but the widow was to have her maintenance and support out of the estate. The widow held a claim for over \$1,000 against her husband's estate, but she entered into a written contract with her daughter by which the daughter was permitted to invest said fund with other property devised by the will in a good farm for the comfortable support of all, which was done. After the death of the daughter the claim of her mother was presented against her estate. Held—That her claim was properly allowed.

Gilbert, Peak & Gilbert for appellants.

Willis & Willis for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Barker.

In 1897 H. B. Morton died testate, domiciled in Shelby county, Kentucky, leaving a widow, Sarah F. Morton, and an only child, Martha L. Robertson, wife of John W. Robertson. So much of his last will and testament as is pertinent to the issues involved in this case is as follows:

"1st. I will and desire that all my honorable debts be paid with all convenient speed.

"I will and desire that all money and cash notes in my possession, or belonging to me at my death, shall be invested in real estate, such investment to be made within twelve months after my decease, for the benefit of my beloved wife and only child, Martha L. Robertson (wife of J. W. Robertson), to be deeded to her for her separate use and benefit, and to her children.

"And I also will and desire the money due to my estate from life insurance to be invested in the same way and for the same purposes, save and except the sum of \$250 of said insurance, which I hereby give and bequeath to my wife, Sarah F. Morton; and I further will and decree that my wife, Sarah, shall be supported out of such real estate as shall be purchased under the provisions of this will for my daughter, and such support, meaning proper food, clothing, shelter and medical attention; and I further will and decree that upon failure of my daughter and her husband to furnish my wife with the support above named, that she shall have a lien, during her life, upon such part of the real estate to be purchased, as above indicated, as shall insure her a comfortable maintenance."

By the terms of the will Martha L. Robertson was named as sole executrix, without bond or security. This will was duly and legally probated by order of the Shelby County Court, and Martha L. Robertson was appointed and qualified as sole executrix.

After the payment of all her father's debts the executrix invested all of his estate, together with funds of her own and of her husband, in the purchase and improvement of a farm of 190 acres, situated in Shelby county, Kentucky. The conveyance of this farm was made to Martha L. Robertson alone, in fee simple, and it constituted the home of herself, her husband and their children, and Sarah F. Morton.

Afterwards, in 1895, her son, H. M. Robertson, who had become of age, for himself, and as next friend of his infant brothers and sisters, instituted an equitable action in the Shelby Circuit Court against his mother, Martha L. Robertson, his father, John W. Robertson, and his grandmother, Sarah F. Morton. In his petition he recites the provisions of the will of his grandfather, H. M. Morton, and charges that his mother wrongfully invested the money which came to her hands, as executrix and devisee, in a farm of 190 acres, which she had caused to be conveyed to herself in fee simple, to the exclusion of the rights of himself and his infant brothers and sisters. It is not necessary to set forth with minute particularity the proceedings which were had in this case; it is sufficient to state that Martha L. Robertson settled her accounts as executrix in this action, and that in this settlement it appears that, after the payment of all the debts of her father, there remained in her hands, of the trust fund devised to herself and her children, the sum of \$3,750, which had been invested in the purchase of the farm of 190 acres, and that afterwards, the cause having been submitted, the court rendered the following judgment: "This cause being submitted on pleadings, proof and exhibits, and the court being sufficiently advised, it is the judgment of the court that the sum of \$3,750 of the fund that came to the hands of defendant, Martha L. Robertson, from the estate of Hiram Morton, which was invested in the lands now held by defendant, Martha L. Robertson; that Martha L. Robertson owns to the amount of \$3,750 for her life, with remainder to her children. All the remainder of said lands belong absolutely to the defendant, Martha L. Robertson. And Simeon Cook and E. J. Doss are appointed commissioners, who will go on said lands, on a day to be fixed by them, of which they will give the adult parties hereto notice, and will divide said lands described in the petition thus: They will allot to Mrs. Martha L. Robertson for her life, with remainder to her children land of the value of \$3,750, and the remainder they will allot to Mrs. Martha L. Robertson absolutely. Before making said survey and division said commissioners will be sworn to fairly and impartially discharge the duties by this order imposed."

In pursuance of this order the commissioners allotted 76 acres of the farm to Martha L. Robertson for life, with remainder over to her children. The balance of the farm they allotted to her absolutely, and reported their acts to the court. No exceptions having been filed to this report, it was confirmed, and the case went off the docket, and the judgment has never been appealed from or in any way vacated.

On the 13th day of April, 1901, Martha L. Robertson died, a resident of

## BETHEL v. BOOTH &amp; CO.

(Filed March 18, 1903.)

Statute of frauds—Contracts—Appellant had been the owner of and engaged in keeping a fish and oyster store in the city of Covington for about twenty-five years, and was doing a profitable business, and entered into a verbal agreement with appellee, a corporation, by the terms of which he, in consideration of employment to conduct a store of like kind for appellant for a period of ten years, sold and transferred to it for the sum of \$600 the assets of his business, which were of the actual value of \$1,200. After appellant had performed services for appellee for twelve months it discharged him without fault on his part, and refused to carry out its contract. Appellant brought this suit for \$1,990 damages for a breach of the contract. Appellee, as a defense, relied on the statute of frauds, which forbids the enforcement of a verbal contract not to be performed within one year from the making thereof. The lower court gave a peremptory instruction to find for the defendant. On appeal, Held—That the statute of frauds was not enacted for the purpose of enabling one party to practice fraud upon another. It was not intended to protect a party in the enjoyment of the fruits of the contract, who wrongfully obtained the property of another by a promise upon which an action could not be maintained. There is an implied promise in law that the appellee will pay the appellant the difference between the amount paid for the assets of the store which it purchased and its actual value on the day the contract was made, and in addition thereto to compensate the appellee for the loss which he sustained of the good will of his business, not exceeding the amount claimed in the petition.

Myers & Howard for appellant.

W. W. Symmes for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Paynter.

It is averred in the petition that on the — day of July, 1899, and prior thereto, the plaintiff was the owner of and engaged in keeping a fish and oyster store in the city of Covington, and had been so engaged for about twenty-five years; that it was a profitable business; that on — day of July of that year he entered into a verbal agreement with the appellee, A. Booth & Co., a corporation, by the terms of which he, in consideration of employment to conduct a store of like kind for the defendant in the city of Covington for a period of ten years, sold, assigned and transferred to it, for the sum of \$600, the assets of his business, which were of the actual value of \$1,200; that pursuant to that contract he performed the services for appellee required by the contract for the period of twelve months, when it, without fault upon his part, discharged him and refused to carry out the contract. For this breach of the contract he avers that he was damaged in the sum of \$1,990.

The defendant denies the contract, and seeks to avoid it because it is a verbal contract, not to be performed within one year, and for that reason no action can be maintained upon it. The evidence introduced by the appellant conduces to sustain the averments of the petition, and the appellee was to pay him \$25 per week for conducting its business for a period of ten years, and that the assets of his business which he sold to the appellee were actually worth \$1,200, and that the good will of the business was very valua-

ble. The court below, being of the opinion that the action could not be maintained upon a verbal contract, gave a peremptory instruction to find for the appellee. To review that action of the court this appeal is here. If this action was one purely upon a contract by which the appellee agreed to employ the appellant for a period of ten years at a stated salary, then, under the adjudications of this court, no action could be maintained upon it. This was decided in *Smith v. Theobald*, 86 Ky., 141, wherein the court said: "A verbal contract for a year's services to be performed at some future time is within the statute of fraud, because it can not be wholly performed within a year from the making day."

There are other opinions of this court of like effect. This court has held that where one part of the contract was to be, and was actually, performed within a year, an action could be maintained upon it. In *Dant v. Head*, 90 Ky., 201, the court said: "It now seems to us the statute was intended and does properly apply only to an agreement that is not to be performed by either party within a year, but not to one which is to be, or has been, performed by one or either of them within such period, and that construction has been adopted elsewhere. (*A., T. & S. F. R. Co. v. English*, 16 Pacific Rep., 82; *McClellan v. Sanford*, 26 Wis., 595; *Curtis v. Sage*, 85 Ill., 22; *Berry v. Dereinus*, 30 N. J. Law, 403; *Haugh v. Blythe*, 20 Ind., 24; *Smalley v. Green*, 52 Iowa, 241; *Blanching v. Sargent*, 83 N. H., 239.)

"For if the practical effect and operation of the statute is, as has been uniformly held by this court in every case where one party has performed an agreement within a year, to hold the other party liable on such agreement, although he is not to perform within a year, such should be construed and held to be the meaning and import of the language used. In fact the statute properly applies to agreements that are wholly executory; and one which has been performed by one of the parties within a year is, to that extent, executed, and can not with propriety be called an agreement to be performed within a year."

This court in a subsequent opinion has recognized *Dant v. Head* as announcing the correct rule. To follow this rule would not enable the appellant to maintain this action, because he did not wholly perform his part of the contract in one year, neither could he do so under the terms of the contract. The contract contemplated that the services he was to perform should be continued for a period of ten years, therefore, the facts do not bring it within the rule announced in *Dant v. Head*.

We think, however, that the action can be maintained by the application of another principle. The statute of fraud in question was not enacted for the purpose of enabling one party to practice fraud upon another. It was not intended to protect a party in the enjoyment of the fruits of the contract, who wrongfully obtained the property of another by a promise upon which an action could not be maintained. If one borrows money from another and verbally agrees to pay it in two years, no action can be maintained upon the verbal promise to pay within two years, but the law implies a promise to pay the money, and upon which an action can be maintained. Otherwise, the borrower could receive full consideration for the promise



which he made and yet shield himself under the statute of fraud. According to the evidence of the appellant appellee was to pay \$600 for his store, but only paid \$300 in cash and the other \$300 in stock in the appellee company, which was of little value, yet the appellee obtained assets which were actually worth \$1,200. In addition to that, it obtained the good will of the business, which was proven to have been of considerable value.

Suppose the appellant had given the assets and good will of the business to appellee in consideration that the appellee was to give him employment for ten years; should the appellee be permitted to repudiate its contract to give the appellant employment for the stipulated time and at the same time hold on and enjoy the assets and good will of the business which it acquired under the contract? If it could not thus enjoy the total value of the assets and good will of the business under the circumstances detailed, then, for the same reason, it is not entitled to enjoy one-half of the assets and the good will of the business. It is not a question as to the extent of the consideration which it received, but that it actually received property on a promise which it refuses to fulfill.

In *Montague v. Garnett*, 8 Bush, 298, this court said: "Where a contract is wholly executory on both sides, as neither could bring a suit for its enforcement, the legal effect would be the same as though the contract had been declared void; but this is not the effect of the statute where there has been an execution of the contract, in part or whole, by one party, for in such cases the law implies a contract to pay for the consideration received; and neither the letter nor spirit of the statute prohibits a suit to recover on this implied obligation of the law. \* \* \* But he could not use it to prevent recovery of the valuable consideration which he had derived by virtue of its terms, because the statute was never designed for such purposes. It was never designed to enable one man to get the property of another, by virtue of a parol contract, and then refuse to either execute the contract or return the property. Even in parol contracts for land, when possession has been delivered, courts adjust the rents and improvements on equitable principles, whilst they refuse to compel a specific execution of the contract."

Again the court said in that case: "But when the consideration, so far from being illegal and vicious, is valuable and virtuous, neither the statute nor public policy forbid a recovery upon the implied promise in law to return or pay for it."

There is an implied promise in law that the appellee will pay the appellant the difference between the amount paid for the assets of the store which it purchased and its actual value on the day the contract was made, and in addition thereto to compensate the appellee for the loss which he sustained of the good will of the business, not exceeding the amount claimed in the petition. Of course this right to recover is based upon the appellant's ability to establish his contract as averred.

Judgment is reversed for proceedings consistent with this opinion.

DAWSON, &c. v. TRUSTEES COMMON SCHOOL DISTRICT No. 40.

(Filed March 18, 1903.)

**Schools—Taxation—Injunction—Pleading**—This action was brought by the taxpayers of a common school district to enjoin the collection of tax levied by the trustees to repair and furnish a schoolhouse. Several issues were raised, and before the trial plaintiffs tendered and offered to file an amended petition, alleging that the trustees did not own the fee-simple title to the lot on which the house was located, but that a masonic lodge owned a half interest in said property, and was bound to keep in repair one-half of the roof and the upper story. The court refused to permit said amended petition to be filed. On appeal, Held—That under section 4487, Kentucky Statutes, it is contemplated that the trustees of a common school district shall hold the fee-simple title to the land on which they are authorized to expend money, collected in the form of taxation, for the erection, maintenance, repair or improvement of a school building, and it was intended that every facility for the proper conduct of the common school should be afforded, and that no person or corporation should hold any interest in the title to the school property which could give them any claim to its use, control or management, or which might in anywise affect or conflict with its uses for school purposes. The court erred in refusing to permit the amended petition to be filed.

R. B. Drake and S. R. Crewdson for appellants.

W. P. Sandidge for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 19th day of September, 1900, the trustees of the school district No. 40, in Logan county, levied a poll tax of \$1 on each white male citizen over twenty-one years of age residing in the district, and 25 cents on each \$100 worth of taxable property in the district for the purpose of repairing and furnishing the district schoolhouse. On the 20th of March, 1901, appellants, taxpayers residing in the district, brought this suit to enjoin the collection of this tax on the ground that the county superintendent of Logan county had not notified the trustees of the district in writing that the schoolhouse or inclosure thereof had been condemned or needed repair; second, that there was no valid levy made by the trustees; and, third, that there was no necessity for the tax. The answer of the trustees filed on the 24th day of May, following, traversed each and every material allegation of the petition. And upon these issues the proof was taken, and shows that there was a substantial compliance by the trustees with the provisions of the statute regulating taxation of this kind. It is clearly shown that the county superintendent notified the trustees in writing that the schoolhouse and furniture had been condemned; that the trustees, in a regular meeting held for the purpose, made the levy, which was duly entered on the record book; that a treasurer was appointed, who executed bond to the board of trustees, and which was approved by the county judge, who caused to be transcribed from the assessor's books a list of the names of all persons and corporations liable to such tax; the amount of property owned by each and the total tax due from each, etc.

On the 7th day of February, 1902, the plaintiffs tendered and offered to file an amended petition, in which they allege in substance that the defend-

ant trustees did not hold the fee-simple title to the lot on which the school-house sought to be improved was located as required by law, but that the title to the lot was held under a deed made on the 22d of November, 1899, by E. L. Ferguson and John Ferguson, her husband, to John G. Orndorf, Master of Emma Council, No. 59, Jo. B. Jackson, High Priest of Whippoorwill Chapter No. 27. W. H. Mills, Master of Ansonia Lodge, No. 275, F. A. M., and the trustees of district school No. 40; that the deed provided that the masonic bodies should keep in repair one-half of the roof, and the upper story, and the school district should keep in repair one-half of the roof and the lower story; and that in the event the school district should vacate this property the masonic bodies should become the sole owners, and if the masonic bodies should vacate the building, it should revert to the grantors; and further stipulated that when it did not conflict with the school, any religious denomination should have the right to use the school room for religious service, etc. The trial court at the instance of the defendants refused to permit the amended petition to be filed, and entered a judgment dissolving the injunction and dismissing the plaintiff's petition.

Appellants failed to show the existence of any valid reason for enjoining the collection of the tax previous to the tender of their amended petition, and they were a little late in tendering their amendment. But in our view of the law it presents a valid and substantial reason for restraining the collection of the tax. Section 4437 of the Kentucky Statutes, which is a section of the common school law, provides: "In the acquisition of land as a site for a schoolhouse the title thereof shall be made in fee-simple to the trustees, and the titles to lands now used as sites for schoolhouses shall at the earliest possible time be perfected by the trustees and the county superintendent. Any reversionary interest in land now used as a site for a schoolhouse shall not deprive the district school of other improvements thereon."

There can be no doubt that the statute contemplates that the trustees of a common school district shall hold the fee-simple title to the land on which they are authorized to expend money, collected in the form of taxation from the people for the erection, maintenance, repair or improvement of a school building. It was intended that every facility for the proper conduct of the common school should be afforded; and that no person or corporation should hold any interest in the title to the school property, which would give them any claim to its use, control or management, or which might in anywise affect or conflict with its use for school purposes. The title in this case does not come up to these requirements. Three distinct and separate lodges have vested interests therein, with a joint right to the use, control and management of the property. In addition to this all religious denominations are permitted to share in its occupancy. Whilst it is possible that there might be some saving in this arrangement at the start, it is evident that in the long run complication might arise, which would compel the abandonment of the use of the property by the common school district. It is better that both the spirit and language of the statute should be observed, and that the common school buildings should be devoted exclusively to the purposes for which they were intended. The trial court erred in refusing to allow the amended petition to be filed, and for this reason the judgment is reversed and cause remanded for proceedings consistent herewith.

MATTINGLY'S TRUSTEE, &c. v. MATTINGLY, &c.

(Filed March 18, 1903—Not to be reported.)

Assignment for benefit of creditors—Attorneys' fees—M. being insolvent, made an assignment for the benefit of his creditors to one of his largest creditors. The assignee operated the farm and distillery for several years, hoping to realize something for the benefit of the creditors. Finally a suit was filed to settle the trust and M. employed attorneys to surcharge the settlement of the trustee as reported by the commissioner. The attorneys finally succeeded in reducing the credits of the trustee about \$4,600, and an order was made allowing the attorneys \$500. The property was sold and the trustee creditor purchased it. Afterwards M. made a compromise of his debt with the trustee and repurchased a part of the property. A rule was afterwards awarded against the trustee requiring him to pay the allowance to the attorneys, from which this appeal is prosecuted. Held—That the assignor had authority to employ attorneys, and as they increased the estate to be distributed an allowance of a fee to them was proper.

Ben Spalding and Richards & Ronald for appellants.

H. W. Rives for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Barker.

On the 19th day of July, 1894, B. F. Mattingly, being insolvent, in order to provide for an equitable distribution of his estate among his creditors, executed and delivered to the appellant, the Columbia Finance and Trust Co., a deed of assignment for their benefit. The assigned estate consisted of some 1,600 acres of land, and a small distillery in Marion county, Kentucky, and whisky in bond. There was a mortgage on all this property to the Columbia Finance and Trust Co., to secure an indebtedness of B. F. Mattingly to it of \$25,000. In addition to this sum owed to appellant he was largely indebted to many other persons. Appellant accepted the trust and qualified as assignee, as by law required. It seems that the trustee and B. F. Mattingly entertained a hope that, by proper management of the affairs of the estate, it would pay all of the debts, and leave a surplus over for the vendor; and under the influence of this hope the trustee, by the aid and largely under the advice and direction of B. F. Mattingly, undertook to operate the distillery and the farms.

In order to carry out this plan it was necessary for the trustee to advance, and it did advance, large sums of money, either to purchase or to pay off the outstanding unsecured debts of B. F. Mattingly. After the expiration of several years it became evident that the hope of paying off the indebtedness by profits arising from the operation of the distillery and the farms was futile; whereupon an action was instituted in the Marion Circuit Court for the purpose of settling the accounts of the trustee and obtaining a judgment for the sale of the assigned property for the payment of the indebtedness. This action was referred to the commissioner, for the purpose of settling the accounts of the trustee; whereupon B. F. Mattingly employed C. S. Hill and H. W. Rives, as his attorneys, to surcharge the accounts of his trustee, and to file exceptions to the report of the commissioner, which allowed certain credits, to which he objected. A great deal of legal labor

## 2030 MATTINGLY'S TRUSTEE, &C. V. MATTINGLY, &C.

and time were expended by the attorneys in question in the performance of the duties assigned them. The estate was a large one, the debts were many, and the accounts embraced a multiplicity of items, as they involved the expense of operating a large property for several years. The final result of the labors of Messrs. Hill and Rives was the disallowance by the court of certain credits allowed by the commissioner's report to the trustee, amounting in the aggregate to \$4,600. All of the exceptions save these were overruled by the court. The judgment also ordered a sale of all the assigned property to pay off and discharge an indebtedness aggregating \$50,000. In the sale which was had of the property under the judgment the trustee became the purchaser, for a sum much less than the amount of its debt against the estate for money advanced to pay the other creditors.

From this judgment, ordering the sale of his property and approving, in the main, the accounts of his trustee, B. F. Mattingly prayed an appeal to this court, which, however, he seems never to have prosecuted. Afterwards he and his trustee had a settlement, by which he became the purchaser from it of the distillery plant, for the sum of \$1,500, and he relinquished his claim to homestead in its favor, upon the payment to him of the sum of \$100, and appellant relinquished all claim against him for the balance of its debt after crediting him by the amount realized from the sale of the assigned property. This resulted, of course, in the abandonment by Mattingly of his appeal.

As between the trustee and Mattingly, this was a final settlement of the trust, which had thus resulted in relieving him from all his indebtedness. Afterwards, Messrs. Hill and Rives obtained a rule from the court against the trustee to show cause why it should not be compelled to pay over to them the sum of \$500, which had been allowed them for their services in surcharging its accounts. This payment was resisted by the trustee, with the final result that the court made the rule absolute, and ordered it to pay over the sum in question. From this order, and the judgment originally allowing the fee, the trustee has appealed to this court, contending that Mattingly had no power or authority to employ counsel, and that the allowance by the court was erroneous.

B. F. Mattingly certainly had an interest in the assigned estate, both in his own right and in the duty of seeing that his creditors received all that was due them therefrom; and it seems to us, therefore, that it was both his right and his duty to have surcharged the accounts of the trustee, if they were erroneous, and withheld from the creditors any sum which was owing them; and to this end we see no reason why he was not authorized to employ counsel; and if the efforts of the counsel thus employed resulted in substantial benefits to the assigned estate and the interest of its creditors, we know of no principle of law which would deny to them a reasonable sum out of the estate for their services.

The allowance seems to have been made directly to the attorneys, and not to Mattingly for them, and therefore, it was not in the power of Mattingly, by any arrangement which he subsequently made with his trustee, to defeat their claim.

In the case of *Taylor v. Jones*, 19 Ky. Law Rep., 129, this court held that an allowance to counsel directly was permissible. In the case of *Taylor v.*

Minor and wife, &c.. 12 Ky. Law Rep. . 479, where a devisee employed counsel to surcharge the accounts of a curatrix, which resulted in a benefit to the estate, it was held that the allowance of a fee to the attorney was proper. In the case of *Mitchell v. Tyler & Apperson*, 20 Ky. Law Rep., 1949, the creditors of an assigned estate employed counsel to force the assignee to account for money unlawfully withheld by him, and it was held by this court that an allowance to the attorney out of the trust fund was proper. It is said in the opinion: "Exception is also taken to the allowance of the fee of \$500 to Tyler & Apperson out of the trust fund. It appears that they were not employed by assignee, and that their services were rendered in hostility to him, to make him account for the profit on the above property and on other exceptions to the settlement of his accounts. They were manifestly entitled to a reasonable fee out of the additions made to the trust fund by reason of their services, and as the record does not give the evidence in full heard by the court below, we must presume that it supported the judgment."

It may be conceded, for the purpose of the question involved on this appeal, that the court below erred in sustaining the exceptions taken by Mattingly to the commissioner's report settling the accounts of his trustee; but, on the face of the matter, it appears that the estate, on the whole, was augmented by the sum of \$4,600. As no appeal was prosecuted from this judgment, it remains in full force and effect, and must be treated as a correct exposition of the law as to the question involved. No complaint seems to be made as to the amount of the fee allowed, but only to the right of allowance. We think the sum allowed, considering the work done and the results accomplished, reasonable, and that, under the authority of the decisions of this court, above cited, its allowance must be upheld on principle.

Wherefore, the judgment of the court below is affirmed.

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THOMAS, &c. v. SCOTT, &c.

(Filed March 15, 1903.—Not to be reported.)

**Wills—Evidence**—By the terms of her will K. devised to T. a house and lot, with remainder to the nephew and niece of T. Adjoining the lot devised to T. was a large vacant lot separated from her lot by a fence. After the death of K. her devisees sold this vacant lot to different parties, who built houses on it. This action was instituted by the nephew and niece of T. claiming this vacant lot as having been devised to T. and to them in remainder. Held—That under the terms of the will the testatrix did not intend to devise this vacant lot to T. Parol evidence is admissible to explain a latent ambiguity in the will, and this evidence clearly shows that the vacant lot was not intended to be included in the devise to T.

McMillan & Talbott and T. N. Lindsey for appellants.

H. C. Howard and Buckner Clay for appellees.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Paynter.

Louisa A. Keiningham departed this life in September, 1890, leaving a will, which, among others, contained the following provisions:

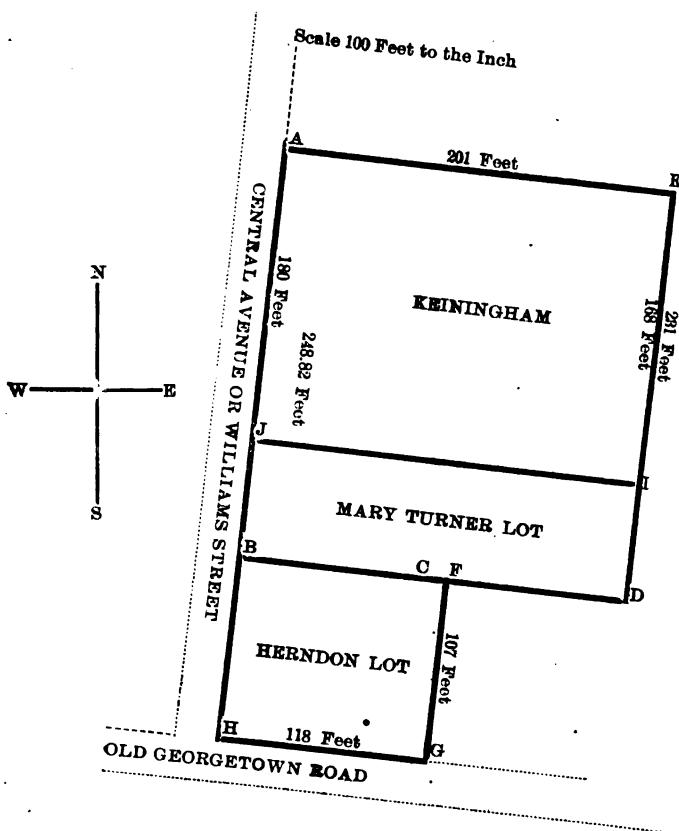
"If Eliza Baker (colored) stays with and takes care of me as long as I

live, I wish my executors to give her five shares of my Northern Bank Stock for life, the dividends to be paid her by her trustee, and after her death go to pay taxes on her brick house on Pleasant street; also on the two houses given to servants on Georgetown Hill. The house and lot on Georgetown road to be given to Ellen Herndon's four girls, namely, Bettie, Laura, Carrie and Mary Eliza Herndon.

"The lot adjoining, with two-storied frame house on it, given to Mary Turner (colored) for her sole use and benefit, her husband, who she is separated from, to have no interest in it, and at her death, without children, to go to her sister, Eliza Baker and brother, George Scott. These were the children of my faithful servant, William Scott, who, when freedom came, never left me, and never did or would receive one cent of wages.

"All the rest of my estate, including home place, after payment of my debts, if any, with charges and expenses of administration, including a plain monument for my grave, I give to my dear brother, Landon A. Thomas."

At the time of her death the testatrix was the owner of the lots shown by the following plat:



The lot designated on the plot as the "Herndon lot" was devised to the Herndon girls; a house of two stories was on the lot designated as the "Mary Turner lot." The lot designated as the Kelningham lot" is what is known as the "vacant lot" in this record. After the death of the testatrix the widow and heirs of Landon A. Thomas, the residuary legatee, sold it to a party, and afterwards it was divided into lots and upon it seven houses were built.

Mary Turner died in 1891. George Scott and Eliza Baker, who took the remainder interest in the lot devised to Mary Turner, instituted this action to recover of appellants the several lots in their respective possessions. The right to recover depends upon the construction of the clause of the will devising the lot to Mary Turner. The testatrix bought the property, consisting of the Mary Turner lot and the vacant lot, from James O'Keefe, and after doing which she placed Mary Turner in the house which was situated on what is known as the "Mary Turner lot." After this was done Pete Mason, desiring to use the vacant lot, approached the testatrix with a view of obtaining her permission to fence and use it; she referred him to Mr. Alexander, her agent, who gave Mason permission to erect the fence around the lot, except on the back part of it, where there was a stone fence. There seems to have been an old fence between the Mary Turner lot and the vacant lot which was either rebuilt or repaired by Mason, enclosing the vacant lot.

The testimony conduces to show that the testatrix claimed the vacant lot as her own after she had placed Mary Turner in possession of the house. She often referred to it as "my lot" and to the other one as "Mary Turner's lot." The evidence is conclusive that the property purchased from O'Keefe was divided by a fence as represented on the plat, and the small lot is the one the testatrix referred to as the "Mary Turner lot." It will be observed that the testatrix gives to the Herndon girls a lot on the Georgetown road, and Mary Turner is given the lot adjoining, with a frame house of two stories on it. The testatrix referred to the Herndon property as a lot, and designated the property given to Mary Turner as a lot adjoining the Herndon lot.

When we consider the extrinsic facts which we have detailed, there is no escaping the conclusion that the testatrix only intended to devise to Mary Turner the lot upon which her house was situated. Where the ambiguity in a will is patent, testimony is inadmissible to aid the court in interpreting it, but where the intention of a testator is clearly expressed and a doubt exists, not as to the intention, but as to the nature or state of facts in the country, any legitimate evidence of which the facts are susceptible is admissible from that quarter to remove the doubt. (*Breckinridge v. Dugan*, 2 A. K. Marshall, 506.)

In *Hayden v. Ewing's Devises*, 1 Ben Monroe, 113, it was held in case of a latent ambiguity arising from the application of the devise to the subjects described in it, it might be solved, not only by the facts both in and out of the will, but also by parol evidence of intention, for it is a question, not of power, but of intention.

This court, in *Allen v. Van Meter*, 1 Metc., 264, said: "It is now well settled that evidence of extrinsic facts is admissible in aid of the exposition of wills, although they are by our statute required to be in writing, and



are, for that reason, peculiarly within the general principle which excludes parol evidence which tends to contradict, add to, or explain the contents of written instruments. But this extrinsic evidence must always be such as, in its nature and effect, simply explains what the testator has written, and not what he intended to have written. In other words, the question in expounding a will is not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words used."

In this the evidence to which we have referred simply goes to explain what the testatrix had written, not what she intended to have written. If the language of the will had purported to convey both lots, it would not have been admissible to show that the testatrix did not intend to devise but one of them. Had that been true, the testimony of Mrs. Shackelford and others as to what the testatrix claimed with reference to the vacant lot would not have been admissible to show that she did not intend to devise both of them. Their testimony serves to explain what the testatrix had written, not what she intended to have written.

The case of *Allen v. Van Meter*, cited by appellees, does not lay down a rule different from the one in the cases of *Hayden v. Ewing's Devisees* and *Breckinridge v. Dugan*. We might call attention to the fact that Mary Turner after the death of the testatrix recognized Keeningsham estate as the owner of the vacant lot, and expressed her gratification to one of the persons who had bought a lot in the subdivision that she was going to have a neighbor. Mary Turner saw the parties engaged in dividing the lots and persons engaged in building houses thereon, and never made a complaint to any of them that they were building houses upon her land. Neither did Eliza Baker or George Scott do so. Mary Turner lived upon the adjoining lot and the other parties lived in the city of Paris. While this does not tend to aid the court in interpreting the will, it shows a contemporaneous construction of the will by the parties who are now asking a different construction to be placed upon it.

Judgment is reversed for proceedings consistent with this opinion.

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CLAY v. KENNEDY, &c.

(Filed March 18, 1903—Not to be reported.)

1. *Passway—Easement—Statute of limitation*—A passway which had been used by plaintiff and those under whom he claimed for about fifty years as the most accessible way between his land and the turnpike over the land of defendant, creates a presumption of a grant, and defendant by closing up same did not deprive plaintiff of his rights, and the finding of the chancellor in favor of plaintiff will not be disturbed as the proof is conflicting.

2. *Pleading*—The failure of the petition to allege that the adverse holding of the passway was open and notorious, or the exact time it was held, was waived by failure to demur to the answer. Such objections can not be raised for the first time in the Court of Appeals.

John I. Williamson and Harry Kennedy for appellant.

J. F. Morgan and Leslie S. Hughes for appellees.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Hobson.

Appellant Clay owns a tract of land in Nicholas county on the Carlisle and Sharpsburg pike. Appellees own land back of him. As far back as 1889 there was a road leading across Clay's land along the ridge back to the land now owned by appellees, and it seems to have been the main, if not the only, way at that time of reaching it. About the year 1880 Walter Roberts, who lived where appellee Tapp now lives, kept a store there, and the road referred to was used to get from the pike to the store. After Roberts' death a man named Bradshaw lived there, and during this time Clay bought the farm in front. There seems to have been no trouble about the right of way between Bradshaw and Clay, but after Bradshaw's death Clay closed up the road when Wyatt was living there, some time previous to the year 1889. Tapp got the place in the year 1900. He and Kennedy, in August, 1901, filed this suit, alleging that they and those under whom they claimed had for over thirty years claimed and held adversely the passway over Clay's land, and prayed that he be enjoined from obstructing them in the use of it. The defendant filed answer denying the allegations of the petition and on final hearing the court granted the plaintiffs the relief sought.

The petition of the plaintiffs is certainly good after answer on the merits and judgment. There was no demurrer filed to it. The answer not only traversed the allegations of the petition, but denied that the passway had been used for the time specified therein or any other length of time, adversely to the owners of the land. Proof was taken on the issues thus raised and heard in the trial court without objection. The question can not be made for the first time in this court that the petition did not allege that the adverse holding of the passway was open and notorious, or that the exact time when it was so held was not stated in the petition. On the questions of fact the proof is very conflicting, and giving some weight to the chancellor's conclusion, we do not think we ought to disturb the judgment. The long use of the road, from 1889 until after the death of Bradshaw, is sufficient, considering the manner of the use, to raise a presumption in favor of the right, and we are by no means clear from the evidence that there has been any such adverse holding by Clay for fifteen years prior to the bringing of this suit as to bar the plaintiffs. Their prima facie case, from the long use of the road, its location on the ridge, its being the only practical means of access, and the general use made of it for something like half a century, can only be defeated by such adverse possession as would defeat a right of entry on real estate. This is not shown. At least the evidence on this subject is not such as to warrant us in disturbing the chancellor's judgment.

Judgment affirmed.

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LOUISVILLE, HENDERSON & ST. LOUIS RY. CO. v. CHANDLER'S  
ADM'R.

(Filed March 18, 1908—Not to be reported.)

J. P. Helm, Helm, Bruce & Helm and Chapeze Wathen for appellant.

B. H. Young and M. W. Ripy for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Hobson.

It is urged in the petition for rehearing that the first instruction of the court is erroneous, in that it assumes that if the car was overloaded this necessarily caused the cars to be derailed and brought about the death of the intestate; also that it is erroneous in that the jury were told by it that the cars were overloaded if loaded beyond their estimated capacity, and that the question of negligence in overloading the cars was not left to the jury.

The instructions are quoted in full in the opinion of the court heretofore delivered. It is true the first instruction is subject to the criticism that it did not submit to the jury the question whether the death of the intestate was caused by the overloading of the car. But this defect was cured by the second instruction, which expressly told the jury that this was the issue submitted to them, and that the jury were not misled, but understood the instructions appears from the form of their verdict, in which they, in effect, find from the evidence that the intestate's death was due to the overloaded train.

There was proof on the trial by both sides that the marked capacity of the car was 10 per cent. less than its real capacity. In other words, the capacity was marked at this margin below the real capacity to allow for errors of judgment in loading. It also appeared that one railroad will not receive from another a car loaded over 10 per cent. above its marked capacity. The proof on the trial on behalf of appellee tended to show that the cars were grossly overloaded; that for appellant showed that they were not loaded up to their marked capacity. There seemed to be no controversy on the trial that the real capacity of a car was at least 10 per cent. more than its marked capacity, and there was testimony on the part of appellant that cars could safely be loaded beyond this. The witnesses all speak of the capacity of the car or the marked capacity, or the registered capacity, it appearing that a register is kept of the capacity of the cars as marked on them, but the expression, "the estimated capacity," does not seem to have been used on the trial until put by the court in the instructions referred to. We do not think, therefore, the jury could have understood the words "estimated capacity" to mean the marked capacity on the car, for it is perfectly apparent from the record that there was no controversy that cars could be safely loaded 10 per cent. above the marked capacity. On the other hand, we think that, as there was nothing in the record to restrict the meaning of the word estimated, the jury must have understood it in its ordinary sense. The ordinary meaning of estimate is to calculate roughly, or to form an opinion as to amount from imperfect data. In this sense the expression "estimated capacity," meant substantially the supposed or probable capacity of the car, and we do not see under all the evidence that the defendant was substantially prejudiced by the use of the word estimated. It is true it would have been better for the court to have told the jury that an overloaded car was one which had more load put on it than should have been placed on it in the exercise of ordinary care, but the jury, taking the charge as a whole, could not have understood the instruction to mean that if the cars were overloaded a little above the estimated capacity, but not so much as to show a want of ordinary care, they should find for the plaintiff, for the reason that in the first, second and fifth instructions the jury were told that it was

the duty of the conductor or other agent of the defendant who had charge of the loading of the cars to use ordinary care to see that the cars were not overloaded, and that they could not find for the plaintiff unless the cars were overloaded, and this was known to the conductor or other agent whose duty it was to see to the loading of the cars, or could have been known to him by ordinary care. There could, therefore, have been no verdict for the plaintiff unless he failed to use ordinary care in the loading of the cars, and by the exercise of ordinary care could have known that the cars were overloaded. The proof showed that the cars were loaded with ties along the side of the road; they were not weighed, and the conductor could only estimate or calculate roughly what the weight was, or how many ties should be put on a car, but in doing this it was his duty to exercise ordinary care.

Under all the evidence, and taking the instructions as a whole, we are unable to see that the jury could have been misled, or that the rights of the defendant were substantially prejudiced by the form of the instruction.

Petition overruled.

ALBANY MILL CO., &c. v. HUFF BROS., &c.

(Filed March 19, 1908—Not to be reported.)

Appeals—Corporations—Liens—Agents—Transfer of stock and property—Appellant was incorporated as a milling company and some time after its organization, and after it had been doing business, two of its stockholders and directors made a written contract of sale to C. of one-half the shares in said corporation, or one-half the property. The consideration for which was not fully paid, but notes executed for deferred payments. It was further agreed that the stock should not be transferred to C. until the purchase money notes should be paid; that the directors should remain in office until that time and that the management and control of the mill should be given to C. C. operated the mill for a time and incurred expenses for labor and material furnished, amounting to about \$1,200. In this action a number of laborers and material men asserted their claims, which were allowed as debts against the corporation. The judgment of the lower court allowed a separate recovery for each one. On appeal, Held—That the agreement fully authorized C. to bind the corporation for services and material furnished in the operation and repair of the mill, but this court will not consider separate claims, which are less than \$200, and such appeals are dismissed. The property of the corporation was not conveyed by a transfer of the stock, and in this case the stock was not transferred, as the conditions of the transfer were not complied with. The directors still retained control of its affairs and it remained liable for debts incurred for its benefit.

Sam C. Hardin and L. C. Winfrey for appellants.

Allen Sandidge and Bertram & Bertram for appellees.

Appeal from Clinton Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was incorporated April 6, 1892, to do a milling business at Albany, Ky., and to engage in manufacturing lumber, flour, etc. It owned a mill at Albany, which it operated from 1892 till 1901.

The sole stockholders were P. H. Hoskins, who owned  $6\frac{1}{4}$  shares; J. F.

Brents,  $6\frac{1}{2}$  shares; E. J. Hopkins, one share; Ben Young, one share; and T. F. Gutherie, 5 shares. Each share was of par value of \$200. P. H. Hopkins was president, secretary and treasurer, and he and Brents and Gutherie constituted the board of directors. On September 1, 1899, P. H. Hopkins and J. F. Brents contracted to sell ten shares or "one-half of the mill property" to one Lee Clark. The contract was written and is as follows:

"Agreement between Hopkins and Brent and Lee Clark: P. H. Hopkins and J. F. Brents, of the first part and Lee Clark of the second part, all of Clinton county, Ky., to contract. P. H. Hopkins and J. F. Brents sold to Lee Clark ten shares (one-half) of the Albany Mill, to be paid for as follows: \$400 paid, and one note of \$510, due January 1, 1900; one note for \$520, due May 1, 1900 paid, one note for \$530, due September 1, 1900, and one note for \$540, due January 1, 1901, all to bear interest at 6 per cent. per annum after maturity. If any one of the notes fails to be paid off in a reasonable time after it becomes due then all of the notes become due and collectible. The said Clark is to have one-half of all the assets of the Albany Mill Co. and assume one-half of the liabilities of said company. He agrees to apply the profits of the mill to pay off the old debt after the necessary repairs are paid for, and not run the company in debt until he has paid for his part of the mill and discharged the old debts. The said Hopkins and Brents agree to transfer certificates of stock to said Clark as soon as the last payment is made. A lien is retained on said property to secure the payment of the notes, and Hopkins and Brents are to retain their offices as directors of said milling company until the next annual election. It is further agreed that the said Lee Clark has possession and control of the property sold to him from the first of September, 1898."

On the minute book of the corporation this entry appears: "September 1, 1899, P. H. Hopkins and J. F. Brents placed ten shares or one half of the Albany Mill Co. property in the hands of Lee Clark to run and manage same, he agreeing in writing to make no debts against said company, they, Hopkins and Brents, retaining the certificate of stock, and also continuing to be directors, etc., as formerly."

About December, 1899, the Gutherie stock had been contracted to Lee Clark. This entry appears on the corporation's minute book with reference to that transaction: "1900, May 7. At a meeting of the stockholders of the Albany Mill Co. at Albany, Ky., on May 7, 1900, the death of T. F. Gutherie, one of the directors was suggested. It was agreed that the two living directors, P. H. Hopkins and J. F. Brents, be continued directors until the one-fourth of the mill property owned by T. E. Gutherie is sold and certificates of stock transferred to purchaser, then a director to be appointed. Said Hopkins to continue to act as president, secretary and treasurer. Adjourned."

Clark took charge of the plant and operated it under the foregoing agreement till 1901, when, being unable to pay for the stock, he surrendered the mill to appellant. During his control he had incurred about \$1,200 of debts for labor and material furnished to the mill. In this suit by the stockholders for a liquidation (they having since sold the plant to one Perkins), a reference was had to the master commissioner to audit claims against appellant corporation. A number of laborers and material men presented

claims, which were allowed as debts against appellant. The judgment of the circuit court allowed a separate recovery for each one. The following were less than \$200, and the appeals as to them are dismissed: J. S. Duvall, Russell Bros., C. S. Means, Bill Means. (Section 960 Kentucky Statutes; *Hampton v. Caldwell's Adm'r*, 21 Ky. Law Rep., 262.)

The court is of the opinion that by the contracts above set out the vendor stockholders had merely contracted to sell the recited portions of their stock, but that the sale was not complete. (Section 545, Kentucky Statutes.) They continued to hold their stock till it was paid for, and the transfer of the certificate was had. In the meantime, and until the sale of the stock should be completed, the directors of the mill company turned over to Clark its management and operation. His apparent office was such as they had the right under the articles of their corporation to create. His duties as manager were not unusual, and were clearly within the scope of the directory's authority to employ. The stationery, sign and newspaper advertisements used all continued to be in appellant's corporate name. Many of the claimants testify that they contracted with Clark, believing he was appellant's agent, while others said (generally day laborers) that they were employed by Clark, and had heard that he had bought the mill. We find that as a matter of fact they were employed for and rendered their services to appellant, under the contracts and situation above set out. It may have been, and doubtless was so, that Clark, Hopkins and Brents believed that their contract operated as a conveyance of the mill property to Clark, and that the retention of the certificates of stock gave their vendors an adequate first lien upon the property, as well as that Clark's operation of the mill would be upon his own responsibility alone. The property of a corporation is not conveyed by a transfer of its stock. However the certificates of stock may be sold and assigned, the title of the corporation to its property remains unchanged thereby. The corporation does not cease by such transfers.

Under section 538, Kentucky Statutes, not less than three persons (and under the General Statutes not less than two) could form such a corporation as appellant is. Whether the purchase of all the stock of the corporation by one person would *ipso facto* dissolve the corporation is not decided. (*Louisville Banking Co. v. Elseman*, 94 Ky., 83.)

Nor can the belief or intention of the stockholders in the transactions in this case affect the legal status of the corporation in its relation to its property and its creditors. Whatever may have been Clark's motive or belief, under the arrangement described, his act within the scope of the corporate powers was the act of the corporation, and bound it as such. We do not mean to say that Clark's representations and contracts with his laborers might not have bound him personally also. But we are called on here to consider only the effect of his acts upon the corporation. The circuit court adjudged appellant liable for the debts created and mentioned above.

Among the claims presented was one of appellees, Huff Bros., for about \$201. Of this sum the commissioner found that \$222 represented debts contracted by Clark individually, and not in connection with the operation of appellant's mill and business. Nor did it purport to be connected with it. But it was for saw logs and labor furnished at another mill, in another

part of the county, owned by other persons, and wholly disconnected with appellant's plant and business. We are of opinion that the circuit court erred in adjudging any part of this \$232 against appellant.

The judgment in favor of Huff Bros. is reversed and cause remanded, with directions to enter a judgment in conformity to this opinion. As to T. V. Stephenson the judgment is affirmed.

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SMITH v. FRANKFORT & CINCINNATI RY. CO. .

(Filed March 19, 1903—Not to be reported.)

Statute of frauds—Ejectment—Conveyances—This is an action of ejectment instituted by appellant to recover an acre of ground which he alleged in his petition was unlawfully held by the Kentucky Midland Ry. Co. without right. In its answer the railway company alleged that appellant being desirous of having the railway constructed through his land and a depot located on same, donated said land to said company and placed it in possession thereof, and that in pursuance of said agreement said company had constructed its road and depot and expended large sums of money thereon. Appellant in his reply relied on the statute of frauds as avoiding said grant, and tendered a deed duly executed for said land, but insists that said railway company had not complied with its contract to erect the character of building for its station house. Appellee having become the owner of the road and all other property of the Kentucky Midland Railway Co., filed its petition, setting up these facts, and was made a party to the action. The lower court adjudged that the railway company accept said deed, and that each party pay their own costs. On appeal, Held—That the decision of the chancellor will not be disturbed as it was virtually a judgment for specific performance. The tender of the deed by the grantor was a waiver of his right to rely on the statute of frauds. The acceptance of the same by the grantee, and the judgment of the court compelling its surrender to the latter, passed the title to it as effectually as if it had been done by mutual consent of the parties. The appellee, as assignee of all rights of the former railway company, is the owner of said property.

Montgomery & Lee and V. F. Bradley for appellant.

T. L. Edelen for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted by appellant in the Scott Circuit Court against the Kentucky Midland Ry. Co. and the Home Construction Co. on August 11, 1892. The answer of the Kentucky Midland Ry. Co. was filed February 6, 1893, and the reply thereto was filed October 6, 1895.

The action is one in ejectment seeking to recover an acre of ground in the form of a parallelogram situated at a point on the railroad now owned by appellee, Frankfort & Cincinnati Ry. Co., known as Duvall's Station. It is averred in the petition that the Kentucky Midland Ry. Co. and the Home Construction Co. have the possession of the land without right, and that appellant is the owner and entitled to the possession thereof. The petition prays judgment for the recovery of the land and \$200 damages for its detention. Answer was filed by the Kentucky Midland Ry. Co., in

which appellant's ownership of the land in question and his right to the possession thereof is denied. And it is averred in the answer that before the railroad company had located its railroad stations on the line of its railway, and appellant donated and gave to it for railway station purposes, the land described in his petition, in consideration of the undertaking that the Kentucky Midland Ry. Co. would locate one of its stations at that point, that appellant was very solicitous to make the agreement, and it accepted his proposition, and was put in possession of the land by him, and it has continually held the possession thereof ever since. It is further averred in the answer that, relying upon appellant's dedication of the land, a large sum of money, namely, \$875, was expended by the railway company in grading and laying side tracks, and in making other and lasting and valuable improvements on and near the land, in order that it might be used for the erection of a station or depot.

It is also averred in the answer that the Kentucky Midland Ry. Co. was desirous of building upon the land in controversy a suitable station house, but that it had been prevented from doing so by appellant's failure to make it a deed of conveyance for the land. It asked the court to compel appellant to convey the lot, that it might erect the station house thereon as agreed. The averments of the answer were denied by reply, in which it is admitted, however, that the railway company had agreed to erect the station house on the land in controversy, and averred that after the institution of this suit a written agreement was entered into between appellant and the railway company, whereby the latter agreed to erect the station house within ninety days, but had failed to do so. The reply avers that the contract in regard to the land is not in writing and is, therefore, within the statute of frauds. Notwithstanding this plea appellant tendered with his reply a deed to the land. It appears that the written contract referred to in the reply was never agreed to or signed by the railway company. The deed tendered to the railway company is made a part of the record, and was duly signed and acknowledged by appellant and his wife, but it contains no condition with reference to the erection of the station house. The only consideration expressed in it is \$1, the payment of which is therein acknowledged.

It further appears from the record that the Kentucky Midland Ry. Co. did after the tender of the deed by appellant erect a station building on the land in controversy, but appellant insists that it is unsuitable and not such a building as the railway company agreed to erect.

On February 14, 1899, the appellee, Frankfort & Cincinnati Ry. Co., filed its petition to be made a party to the action, and it thus became a party, the petition being taken as its answer in the case. It is alleged in that petition and answer that since the institution of this action the property of the Kentucky Midland Ry. Co. was placed in the hands of a receiver, and thereafter was sold under decree enforcing certain liens existing thereon, and one Dandridge became the purchaser for the bondholders of the old road. Thereupon the appellee, Frankfort & Cincinnati Ry. Co., was duly organized and incorporated, and to this new organization the property, property rights and franchise of the old company were transferred and delivered.



It is further alleged in the petition and answer of appellee that it now owns and holds the title to the railroad property and assets of the former company, and that it purchased the lot in controversy with the remainder of the property, for value, and without notice of the existence of any claim of appellant thereon; and further, that appellant, by his negligent failure to duly prosecute this action against the Kentucky Midland Ry. Co., is estopped to claim or assert title to the land. After the filing of other and subsequent pleadings by the parties necessary to complete the issues the cause was transferred to the equity docket. Numerous depositions were then taken, and the case finally submitted for trial. The court entered judgment, decreeing that the Kentucky Midland Ry. Co. be permitted to withdraw from the record the deed from E. D. Smith and wife to it, and it was further decreed that appellant's petition be dismissed, and that each party pay his or its own costs, and from this judgment appellee has appealed. The judgment does not recite the reasons entertained by the chancellor for the conclusions arrived at, but in view of his decreeing the delivery of the deed from appellant and wife to the Kentucky Midland Ry. Co., we must infer that he regarded the station building, or depot, that was erected by the Kentucky Midland Ry. Co. upon the land in controversy as suitable for the purposes for which it was intended. In other words, the judgment is in the nature of a decree for a specific performance. The deed had been tendered by the appellant, and the chancellor only compelled its delivery to the grantee named therein. So in this view of the case it seems to us unimportant that the contract as originally made between the parties was not in writing. The tender of the deed by the grantor was an offer of performance and a waiver of his right to rely on the statute of frauds. The acceptance of the same by the grantee, and the judgment of the court compelling its surrender to the latter, passed the title to it as effectually as if it has been done by mutual consent of the parties. As the appellee, Frankfort & Cincinnati Ry. Co., acquired the property and franchise of the Kentucky Midland Ry. Co., the conveyance to the latter company operates to vest the title of the land in controversy in the appellee as its successor.

Under the state of the record we are not inclined to disturb the finding of the chancellor, and the judgment is, therefore, affirmed.

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COMMONWEALTH, BY, &c. v. COLLINS.

(Filed March 19, 1903—Not to be reported.)

**Taxation.—Assessment.—Description of personal property.**—This is a proceeding under information filed in a county court by an auditor's agent under section 4241, Kentucky Statutes, requiring an assessment of personal property for several years belonging to appellee, which it is alleged she owned and failed to assess. A demurrer to the information was sustained in both the county and circuit courts on the ground that the description given in the information was insufficient. The property was described as "cash, mortgages, notes, bonds, accounts and choses in action. Held—That if this was error it should have been reached by a motion to make more specific and not by demurrer. Said description is sufficient. The information on which the court is expected to act under this law must be, from the nature of the case, somewhat general.

G. A. Cassidy and B. S. Grannis for appellants.

L. W. Robertson, E. L. Worthington, Garrett S. Wall, W. D. Cochran and W. H. Wadsworth for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Nunn.

In the month of July, 1901, the auditor's agent, F. S. Watson, filed in the county court of Mason county a statement alleging that certain property belonging to appellee, amounting to from \$50,000 to \$60,000 each year from 1884 up to and including 1901, was by her omitted to be assessed or listed for taxation for each of the years named.

It appears that the demurrer to the information and statement was sustained in the county and circuit courts upon the grounds that the statement did not describe the property sought to be assessed as is required by section 4241 of the Kentucky Statutes. The description of the property as given by the auditor's agent in his statement is, in substance, that appellee, Laura G. Collins, omitted, neglected and refused to list with the assessor of Mason county, Kentucky, or the board of supervisors of said county, and she omitted and neglected to assess said property with any one, and that the omitted property was subject to taxation for each of the years aforesaid, and that the omitted property consisted of cash, mortgages, notes, bonds, accounts and choses in action.

Section 4241 of the Kentucky Statutes is as follows: "It shall be the duty of the sheriff or auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted, by the assessor, board of supervisors, board of valuation and assessment or railroad commission for any year or years. The officer proposing to have such property assessed shall file in the clerk's office of the county in which the property may be liable to assessment a statement, containing a description and value of the property to be assessed \* \* \* and the name and residence of the owner \* \* \* of the property, and the year or years for which the property is proposed to be assessed. \* \* \* On the filing of this statement the clerk of the court shall issue a summons against the owner to show cause \* \* \* why such property, if any, shall not be assessed at the value named in the settlement filed. \* \* \* If it shall appear to the court that the property is liable for taxation, and has not been assessed, the court shall enter an order fixing the value thereof at its fair cash value, estimated as required by law; if not liable he shall make an order to that effect. From so much of the order of the court deciding whether or not the property is liable to assessment either party may appeal as in other civil cases." \* \* \*

Appellee's counsel contend that the description of the property in the information filed is insufficient, to wit: "Cash, mortgages, notes, bonds, accounts and choses in action," and that their demurrer was properly sustained. They contend that the information should have stated how much cash, how much notes, and how much of each. If they were correct in this, the proper way to have reached the error would have been by motion to make the information more specific, and not by demurrer. By their demurrer appellee admitted that she was the owner of the property for each of the years of the value stated, and that it was subject to taxation, and had

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not been listed for taxation, nor any tax paid thereon. She was in a better position to know the truth or falsity of this allegation and the kind and character of such property and the amounts of each, if any, than the appellant. Under section 4052 of the Kentucky Statutes it was her duty to list with the assessor all the estate of every kind that she had or owned each and every year named in the information.

In the case of Commonwealth of Kentucky, By, &c. v. The Singer Mfg. Co., 14 Ky. Law Rep., 783, in discussing the auditor's agent act, the court, by Judge Hazelrigg, said: "The information on which the court is expected to act under this law must be, from the nature of the case, somewhat general. The citation is rather to search the conscience of one who is presumably evading the tax gatherer. It is the duty of each citizen to help bear the burden of taxation in common with his fellow, and equally with him, and even upon slight information that he is violating this duty the court should give him an opportunity to perform it."

It is important to the State, and to each and every taxpayer in the State, that each and every owner of property shall not omit the listing of it and the payment of taxes thereon. Every owner of property is presumed to be better acquainted with the value and the description of his property than any other person, and we can not understand the necessity for the sheriff or the auditor's agent, in proceeding under section 4241 of the Kentucky Statutes, and indeed it would be impossible for them to give a particular description of the exact amount of cash, notes, bonds, mortgages, choses in action, etc., that the owner may have in his possession, or may have had in his possession, in the years passed. And this court is of the opinion that when the legislature used the word "description" in that section, that such a construction of the word was not contemplated. We concur in the language of the court by Judge Hazelrigg, to wit: "The information on which the court is expected to act under this law must be, from the nature of the case, somewhat general."

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

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ILLINOIS CENTRAL R. R. CO. v. WHITWORTH.

(Filed March 24, 1902.)

Removal of actions—Jurisdiction—Appellee, a citizen of Tennessee, brought this action in the McCracken Circuit Court to recover damages of appellant, a citizen of Illinois. Appellant filed its petition for removal to the Circuit Court of the United States for the Western District of Kentucky, on the ground of diverse citizenship, but the circuit court refused to order the removal and appellant, under protest, made defense to the action, and a verdict and judgment resulted in favor of appellee. The motion to remand was refused by the Federal court. On appeal it is insisted that the lower court had no jurisdiction to try the case after appellant had complied with the statute with reference to the removal of the action. Held—That under the act of congress of 1875, as amended by the acts of 1887 and 1888, the action was clearly removable to the Federal court on the ground of diverse citizenship, and the lower court had no jurisdiction to try the case after the

petition for removal had been filed. Appellant, by making defense under protest, did not waive its right to remove the case.

Quigley & Quigley and Pirtle & Trabue for appellant.

Hendrick Miller for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Burnam.

In the petition for rehearing in this case our attention is called to the fact that in the decision heretofore rendered, in 24 Ky. Law Rep., 1005, we failed to pass upon the validity of the motion of the defendant to transfer the case from the McCracken Circuit Court to the United States Circuit Court for the Western District of Kentucky. In response to this contention, it is proper for us to say that we did not overlook the fact that this question was presented by the record, but as counsel for appellant in their brief did not rely upon this alleged error of the circuit court as a ground for reversal, but were content to rest their contention wholly upon the merits of the case, we concluded that they did not desire upon this appeal to rely upon that ground, but it seems from their petition for rehearing that we have misconstrued the purpose of counsel, and they now insist upon a decision upon that point.

The plaintiff, a citizen of Tennessee, as he alleges in his petition, brought this suit in the McCracken Circuit Court against the defendant, whom he alleges is a citizen of Illinois, to recover a sum in excess of \$2,000. The defendant tendered and filed its petition and bond for removal to the United States Circuit Court for the Western District of Kentucky, upon the ground of diverse citizenship, but the McCracken Circuit court decided that no ground for removal existed, and thereupon the defendant, under protest, answered and made defense. The trial resulted in a verdict and judgment for the plaintiff. In the meantime a copy of the record in the McCracken Circuit Court was filed by the defendant in the United States Circuit Court for the Western District of Kentucky. And the plaintiff appeared in that court and asked that it be remanded to the State court for trial, basing its claim to this relief upon the provision of section 1 of the act of August 1, 1888. (25 Statutes, 433.) The motion to remand in the Federal court was overruled.

Article 3, section 2, chapter 1 of the Constitution of the United States defines the extent of judicial power which may be conferred upon courts of the United States as follows: "The judicial power shall extend to all cases in law or equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers and consuls; to all cases of admiralty or maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between different States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

The enforcement of this provision of the Federal Constitution was for a very long time controlled by the judiciary act of 1789, section 11. But other

acts were passed from time to time by the congress of the United States, conferring upon the circuit courts of the United States various special-jurisdictions, but the present general right to remove a suit from a State to a Circuit Court of the United States is governed by section 2 of the act of 1875, as amended by the acts of 1887 and 1888. An interesting history of these various acts is found in "Moore on Removal of Causes." The second section of the act of 1875, as amended by the act of 1887, reads as follows: "When in any suit mentioned in this action there shall be a controversy, which is wholly between citizens of different States and which can be fully determined between them, then either one of some of the defendants, actually interested in such controversy, may remove such controversy to the Circuit Court of the United States for the proper district."

And section 1 of the act of August 18, 1888, amending the act of 1875, provides: "The district and circuit court of the United States shall have original jurisdiction, concurrent with the courts of the several States, over all suits of a civil nature at common law or equity, in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the value of \$2,000."

And the act further provides that no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant. But when the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant. The second section of the same act provides that: "Any suits of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought in any State court, may be removed into the Circuit Court of the United States for the proper district of the defendant or defendants therein being nonresidents of this State."

As neither of the parties to this action are citizens or inhabitants of Kentucky, it is contended under section 2 that the case is not removable, and appellees refer to *Shaw v. The Mining Co.*, 145 U. S., 144, and *Railroad Co. v. Davidson*, 157 U. S., 201. The question decided in the first case was that a corporation created by one State did not become a resident of another for jurisdictional purposes by establishing a place of business therein. And in the second it was decided that an action by an assignee, where an assignor could not maintain his suit in a Federal court, was not removable.

In the case of the *Central Trust Co. v. McGeorge*, 161 U. S., 183, it was held that exemption from being sued out of the district of its domicile was a privilege which a corporation might waive, and which was waived by pleading to the merits of the controversy without objection. But the case clearly recognizes the right of transfer to the Federal court where the citizenship of the parties is diverse. And this case seems to be in accord with the current of the recent decisions of the Federal court on this question. (*Cowell v. Supply Co.*, 96 Fed., 769; *Creagh v. Society*, 83 Fed., 849; *Duncan v. Associated Press*, 81 Fed., 417; *Long v. Long*, 73 Fed., 869; *Sherwood v. Mississippi Valley Co.*, 55 Fed., 1; *Amsinck v. Balderston*, 41 Fed., 705; *Uhle v. Burnham*, 43 Fed., 1; *Burck v. Taylor*, 39 Fed., 581; *Kansas City*

& T. R. Co. v. Intestate Lumber Co., 37 Fed., 3; First Nat. Bank v. Merchants' Bank, 37 Fed., 657; Bulbery v. City of Topeka, 34 Fed., 511; Wilson v. Telegraph Co., Id., 561; Fales v. Railroad Co., 32 Fed., 673.) And Judge Dillon, in his well approved work on Removal of Causes (section 96), says: "At first it was held that if the action was brought against a defendant in a district of which he was not an inhabitant, so that the Federal court would not have originally had jurisdiction of it under the first section of the act, if it could not be removed under the second section. But this position was soon abandoned. It was next considered that, while the right of removal might depend upon the capacity of the particular Federal court to entertain original jurisdiction of the suit sought to be removed, yet the statute permitted the plaintiff to sue the defendant in the Federal district of the plaintiff's own residence as well as in that of which the defendant was an inhabitant, where the Federal jurisdiction depended only on the fact of diverse citizenship of the parties; and, therefore, such a suit was removable by the defendant, if brought in the State court of the plaintiff's own State. But this rule was in turn superseded by a more liberal doctrine. It came to be perceived that the restrictive language of the first section of the act was referable only to suits commenced in a Federal court by original process or proceeding, and had no application to suits removed from State courts, and that the word jurisdiction in the clause in the section relating to suits of which the Federal court may have original jurisdiction is not to be taken in the narrow sense of a certain territorial limits but in a wider sense, meaning jurisdiction over the whole class of cases enumerated in the statute. Accordingly, it is now well settled that 'where the parties are citizens of different States, and the other conditions of removability are satisfied, the cause may be removed to the Federal court, notwithstanding the fact that neither plaintiff nor defendant is a citizen or resident of the State where the suit is brought, or of the district within the territorial jurisdiction of the Federal court to which it is to be transferred.'"

It is evident that under the section of the Constitution quoted supra the congress of the United States is authorized, where there is a controversy between citizens of different States, to confer jurisdiction for the determination of such controversy upon the Federal courts, and to provide for the removal of suits involving such an issue from the State to the Federal courts. And a careful review of the decisions of the Federal courts construing the statute regulating this question has satisfied us that the circuit court of McCracken county had no jurisdiction to hear and determine this controversy after the defendants had complied with the provisions of the Federal statute and had petitioned for its removal. Nor was the right of transfer waived by the defendant in pleading under protest to the issue in the State court. (*International, &c. v. Tugman*, 106 U. S., 123.)

For reasons indicated the opinion heretofore delivered is withdrawn and the judgment is reversed and cause remanded for proceedings consistent with this opinion.

## HOWE &amp; JOHNSON v. SKIDMORE, &amp;c.

(Filed March 19, 1908—Not to be reported.)

**Attachment—Evidence**—In this action to establish as grounds for attachment of a stock of goods in a saloon plaintiffs introduced S. as a witness, by whom they expected to prove that the defendant made a sale of the goods to his brother with the intent to defraud the plaintiff out of his debt, but the witness failed to give any evidence to their interest or detriment. They then offered to prove by other witnesses that S. had previously made such statements. Held—That the court properly rejected said testimony as incompetent. Statements as to the reasons for the sale made by defendant afterwards were also incompetent.

Robt. H. Winn for appellants.

W. D. Jackson and Hazelrigg & Chenault for appellees.

Appeal from Powell Circuit Court.

Opinion of the court by Judge Nunn.

The appellants sued D. B. Skidmore in the Powell Circuit Court on an account, for between \$500 and \$600, and at the same time obtained an attachment against his property. This attachment was issued and levied on the 6th day of May, 1899, on the contents of a saloon in Bowen, Ky.

The appellee, M. F. Skidmore, filed a petition, setting up claim to the attached property by purchase from his brother, and asked to be made a party defendant to the action, and it was so ordered by the court. The appellants merely traversed this pleading. They did not charge any collusion, fraud or other unlawful act on appellees' part. Under this state of pleading and proof the lower court gave judgment against D. B. Skidmore for the amount claimed by the appellants and sustained the attachment against him, but found in favor of appellee, M. F. Skidmore, and released the property claimed by him from the attachment.

The only question before the court on this appeal is whether or not the court erred in releasing to M. F. Skidmore the attached property under his alleged purchase. The evidence, without any contradiction, shows that defendant, D. B. Skidmore, had been endeavoring to sell his saloon stock for about a month or more with a view of embarking in other business, and appellants were informed of this fact at the time they sold the larger part of the bill sued on. Appellee, M. F. Skidmore, testified, and was corroborated by D. B. Skidmore and others, that he bought the stock from his brother at the price of \$752, the invoice price, and paid for the stock in cash, after deducting an amount his brother owed him, amounting to about \$100. We have not been able to find in the record any contradiction of the statement of appellee, nor any fact or circumstance tending to discredit him.

The contention of appellants is that the court erred to their prejudice in refusing to allow to be read as evidence the depositions of R. H. Winn and W. L. Stout. They testified that on more than one occasion one John L. Scott told them that "he would testify that D. B. Skidmore told him on one occasion, while up in Harlan county, that he owed Howe & Johnson, and that he intended to sell out to his brother, Millard F. Skidmore, and beat them out of their debt. Appellants first introduced John L. Scott as a witness and attempted to prove these statements by him, but they utterly

failed to prove them, or any fact connected with the issue, either in their interest or to their detriment; then the appellants took the depositions of Winn, Stout and others to prove what Scott had told them. The court refused to consider this evidence. The court was right in this.

Appellants refer to the case of *Wren's Adm'r v. L., St. L. & Tex. R. R. Co.*, 14 Ky. Law Rep., 324, and contend that this opinion sustains their position. In that case the engineer testified on the trial that he first saw the person sitting on the track when the engine was in about 463 feet of him, and that he could not stop the train in that distance. Then he was asked if he had not testified at the inquest, and then and there testified that he first saw the person sitting on the track when the engine was at a distance of 1,287 feet from him. The court in that case erred in refusing to permit the witness to answer the question, for the reason that the witness had made a statement contradicting his former statement, and one that was very material and prejudicial to the party introducing him. But in the case before us Scott made no statement in his evidence, material or prejudicial, to appellants. The evidence of H. T. Rice was also incompetent for the reason that it pertained solely to conversations between Rice and D. B. Skidmore after the sale of the stock of goods to M. F. Skidmore.

Perceiving no error in the record prejudicial to the rights of appellants the judgment of the lower court is, therefore, affirmed.

Judge Hobson sitting in place of Judge O'Rear not sitting.

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SUMMERS BROTHERS v. BLAND, SURVIVING PARTNER, &c.

(Filed March 19, 1903—Not to be reported.)

Partnership—Instruction—In this action against appellants as partners to recover an indebtedness on account, the defense was interposed that the creditor had accepted a note of one of the partners in satisfaction of the debt. After a judgment rendered against them they prosecute this appeal, urging as a ground for reversal the giving of an instruction, to the effect that although a note of one member of the partnership was executed and accepted, it was without consideration and did not release the partnership. Held—That although said instruction was erroneous, it was not prejudicial as it is not claimed that said note was delivered to the creditor, and it was not shown to have been received by him at all or in lieu of the partnership indebtedness.

Lewis McQuown and S. M. Payton for appellants.

L. A. Faurest and W. H. Marriott for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge O'Rear.

During 1897 and 1898 two firms of co-partners were engaged in Hardin county in buying, feeding and selling cattle. One was composed of appellee, W. H. Bland, and L. B. Summers, which was styled Bland & Summers; the other of the said L. B. Summers and his two brothers, D. C. Summers and W. P. Summers. The last-named firm was styled Summers Bros. L. B. Summers was the manager of the firm of Summers Bros. During the years named Bland & Summers, it is claimed, sold cattle and feed and advanced



money to Summers Bros. to the amount of \$2,526.26. In the year 1899 L. B. Summers became a bankrupt; and was discharged as such. Appellee Bland, as surviving partner, thereupon brought this suit against D. C. and W. P. Summers to recover from them as members of the late firm of Summers Bros. the balance of the above-named account, subject to certain admitted credits.

The answer of two paragraphs pleaded first a denial that the items charged, or any of them, had been sold or furnished to the firm of Summers Bros.; and, second, that appellee and L. B. Summers had a settlement by which, and in which, all the items sued for were embraced, and merged in the individual note of L. B. Summers to appellee, which he "had accepted and received."

Appellants' proof was directed to show that the sales of the cattle charged had been by Bland & Summers to L. B. Summers personally; and that he had sold them to D. C. & W. P. Summers in part payment of a debt he was owing them. A jury was called, whose verdict was against appellants. We think the proof clearly sustains the verdict. The instructions given to the jury by the circuit judge were apt and proper, unless it was the 6th, which is especially criticised by appellant. It is as follows: "If the jury believe from the evidence that Summers Bros. were indebted to Bland & Summers the amount sued for herein, or any part thereof, any agreement that plaintiff may have made, if any such was made, to look to L. B. Summers alone therefor, or to accept his individual note therefor, was without consideration, and did not release defendants from their liability, if there was such liability."

This court has held that an account against a partnership may be merged and satisfied by the creditor's taking the note of one of the co-partners, provided it was the intention of the parties that the others should be released, and the note was so accepted and received by the creditor. (*Sneed v. Webster*, 2 Mar., 77; *Patterson v. Chalmers*, 7 B. Mon., 597; *Macklin's Ex'or v. Crutcher*, 6 Bush, 401.)

Without discussing the sufficiency of appellants' plea on this point (of which sufficiency we have grave doubt), the court is of opinion that there was a complete failure of proof to sustain it. The note claimed by L. B. Summers to have been delivered to appellee was not shown to have been received by him at all; not was it shown, or attempted to be, that appellee accepted it in lieu of the liability of Summers Bros. The instruction complained of was, therefore, not prejudicial to appellant.

The judgment is affirmed.

#### COSBY V. COMMONWEALTH.

(Filed March 19, 1908.)

Criminal law—Malicious striking and wounding—Instructions—Appellant was indicted and convicted of the crime of unlawfully and maliciously striking and wounding another with a club and rock, deadly weapons, with intent to kill him. Error in instructions are relied on for a reversal. Held—The court erred in giving an instruction defining a deadly weapon. A deadly weapon is one "dangerous to life." A rock or club is not necessarily

a deadly weapon, but may be made so in the hands of a malicious or infuriated person of ordinary strength, if used in an attack on another with intent to take his life. The court should have instructed the jury that a rock and club, or either, were such instruments as were reasonably calculated to produce death when used by a person of defendant's physical strength, and in the manner in which they, or either, were used, that they should find that such club and rock, or either, are deadly weapons within the meaning of the law.

C. F. Atkinson for appellant.

Clifton J. Patt and M. R. Todd for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Settle.

The appellant, George Cosby, was indicted in the Nelson Circuit Court for the crime of unlawfully and maliciously striking and wounding one Wm. Gilky with a club and rock, deadly weapons, with the intent to kill him. Upon the trial appellant was found guilty by the verdict of the jury, and his punishment fixed at confinement in the penitentiary for a term of three years. A new trial was refused him, hence this appeal.

The lower court gave five instructions, four of which, viz., 1, 2, 3 and 5, we do not hesitate to approve, as they fairly and explicitly set forth, as far as they go, the law of the case, but we are unable to approve instruction No. 4, given by the court, which is as follows: "By the words a deadly weapon as used in these instructions is meant a weapon with which death might be produced in the manner in which defendant used the club and rock, or either, on the occasion mentioned in the indictment (if he used club and rock, or either, on said occasion)."

It was of course necessary to submit to the jury, as was done in instructions 1 and 2, the question of whether the instruments used by appellant in the striking and wounding of Gilky were or not deadly weapons, but it was also necessary to tell the jury in those instructions, or a separate one, what may be considered a deadly weapon in the meaning of the law.

As said by this court in *Commonwealth v. Duncan*, 92 Ky., 595: \* \* \* "The statute does not say what shall constitute a deadly weapon. It merely punishes for a willful and malicious wounding with one. If one man maliciously wounds another with a rock, with which he might have killed him, there exists no reason why the same punishment should not be meted out to him as if he had done it with a shotgun, and undoubtedly the legislature in enacting this statute so intended, whether in this instance the rock was large enough to produce death, and, therefore, a deadly weapon, should have been left to the jury, and the court erred in taking the question from them."

This court has never adopted a form of instruction defining the meaning of the words "deadly weapon" and an examination of the opinion in the case *supra* will show that it does not undertake to say what will constitute a deadly weapon within the meaning of the statute, but simply declares that "under a statute punishing one for an injury with a deadly weapon, not only the character of the weapon used, but the manner of its use, is to be considered." \* \* \* We think the court might have gone further, and said that the physical strength of the person using the instrument or weapon

is also to be considered by the jury in determining whether it is a deadly weapon. A deadly weapon is "one dangerous to life." A rock or club is not necessarily a deadly weapon, but may be made so in the hands of a malicious or infuriated person of ordinary strength, if used in an attack upon another with intent to take his life.

It will be observed that instruction No. 4 told the jury that "any weapon" is deadly which might produce death, if used in the manner in which the club and rock were used by appellant. A bar of iron or a sledge hammer might easily produce death if used in the manner in which the club and rock seem to have been used by appellant, but the question to be determined by the jury was not whether any weapon (such as a bar of iron or other heavy instrument) might produce death if used as the club and rock were used, but whether the latter, considering their character and the manner of their use, might have produced death.

We are of the opinion that the lower court should have given the instruction on this point as follows: "If the jury believe from the evidence, beyond a reasonable doubt, that the club and rock, or either, with which the defendant struck and wounded Gilky, if he did so strike and wound him with a club and rock, or either, were such instruments as were reasonably calculated to produce death, when used by a person of defendant's physical strength and in the manner in which they, or either of them, were used by him on the occasion mentioned in the indictment, they will, in that event, be authorized to find that such club and rock, or either, are deadly weapons within the meaning of the law."

For the error committed by the lower court in the matter of giving instruction No. 4 the judgment is reversed and the cause remanded, with directions to that court to set aside the verdict of the jury and the judgment and sentence entered thereon, and to grant appellant a new trial in conformity to the opinion herein.

Whole court sitting.

#### BURNSIDE & CUMBERLAND RIVER RY. CO. v. TUPMAN.

(Filed March 19, 1903—Not to be reported.)

1. Common carrier—Negligence—Evidence—Appellee brought this action against appellant on a breach of contract for injuries sustained to mules shipped in an unsafe car to Shelman, Georgia. A judgment having been rendered in favor of appellee, appellant prosecutes this appeal, insisting that the court erred to its prejudice in failing to give an instruction confining appellant's liabilities to injuries which occurred on its own line. Held—That appellant having furnished an unsafe car, was properly held responsible for all injuries resulting from same, although such injuries may not have occurred until after the car was delivered to the connecting line. Records of other roads showing that stock was in good condition while on said roads were incompetent.

2. Statute of limitation—Section 2516, Kentucky Statutes, prescribing a limitation of one year within which actions for injuries to stock by railroads, does not apply to this case. This action is for a breach of contract, and is not barred until after five years under section 2515, Kentucky Statutes.

O. H. Waddle for appellant.

Benton & Robinson for appellee.

Appeal from Pulaski Circuit court.

Opinion of the court by Chief Justice Burnam.

On the 7th day of December, 1898, the appellant, the Burnside & Cumberland River Ry. Co., contracted with the appellee, B. F. Tupman, to transport a car load of mules and horses from Burnside Landing to Burnside Junction, both points being on its own line of road, and as the agent of the shipper to forward it to him at Shelman, Ga., in consideration of \$107.50. On the 18th of May, 1901, Tupman instituted this suit against the railway company, in which he alleges that at the time of the shipment the mules and horses were put into a defective car, to which he objected; but that the agent of the defendant assured him that it was sufficient and guaranteed it to be all right; and that relying upon these representations and guaranty, he consented that his stock might be shipped therein; that by reason of the defective condition of this car one of his mules had his hip broken, and was rendered worthless; and that a number of others were so crippled, cut, gashed, maimed and disfigured as to greatly depreciate their salable value; that all of the injury was caused by the defective car and the negligence of the defendant, and asked a judgment for \$800 in damages. The answer of the defendant traversed all the affirmative averments of the petition and denied the alleged representation and guaranty as to the sufficiency of the car, and plead that under the terms of the contract of shipment their liability for injuries to stock was confined to such injuries as might be received on their line of road.

The testimony shows that the defendant's road runs from Burnside Landing to Burnside Junction, a point on the Cincinnati Southern Ry., a distance of a little more than a mile. The substance of the testimony for the plaintiff was to the effect that he objected to the car in which the railway company proposed to ship his stock, on the ground that the slats were too far apart, and that it was otherwise defective; that he pointed out these defects to the agent of the company, who assured him that the car was all right, and said that they would guarantee that his stock could be safely transported therein to their destination in Georgia; and that only a few minutes after the stock had been loaded he saw the leg of one of his mules sticking out between the slats some four or five feet from the bottom of the car; that the slat was sawed into and the mule released, but that when they arrived at their destination in Georgia this mule had a broken hip and in consequence thereof had become worthless, and that several slats on the car had been broken and nailed up, and that other mules were considerably injured. The agent of the company denied the alleged guaranty of the sufficiency of the car, but testified that it was in good condition and that plaintiff made no objection to it when it was pointed out. The trial resulted in a verdict and judgment for the plaintiff for \$200, and a reversal is asked, first, because the court erred in giving to the jury the following instruction: "If the jury believe from the evidence that any of plaintiff's stock mentioned in evidence were injured or damaged by reason of a defective or unsuitable car furnished by defendant for shipment, and that the defendant guaranteed that the car was safe; and that plaintiff, relying on the guar-

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anty, loaded the stock, and any of the stock were injured by reason of defective or unsuitable condition of the car, you will find for the plaintiff such a sum, not exceeding \$800, as you may believe from the evidence to fully compensate him for the injury, if any, to the stock. The defendant is not responsible for any injury occurring to the stock beyond such injury unless caused solely by reason of the car in which they were shipped being defective or unsuitable."

If defendant guaranteed the sufficiency of the car for the purpose for which it was to be used, they were liable for the damages resulting from such breach, whether it occurred on their own line of road or after the delivery of the car to the connecting lines of railway. And the insurance is based wholly upon this theory, and, in our opinion, aptly states the law applicable to the facts in issue in this case. It concedes defendant's contention, that they were not responsible for any injury occurring to the stock beyond their line, unless caused by reason of the defective and unsuitable condition of the car exclusively.

Upon the trial the defendant offered to introduce records of connecting railway lines for the purpose of showing that the stock were in good condition when they arrived at Chattanooga, Tenn., and that the injuries were received after the car was delivered to the Southern Railway beyond that point. In our opinion this testimony was properly excluded. They also complain that the trial court did not sustain their plea of limitation to suit under section 2516 of the Kentucky Statutes, which provides that: "An action \* \* \* for injuries to cattle or stock by a railroad \* \* \* shall be commenced within one year next after the cause accrued, and not thereafter."

This is not an action for tort, but for a breach of contract, and the statute relied on has no application. The limitation to actions of this character is regulated by the provisions of section 2515, and must be brought within five years after the accrual of the right. We are, therefore, of the opinion that the trial court did not err in sustaining a demurrer to the plea of limitation or in either of the other grounds relied on for a reversal.

Judgment affirmed.

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COMMONWEALTH, BY, &c. v. WILLIAMS' ADM'X.

(Filed March 19, 1903—Not to be reported.)

G. A. Cassidy for appellants.

L. W. Robertson, Garrett S. Wall, E. L. Worthington and W. D. C. for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Nunn.

The same question is presented in this record as in the case of Commonwealth, By, &c. v. Laura G. Collins, ante, 1042, this day decided. The authority of that case, and for the reasons therein stated, the judgment is reversed and the cause remanded for further proceedings consistent with that opinion.

NELSON COUNTY v. BARDSTOWN AND LOUISVILLE  
TURNPIKE CO.

(Filed March 20, 1903—Not to be reported.)

**Appeals—Schedule—**If a schedule for a partial record is not filed within ninety days after the granting of the appeal in the lower court, the appeal should be dismissed. Filing the partial record afterwards will not cure the defect.

W. S. Pryor, Eli H. Brown, M. Yewell and Nat W. Halstead for appellant.

Geo. S. & John A. Fulton and John S. Kelly for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Paynter.

The judgment appealed from was rendered June 12, 1902. The appeal was granted in the lower court. On the 11th day of December, 1902, a schedule for a partial record was filed in the clerk's office of the clerk of the circuit court, six months after the judgment was rendered. The transcript made pursuant to the schedule was filed herein December 16, 1902. On this state of facts a motion was made to dismiss the appeal. By subsection 4 it is provided that if a schedule showing what parts of the record is desired is not filed within ninety days after the granting of the appeal in the lower court the appeal shall be dismissed. If the appellant had filed a complete transcript of the record, instead of the partial one, then the motion, by authority of Louisville & Nashville R. R. Co. v. Brice, 83 Ky., 210, should be overruled. As only a partial transcript was filed the motion must prevail.

The appeal is dismissed.

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

## KENTUCKY COURT OF APPEALS.

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PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RY. CO., &c.  
v. DODD, &c.

(Filed March 19, 1903.)

1. **Contracts—Corporations—Parties to actions**—The Louisville Bridge Co. having become incorporated, constructed a railroad bridge across the Ohio river at Louisville, between Kentucky and Indiana. The capital stock paid in was \$1,500,000; the bond issue was \$800,000. In 1873 it entered into a written contract with the J., M. & I. R. R. Co., the O. & M. Ry. Co. and the L. & N. R. R. Co. for the use of such bridge in the transportation of its trains, freight and passengers at such rates as the bridge company might from time to time fix, not exceeding in the aggregate a sum sufficient to pay a semi-annual dividend of 6 per cent. to the stockholders and taxes, cost of operating expenses and the maintenance of the bridge company's organization, but it was provided that any railroad company could withdraw from this contract by giving two years' notice of its intention to do so. Under this provision the O. & M. Ry. Co. has severed its connection with said contract. The J., M. & I. R. R. Co. has been purchased by the appellant, P., C., C. & St. L. Ry. Co., now designated in this opinion as the "Pan Handle." It was agreed that any roads that might afterwards be permitted to use said bridge should not be admitted on terms more favorable than specified in said contract. The "Monon" road afterwards was granted the use of said bridge, but was not a party to said contract. In 1896 the bridge company reduced its dividends from 4 per cent., due for the first half of that year to 2½ per cent., and for the year 1897 they were reduced to 3 per cent. semi-annually and a similar reduction for the year 1898. No dividend was declared for the first half of 1899. Appellees representing about 700 shares of the capital stock in the bridge company, out of an issue of 15,000 shares, brought suit against the bridge company, the L. & N. R. R. Co. and the J., M. & I. R. R. Co. and the Pan Handle road to compel the railroads named to provide, and the bridge company to collect from them, a sum sufficient to pay the deficit in dividends. It is charged that the contracting railroad companies failed to pay all the taxes assessed against the bridge and were then in de-

fault on that account about \$300,000, and that the railroad companies had illegally and fraudulently distributed and appropriated among themselves about \$108,000 of property constituting that much of the capital of the bridge company. The plaintiffs sued for not only the deficits in dividends above named, but claimed that they should be paid 12 per cent. for all the time since 1877, and interest on deficits. The plaintiffs allege that the directors of the bridge company refuse to sue to redress the grievances complained of, and will not and ought not to take charge of this litigation because of a conflict of interest and of duties, owing to their being also directors and interested in the Pan Handle and the J., M. & I. R. R. Co. One of the questions involved on this appeal is whether the minority of the stockholders have a right to maintain this action. Held—That under the ordinary rules of law governing corporations the directors alone are required to take all steps involving the interests of the corporation or its stockholders, yet upon an allegation of fraud on the part of the directors, or upon an allegation of facts showing that the directors (who are also directors of another contracting corporation), because of conflicting interest and duty, could not or ought not to act in the matter, coupled with the further allegation showing material damage to the complaining stockholder by reason of the transaction between the two corporations, a court of equity will hear a single stockholder's complaint, and if the charges be sustained by the proof will grant appropriate relief. In this action a cause of action was shown against the "Pan Handle." If the directors can not sue the L. & N. R. R. Co. without conflicting with its interests, as directors in the Pan Handle, then a sufficient reason exists for permitting the minority stockholders to sue any of the parties to the contract in place of the directors.

2. Collection of dividends—Estoppel—The stockholders having for many years acquiesced in the action of the directors of the bridge company in collecting money from the railroad companies to enable it to pay a semi-annual dividend of 4 per cent. instead of 6 per cent., as required by the terms of the contract, are now estopped to claim more than 4 per cent. semi annual dividend.

3. Misappropriation of capital stock—Appellees claim that the appellants and other railroad companies appropriated to their own use about \$108,000 of the capital stock of the bridge company. This amount is made up of about \$87,518.05, as a balance realized from the proceeds of the capital stock; also about \$10,000 realized from sale of right of way under the northern abutment; also from a sale of 10½ acres of land conveyed to J., M. & I. R. R. Co., amounting to \$107,798.96, all of which was placed in the sinking fund. Held—That the expenditure of \$20,000 for fender piers and the draw span, \$36,540.67, were properly paid out of the sinking fund as they were necessary permanent improvements, and the residue of said fund was expended for the benefit of said bridge company with the acquiescence of the stockholders.

4. Fraudulent conveyances—Conveyance without authority of corporation—Statute of limitation—The petition seeks to have the conveyance of the 10½ acres of land to the J., M. & I. R. R. Co. set aside as ultra vires and in fraud of the rights of the stockholders, to which the statute of limitation of ten years, as provided by section 2519, Kentucky Statutes, is interposed as a defense. Held—That the directors exceeded their powers in conveying said property to the J., M. & I. R. R. Co., and same is void, and same should be cancelled upon the bridge company refunding the consideration paid. The deed to the railroad company was incompatible with its possession. It was hostile to the title by which, and under which, it had been let into the possession. The relation between the parties was akin to that of



landlord and tenant, and the statute of limitation, therefore, presented no defense to the recovery sought.

5. Liability of railroad companies to pay deficiency of dividends—Defendant railroad companies are liable to provide an income from tolls sufficient to pay the full dividend of 4 per cent. semi-annually for the years in litigation, and the lower court properly apportioned the liability between them.

6. Contribution to pay judgment of L. & N. R. R. Co.—The L. & N. R. Co. obtained a judgment against the bridge company for about \$168,000 for amount paid over and above its proper assessment, and the other railroad companies should contribute to the payment of said judgment, interest and costs. But the liability of said railroads are not to be increased on account of a loss of collections from the "Monon" and "Air Line" companies on account of insolvency. These liabilities are to be treated as if they had been collected by the bridge company and then lost.

7. Termination of contract—Appellant, the "Pan Handle" road, terminated the contract on September 25, 1899, by having given the notice stipulated in the original agreement.

Lawrence Maxwell for P., C., C. & St. L. Ry. Co.

Helm, Bruce & Helm for L. & N. R. R. Co.

J. C. Dodd, Harris & Marshall, Kohn, Baird & Spindle and Hazelrigg & Chenault for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge O'Rear.

The Louisville Bridge Co. was incorporated by an act of the legislature in 1856, with authority to build a railroad toll bridge across the Ohio river at Louisville. The bridge was not built and completed till about 1870. The charter of the bridge company authorized it "to contract, at an agreed sum or rate, with any railroad company, chartered by the State of Kentucky, or any other State of the United States, for the annual use of said bridge by the cars, or for the purposes of said railroad company."

This bridge was built from stock subscriptions and the proceeds of an issue of mortgage bonds. The capital stock paid in was \$1,500,000; the bond issue was \$500,000. When this bridge was built there was no other railroad bridge across the Ohio river below Cincinnati. Then the only railroad connecting with it from the south was appellant, Louisville & Nashville R. R. The only railroad connecting from the north were the Jeffersonville, Madison & Indianapolis R. R., and the Ohio & Mississippi Ry. (the latter by way of using the approach owned by the former). The bridge was constructed exclusively for railroad traffic. The bridge company owned no rolling stock, and has never owned or operated any.

On June 5, 1872, the Louisville Bridge Co. (hereinafter referred to as the bridge company), the Jeffersonville, Madison & Indianapolis R. R. Co., the Ohio & Mississippi Ry. Co., and the Louisville & Nashville R. R. Co. entered into a contract, perpetual except as it might be terminated by the parties according to its terms, by which the railroad companies agreed to pass over the bridge their traffic destined to cross the Ohio river at or near Louisville, and to pay for this privilege such rates per engine, per car, per ton and per passenger as the bridge company might from time to time fix,

not exceeding in the aggregate a sum sufficient to pay a certain fixed income to its stockholders, and taxes, cost of operating expenses and the maintenance of the bridge company's organization. It was not agreed, and could not have been, by the bridge company that the contracting railroads were to have the exclusive right of passage over the bridge; on the contrary, it was expressly stipulated that the bridge company might admit any other railroad or railroads to the same privileges as by the contract were accorded to the then contracting roads, but upon terms no more favorable. As this contract is at the foundation of this litigation, and its construction and application are involved, it is set out at length:

"Agreement made this 5th day of June, 1872, between the Louisville Bridge Co., party to the first part, the Jeffersonville, Madison & Indianapolis R. R. Co., party of the second part, the Ohio & Mississippi Ry. Co., party of the third part, and the Louisville & Nashville R. R. Co., party of the fourth part, witnesseth:

"Whereas, the first party owns the bridge over the Ohio river at Louisville, between the Commonwealth of Kentucky and the State of Indiana, with the approach thereto on the south or Kentucky side thereof, its capital stock being \$1,500,000, and its mortgage debt \$800,000, bonds for said debt being issued for \$1,000 each, dated the 1st day of December, 1868, and payable twenty years after said date, with interest at 7 per cent. per annum, payable semi-annually in gold on the 1st day of June and the 1st day of December, principal and interest payable at the Bank of America, New York City; and whereas, the second party owns the approach to said bridge on the north or Indiana side thereof and the railroad connecting therewith; and whereas, the third party owns a railroad connecting with the railroad of the party of the second part at or near the north end of said approach; and whereas, the party of the fourth part owns a railroad terminating in the city of Louisville and connecting with the track over and across the said bridge.

"Now this agreement witnesseth: In consideration that the second, third and fourth parties agree respectively to use said bridge as is hereinafter covenanted, the first party hereby covenants and agrees jointly and severally with the second, third and fourth parties, their successors and assigns, respectively, that the tolls and charges over and for the use of said bridge and its tracks, owned by the first party, in the transportation of freights, passengers, mails and other goods received from or delivered to the roads of said second, third and fourth parties, per ton, and per passenger or per car, engine or other means of transfer over said bridge, shall be fixed on signing this agreement, and shall not be in excess of a toll or charge sufficient to produce in the aggregate a sum equal to the cost and expense of keeping in repair and taking care of said bridge and the said approach owned by the first party paying a dividend semi-annually of 6 per cent. on said capital stock of \$1,500,000, the interest upon the said bonds as the same matures and becomes payable—a sinking fund sufficient to pay off said bonds of \$800,000 at maturity, the amount necessary to keep up the corporate organization of the party of the first part, with its proper officers and servants, and such taxes as may be chargeable against such bridge company on said bridge or other property pertaining thereto or otherwise; and it is understood and

mutually agreed that said charges and tolls shall from year to year be reduced in proportion to the reduction of interest on said bonds by the operation of said sinking fund; and that said tolls and charges shall always be the same to each of the second, third and fourth parties, and that the tolls and charges to other railroad companies for like use of said bridge and the approach owned by the first party shall not be less than those charged to or incurred by the parties hereto. And all such tolls and charges paid by other railroads or railroad companies shall be applied to and form a part of the fund hereinbefore provided for the payment of expenses, sinking fund, interest, dividends and taxes the same as if paid by the second, third and fourth parties.

"Sec. 2. The first party shall keep in repair, maintain and renew the said bridge and its appurtenances, and the tracks and approach thereto owned by the first party. If, however, said bridge or its appurtenances shall be injured by floods, ice, or other casualty, or by crystallization of the iron, or other inherent decay, so as to render same useless or dangerous, and it shall become necessary to rebuild the whole, or any material part thereof, involving an expenditure greater than could be realized from a judicious amount of current rates and charges, then, and in every such case, it is mutually agreed between the parties that the first party shall issue bonds, secured by mortgage on said bridge and its appurtenances and appendages owned by the first party, at a rate of interest not exceeding 7 per cent. per annum in gold, payable semi-annually, principal payable in forty years, and to an amount sufficient to yield a fund equal to the expenses of renewing and repairing said bridge, and the proceeds of said bonds shall be applied to that purpose, in which event the tolls and charges for the use of said bridge, as hereinbefore provided, shall be increased so as to cover and provide for the payment of the interest on said bonds, and a sinking fund to retire and take up said bonds at maturity.

"Sec. 3. In consideration of the premises, the second and third parties each severally covenant for itself, its successors and assigns with the first party, its successors and assigns, that it will pass over the said bridge all the freight, passengers, mails, express matter, and other goods carried on and over their roads to and from Louisville, and to and from points which require their passage over the Ohio river at or near Louisville during the existence of this agreement, and will pay punctually to the party of the first part the tolls and charges hereinbefore provided for the use by them respectively of said bridge and the tracks and approaches thereto, owned by the first party; and the party of the fourth part, for itself, its successors and assigns, covenants with each of the parties of the first, second and third parts, their respective successors or assigns, that it will deliver to said party of the first part, to be passed over said bridge, or to the parties of the second or third parts, or to such other railroad company or companies as may for the time being be transporting freight, passengers, mails, express matter and other goods over the said bridge, all the freight, passenger, mail, express matter, and other goods carried on and over its road, or any part thereof, destined for Jeffersonville, in the State of Indiana, or any other points which require their passage over the Ohio river at or near Louisville, during the existence of this agreement, and will charge on such traffic, in

addition to its rates for transportation service, the then established rates of toll and charges hereinbefore provided for the use of said bridge and approaches, and punctually pay the said tolls and charges to the first party.

"Sec. 4. In consideration of the premises aforesaid, and in consideration of the ownership and investment made by the second party in, and its control of, said approach to said bridge, at the north end thereof, the third party hereby covenants and agrees with the second party, to use said approach to said bridge, from the existing point of connection between their respective roads, or such other point as may hereafter be agreed on by the said two parties in going to and from said bridge with the cars, engines and trains, or other means of transporting freight, passengers, mails, express and other goods over its railroad, destined to and from Louisville, and to or from points at or near Louisville during the existence of this agreement. It is, however, mutually understood and agreed that all the said trains, cars and engines passing over said approach and over said bridge are, and shall be, under the control and direction of the second party, and that whatever rules are prescribed for the government of the trains, cars and engines of the second party in the premises, shall be equally applicable to the trains, cars and engines of the third party, each being dealt with alike. It is, however, further mutually understood and agreed between the second and third parties, that so long as the passenger trains of the party of the second part are run to and from said city of Louisville with the proper train engines of the second party, the passenger trains of the third party may also be so run by its own proper train engines. But whenever, in the opinion of the second party, the trains of the parties can not be so run with safety, the second party shall set apart a sufficient number of engines for that service. The freight trains and freight cars of the parties shall be run over said approach and said bridge, to and from Louisville, with the engines of the second party set apart for that service, and the second party hereby covenants to furnish all needful and sufficient engines for the service hereinabove mentioned, and at all times to transfer with the same promptness and care, over the said approach and bridge, the trains, cars, engines and traffic of the parties of the third and fourth parts, received from, or to be delivered to, the roads of the parties of the third and fourth parts that it does the trains, cars, engines and traffic received from, or to be delivered to, its own road, the intention being that each of the parties shall enjoy equal facilities over said approach and bridge.

"For the services aforesaid of the said engines of the second party, and the conducting and management of the same, and of the cars, trains and business over said approach and bridge, the second party shall be allowed a reasonable compensation, to be fixed on signing this agreement, to be apportioned between the parties hereto in proportion to the service to each, per ton and per passenger, or per car, engine or other means of transfer, as the parties may hereafter agree.

"In respect to the use by the third party of the approach to said bridge, owned by the second party, on the north side of said bridge from the point of connection made therewith by the third party, the party of the third part hereby covenants and agrees to pay the second party 5 per cent. per annum on the actual cost of the right of way, the construction of the same and the

value of the superstructure thereon, which cost and value are together assumed at ——— dollars, and also pay in proportion to use the expenses of keeping up and maintaining and renewing same. If any of the parties hereto, and in interest, can not agree as to the compensation or rule of apportionment for said engine service and management of trains, or upon the expense or rule of apportionment of the expenses relating to said approach, or the cost and value of said roadway and track, as above provided, then each of the two parties in interest may select one referee to determine the difference, and if said referees can not agree, an umpire may be chosen by them, and their decision, or a majority, shall conclude the matter. If either party fail to appoint a referee as aforesaid within thirty days after written notice to make such appointment, the referee appointed by the party not in default shall appoint the referee for the defaulting party, and the two shall proceed to determine the matter or appoint an umpire. No person shall be qualified to act as umpire or referee except disinterested persons of experience and skill in railroad management. The parties mutually covenant to perform the awards.

"Any of said parties in interest, after the expiration of six months from the time such agreement for said compensation for said services and expenses is made, or six months after such award, may then, and semi-annually thereafter, upon thirty days' previous notice in writing to the other party in interest, require said compensation to be readjusted, and if they can not agree upon the terms of such readjustment, the same may be referred to and determined by arbitrators as hereinbefore provided; but no readjustment shall be made of the rate of interest to be paid for the cost of such approach to said bridge.

"Sec. 5. Accounts of all expenditures, tolls and charges and payments required by the terms of this agreement shall be kept by the party authorized by this agreement to charge the same against either of the parties hereto. The account of tolls, however, to be kept by the respective parties chargeable therewith, and all such accounts, shall be rendered to the proper parties during the month next succeeding the accruing of the items thereof, and the same shall be settled and paid within thirty days after the rendition of each monthly account.

"Sec. 6. If it is found during the month of May or November in any year that the tolls and charges herein provided are not sufficient to meet the said interest and dividend due the first day of the next succeeding month, the parties of the second and third parts each covenant and agree separately with the first party, and mutually covenant each with the other to advance and pay the deficit immediately, and prorate according to the aggregate amount of tolls and charges for the use of said bridge against each for the then current six months. The said advance, with interest thereon at the rate of 7 per cent. per annum, shall be refunded by the first party out of the tolls first thereafter accruing.

"Sec. 7. This agreement shall take effect on the 1st day of July, A. D., 1872, and the first semi-annual interest on said mortgage bonds of the first party and the first semi-annual dividend on the capital stock of the first party provided for by this agreement, shall be payable on the 1st day of December, A. D., 1872, and the 1st of January, A. D., 1873, respectively, and

semi-annually thereafter. If any difference shall arise between the parties, or any of them, as to the construction of any of the provisions of this contract or the mode of performance, the same shall be submitted to arbitrators, the qualification of arbitrators and an umpire, and the obligation to perform the award, by them made to be the same as hereinbefore provided in section 4.

"This contract shall continue in force and in operation until it shall be terminated by some one of the parties thereto giving notice in writing to the other parties of its election to terminate the same at the expiration of two years from the giving of such notice, at the expiration of which two years the same shall terminate as to all the parties thereto included in such notice.

"In witness whereof, each of the parties has hereto set its corporate seal, and has caused these presents to be duly signed by its president, the day and the year first before mentioned."

(Signed.)

In 1883 two other roads were admitted by the bridge company, upon terms substantially identical (save as to amount of dividends to be provided for stockholders, the rate being in these contracts stated at 8 per cent., payable semi-annually), being the Louisville, New Albany & Chicago Ry. Co. (in the record called the "Monon"), and the Louisville, Evansville & St. Louis R. R. Co. (called the "Air Line.")

Since 1877 the bridge company has exacted, and the railroads have provided, only 8 per cent., payable semi-annually as a fund for dividends to stockholders upon the capital stock of \$1,600,000. The Ohio & Mississippi Ry. Co. has long since ceased to use the bridge under the contract, having availed itself of the privilege to terminate its connection upon notice as is therein provided. The Jeffersonville, Madison & Indianapolis R. R. has, by lease and consolidation, become a part of, and is now operated as, the Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. (in the record called the "Pan Handle"), the latter having taken over the property of the former and assumed its place under the contract in suit. The L., N. A. & C. Ry. has, by insolvency, changed hands, and is now operated by the Chicago, Indianapolis & Louisville R. R. Co. The latter is not, and has not been, a party to the contract sued on.

In 1896, because of lack of funds, the bridge company reduced its dividends from 4 per cent., due for the first half of that year, to  $2\frac{1}{4}$  per cent.; and for the year 1897 they were reduced to 3 per cent. semi-annually, and a similar reduction for the year 1898. No dividend was declared for the first half of 1899.

This suit is by appellee, John L. Dodd, and others, representing about 700 shares of the capital stock in the bridge company out of an issue of 15,000 shares, against the bridge company, the Louisville & Nashville R. R. Co., and the Jeffersonville, Mad. & Ind. R. R. Co. (the B., O. & S. W. as successor of O. & M. R. R. Co. sued, but not involved on this appeal) and the Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co., to compel the railroads named to provide, and the bridge company to collect from them, a sum sufficient to pay the deficit in dividends just mentioned.

It is also alleged that the contracting railroads have otherwise broken their contracts in failing to pay all the taxes assessed against the bridge,

and were then in default on that account about \$200,000 to the city of Louisville; and that the railroad companies had illegally and fraudulently distributed and appropriated among themselves about \$198,000 of property, constituting that much of the capital of the bridge company, and for other alleged derelictions, all of which will be particularly noticed and treated of below. The plaintiffs sued for not only the deficits above named, but claimed that they should be paid 12 per cent. for all the time since 1877, and interest on the deficits.

In fine their claims are as follows:

1. For deficit in 6 per cent. dividends, semi-annual and interest. \$2,389,875 00
2. Capital appropriated, with interest ..... 448,842 36
3. To have reconveyed to the bridge company a lot of 10¼ acres of land, on which is built the northern approach to the bridge.
4. Taxes due by the bridge company ..... 200,002 38

Total (not valuing the 10¼ acres of land) ..... \$3,882,720 02

The record made up, comprising several thousand pages, is unnecessarily large, for there is little or no dispute concerning the facts. The principle controversies over the facts relate to their application or interpretation. Indeed no witness is living who participated in the execution of the contract, at least none is introduced or mentioned as living. The method of dealing between the railroads and the bridge company from the making of the contract, are shown principally by the books kept by the bridge company.

There are but few provisions of this contract which have not been either altered by agreement or long acquiescence of the parties, or by construction placed upon it and carried into effect in innumerable and almost daily transactions for nearly twenty-five years, making it to read, as thus altered and practically construed, different from what would probably have been the judicial interpretation of the terms of the instrument as a matter of original impression.

This suit is brought by the minority stockholders of the bridge company because they aver that the directors of the company refuse to sue to redress the grievances to the company complained of, and will not, and ought not, take charge of this litigation because of a conflict of interest and of duties, owing to their being also directors, and interested in the P., C., C. & St. L. R. R. Co. and the J., M. & I. R. R. Co.

The circuit court granted plaintiffs relief in part only. The P., C., C. & St. L. R. R. Co. and the L. & N. R. R. Co. have appealed, and the minority stockholders, represented by the plaintiffs below, have prosecuted a cross appeal.

#### THE RIGHT OF MINORITY STOCKHOLDERS TO MAINTAIN A SUIT FOR THE CORPORATION.

The first question naturally presented is the right of minority stockholders of a corporation to maintain suit on its behalf. Generally such a suit can not be so maintained. The management of a corporation's affairs, involving exercise of judgment and policy, are by law committed to a govern-

ing body, usually styled a board of directors. Touching all things that the corporation might lawfully do, their discretion and acts are conclusively deemed to be those of the corporation. Such are called *intra vires* acts. The courts neither can nor should undertake to control or interfere with their exercise. But there are admitted exceptions to the general rule, that the acts of the directors are the acts of the corporation, and can not be interfered with by the courts at the complaint of stockholders, which are as well established perhaps as the rule itself. If the directors have done, or are about to do some act *ultra vires*, the suit of a minority stockholder will be entertained to prevent or redress it. Or, if the directors are guilty of fraud, or are committing a breach of trust, as against the corporation, the right of the stockholder to sue is recognized in this country. Whether the fraud or breach of trust must involve moral turpitude on the part of the directors, the courts do not seem to be of one mind. It is our opinion that it is much the same thing to the corporation, whether the wrongful act flows from an improper motive, or from such acts themselves so wrong in the eyes of the law that the improper motive, that is an ingredient of fraud, is imputed to it.

In the case at-bar the holders of the majority of the stock of the bridge company are also owners of a majority of the stock of the "Pan Handle" R. R. The same votes elect the board of directors or managers of each corporation. They select the same persons to fill these places in each board. If there is a misunderstanding between the two corporations, it must be solved substantially by one and the same set of representatives, constituting complainants, defenders and triers of the fact. The reason of the rule making the judgment of the directors that of the corporation depends in large part upon their having been selected by the stockholders as their representatives, or proxy, in that matter that their wills being free as would be the principals, expediency favored the recognition of their act as that of the principals, the stockholders. But where the directors can not act, and where every presumption founded in reason and ascribed by the law to their acts, is resolved at once into a doubt, the reason of the rule fails, and the rule itself must cease. The directors need not be dishonest. It is enough if their situation is such that by reason of conflict of interest they can not, or should not, act.

Under this application of the rule discussed it does not follow that every contract entered into between two corporations having directors in common is void, or even that it may be set aside upon the complaint of a single stockholder for that fact alone. (*Roberts v. Washington Nat. Bank*, 11 Wash., 550; 40 Pac. Rep., 225, and notes, 2 Am. & Eng. Dec. Equity, 272-284.) We go no further than to say that upon an allegation of fraud on the part of his directors, or upon an allegation of facts showing that the directors (who are also directors of another contracting corporation), because of conflict of interest and duty, could not, or ought not to, act in the matter, coupled with the further allegation showing material damage to the complaining stockholder by reason of the transaction between the two corporations, a court of equity will hear a single stockholder's complaint, and if the charges be sustained by the proof, will grant appropriate relief.

In this case the complaint shows a contract between two corporations hav-



ing directors in common, both dominated by the same controlling interest, and that one of them had reaped material advantage over the other because of the former's breach of the contract, which the directors of the latter refuse to sue to redress. In addition, it is charged that one corporation has actually converted over \$100,000 of the capital stock of the other, as well as has caused to be conveyed to the former a material part of the corpus of the latter's property, necessary to enable it to continue to serve the public according to the intent of its charter. The latter acts, if true, are ultra vires, and under all the authorities are the proper subject of a suit for correction by a single stockholder; the others, although intra vires, and although actuated by the most honest purpose of the directors, show a state of case wherein the directors are placed in such an attitude as materially embarrasses and hinders them in giving to the settlement of the controversy either an undivided judgment or such an untrammelled service as the injured corporation is entitled to.

To close the doors of the courts to a single stockholder in such a case, upon the theory that the majority must rule, and that having embarked in a common enterprise with them he must abide the judgment of the majority, would be to turn over to a possible wrongdoer the adjudication of his own case. In such an unequal struggle between duty and interest it would more frequently happen that "duty would be overborne in the conflict."

It is clear to us that upon the allegations in the petition in this case a cause of action was shown against the "Pan Handle" Co.

The case of allowing the suit by minority stockholders of the bridge company against the Louisville & Nashville R. R. Co. is not so free from difficulty. It is not claimed that the Louisville & Nashville R. R. Co. had any part in the selection of the bridge company's directors; nor that their dealings were otherwise than at arm's length, and free from fraud, actual or constructive. Nor was it shown or claimed that the Louisville & Nashville R. R. Co. was under any duty whatever toward, or had any connection with, the bridge company other than as fixed by contract. The Louisville & Nashville R. R. Co. asks why may it not, under such circumstances, deal with assurance with the corporate authorities of the bridge company, as other people might?

We think it can. Its position, so far as the validity of its contracts and settlements with the bridge company are concerned, is distinctly different from that of the "Pan Handle" Co. In other words, its contractual relation and liabilities to the bridge company, in the absence of fraud or acts of the bridge directors ultra vires, are to be considered under materially different rules from those affecting a corporation whose officers control the bridge corporation. But there is a distinction between the Louisville & Nashville R. R. Co.'s contract liabilities in such a case and the right of a single stockholder of the bridge company to maintain a suit on behalf of the bridge company against the Louisville & Nashville R. R. Co., to have those liabilities enforced. The instance must be rare when the action by the single stockholder, under the phase now being considered, could be maintained.

It will not be questioned that if the bridge company directors, through a fraudulent purpose, refused to bring the suit against the Louisville & Nash-

ville R. R. Co. to enforce its liability under the contract, the minority stockholders of the bridge company might maintain the suit on its behalf, although the Louisville & Nashville R. R. Co. was not a party to the fraud. (Cook on Stock and Stockholders, section 645; Dodge v. Woolsey, 18 How., U. S., 284; Rogers v. L. & N. R. R. Co., 91 Fed. Rep., 299; Mack v. De Bardelaban Co., 90 Ala., 396.) Here it is charged in substance that the liability of the Louisville & Nashville and of the "Pan Handle" roads under the contract are identical; that the directors of the bridge company can not, and will not, bring the suit against any of the parties to the contract, because to do so would be to subject the "Pan Handle" Co. to liability if the grounds should be sustained. Therefore, if for improper reasons, or if discretion is benumbed by the jarring conflicting interests, the bridge directors can not bring the action against any of the parties because of the involvement of their other principal, the Pan Handle Co., certainly every sufficient reason exists for replacing the directors by the minority stockholders in the suit against all the parties for the accounting.

The court is of opinion that the cause of action set out may be maintained by the minority stockholders of the bridge company, suing on its behalf and joining it as a defendant, against all the defendants. Whether the grounds of action are sustained is another question.

**IS THE BRIDGE COMPANY ENTITLED TO COLLECT FROM THE CONTRACTING RAILROADS TOLLS TO PRODUCE 6 PER CENT. SEMI-ANNUAL DIVIDENDS ON ITS STOCK, IN ADDITION TO THE OTHER CHARGES PROVIDED IN CONTRACT OF JUNE 5, 1872?**

The circuit court adjudged that in 1877 the contract of June 5, 1872, had been modified by all the parties to it, so that 8 per cent. (4 per cent. semi-annually) only has since been paid by the contracting railroads for dividends upon the capital stock of the bridge company. The minority stockholders having sued for 6 per cent. semi-annual dividends for this period, prosecute a cross appeal from the judgment. Unless the contract of June 5, 1872, has been modified as adjudged, the contention of appellees must be sustained. That the railroads ceased to provide, and the stockholders of the bridge company did not receive, dividends at a greater rate than 4 per cent. semi-annually, since 1877, is a conceded fact. From 1877 to 1896, without interruption and regularly, 4 per cent. dividends were supplied by the railroads and paid over by the bridge company, and were received by its stockholders, every six months. No more was exacted of the railroads. It was not claimed that any more would be exacted of them. Their monthly statements to, and quarterly settlements with, the bridge company, and the latter's annual reports to its stockholders, were all made up by the parties respectively upon that basis, and have been carried into innumerable settlements.

The reason attributed by the railroads for this action in that one of the contracting roads, the Ohio & Mississippi Co., in 1875 became dissatisfied with its experience under the contract, alleging that the payment of a 6 per cent. semi-annual dividend on \$1,500,000 of stock, in addition to the other charges required by the contract, was a greater burden than commerce could bear. Notice was given that the complaining road would withdraw in two

years from date (June 14, 1875) "unless those tolls be at once reduced to conform with the times." The letter to the president of the bridge company, containing this notice, showed that the matter had been the subject of previous conference between the parties. The president of the bridge company testifies that this reduction in dividends was made as the result of this demand and the agitation of the question produced by and preceding it. In 1882 contracts were made between the bridge company and the L., N., A. & C. R. R. Co. and the "Air Line," by which it was stipulated that each of them was to have the same privileges as appellants, and were to be charged tolls at a rate no greater than to produce, with all other tolls, a 4 per cent. semi-annual dividend to stockholders, after defraying the other corporate charges referred to. This, in connection with the clause in the original contract of June 5, 1872, that no other road was to be admitted to use the bridge upon more favorable terms than were accorded to these appellants, would of itself have operated as a modification of the original contract. Besides, the stockholders have for more than twenty years before this suit was brought received the reduced dividends, and suffered the matters to proceed upon that basis without material complaint. True, plaintiffs claimed that they submitted to this reduction upon the assurance of the bridge directors, officials of the Pan Handle (or the Pennsylvania interests, as they are sometimes called) to stockholders that a stock dividend would be provided in lieu of the reduced dividends, and that it would be to their interest to yield the point, and that they did yield upon that assurance alone. A stock dividend ought not, and properly could not, have been declared upon any basis other than that of an increase in value of corporate assets justifying it. This was probable only by capitalizing that value represented by the bonded indebtedness, after the debt had been discharged. As the contract provided unquestionably for the liquidation of the bonded debt without reference to any reduction of dividends in the meantime, this reason does not appear to us to have been either substantial or as affording ground of action if the stockholders were subsequently disappointed in not receiving a stock dividend, for manifestly the stockholders property, whatever its value, is there, and their stock, be it so much or more, represents that total value. Nor can we find the fact to be that there was an agreement by the directors and the minority stockholders, to the effect that the stock dividend would be issued in consideration of the reduction of dividends. While there is evidence in the record that a stock dividend was for years contemplated as a possibility, and doubtless is yet, the agreement relied on is disputed, and by no means proved. Mr. Dodd's testimony of conversations on that subject, had with officers of the company who are now dead, can not be admitted, Mr. Dodd being one of the plaintiffs in interest and in fact. (Section 606, Civil Code.)

It would be now impossible to equitably adjust the accounts of all interested parties upon the 12 per cent. basis. This is owing not only to the fact that a number of railroads have since been admitted to the use of the bridge on the 8 per cent. basis, and have settled their accounts and been discharged, and some have since gone out of existence, but it would probably be impossible, owing to the great lapse of time, of death and removal of witnesses, and loss of proper records, to reach a just settlement. The stock-

holders of necessity knew all these years of this state of affairs. They should have taken action sooner, if determined not to abide the reduction. In all probability, if the point had not been yielded at the demand of the Ohio & Mississippi Co., other contracting railroads might soon thereafter have come to the same conclusion, and availed themselves of the privilege under the contract of withdrawing from the bridge. The parties have so long rested upon the present status, have treated it as satisfactory and valid till such material changes in conditions and circumstances have occurred as to constitute an estoppel against them. Furthermore, in view of changed and changing conditions, the action of the bridge company seems to us to have been wise, and fully justified, as based upon sound business judgment and experience.

#### MISAPPROPRIATION OF CAPITAL STOCK.

Appellees assert that appellants, and the other railroad companies using the bridge under the contract referred to herein, have appropriated to their own use and distributed among themselves about \$108,000 of the capital stock of the bridge company. Appellants deny the charge. In addition, they plead the statute of limitation (the ten years' statute, section 2519, Kentucky Statutes).

Before considering the plea of limitation we have deemed it best to determine whether the charge was true in fact. Of the authorized capital of \$1,500,000, \$1,208,926 had been paid in when the railroads entered upon their contract of 1872, and took charge of the bridge. In addition, the bridge company owed a floating debt of \$134,612.35 shortly before or about the time of the contract of June, 1872. This was paid off, partly with the proceeds of the remainder of the capital stock, leaving a balance of \$87,513.05, which was paid in some time after the railroad companies took charge of the bridge traffic. This sum seems to have been placed in the bridge company's sinking fund. In addition to that the bridge company sold a right of way under its northern abutment in 1886 for \$10,000, which was placed in the sinking fund. In 1885 the bridge company conveyed to the J., M. & I. R. R. Co. ten and one-half acres of land in Indiana (forming the subject of a distinct branch of this litigation and treated of further along) for \$10,286.91. This sum also seems to have gone into the sinking fund. These three items, making a total of \$107,799.96, are the only ones that we are able to trace as having belonged to capital stock that went into the sinking fund of the bridge company.

To understand how it may be worked out, whether these sums have been appropriated, it is necessary to state the purpose and uses of this sinking fund, how created and supplied by the contracting railroads, and how disposed of.

The contract of June 5, 1872, required the contracting railroads (including of course all others who subsequently came to use the bridge upon the same terms) to provide, from tolls on their traffic passing over the bridge, for discharging the interest annually of 7 per cent. per annum, and the principal of the mortgage debt of \$800,000 against the bridge, due in 1888. The main thing of this matter, so far as the bridge company was concerned, was to have its property freed of the mortgage debt by the time it was due. So far

as the railroads were concerned it was to discharge this debt in the easiest way, and by the one least burthensome to their traffic. A number of experiments seem to have been tried before one was finally adopted as the permanent sinking fund scheme. In the first place, a rate, or schedule of rates, was adopted by the bridge company with the concurrence, and presumably upon an agreement with the railroads, by which it was thought and estimated that the fixed and current charges under the contract would be met. It is plain that the railroad companies were interested in keeping the bridge tariffs down to a minimum figure because they were a charge upon their business and necessarily affected the ability of the roads to get the traffic. The problem was to arrange a schedule of bridge tolls in advance so that surely enough, but no more than enough, would be raised to satisfy the contract with the bridge company. As the volume of business fluctuated—a matter that it was utterly impossible to foretell—there would be either a deficit or a surplus of income. In the contract the deficit was provided against. But not so as to the surplus. It appears that the tolls first adopted did not meet the anticipations of the responsible parties, nor probably the requirements of the contract, for we find that in 1878 but comparatively little had been accumulated in the way of a sinking fund. So in that year a somewhat elaborate and formal sinking fund scheme was devised and adopted. Further than to retain its general purpose, and the service of its trustees, it was not continued longer, however, than 1881, when a rearrangement was had. It was then agreed between the railroads and the bridge company that all the income of the bridge company was to be pooled (such as rents, interest on daily balances of deposits, etc.); the railroads were then to pay in each month, without reference to tolls charged or chargeable against them, except as a basis of prorating it among themselves, the annual sum of \$36,500. It was thought, and it proved to be true, that this arrangement would safely provide for paying the interest as it became due, and for retiring the mortgage bonds at their maturity. Under the sinking fund scheme finally resorted to by the railroads and above outlined, it soon developed that the bridge company's income from tolls was frequently greatly in excess of the requirements of the contract. To whom did this excess or surplus belong? Under the contract the bridge company had stipulated that its tolls should not exceed a rate to produce a sum sufficient to pay the enumerated charges. But the rate fixed produced a sum that did exceed those requirements. First and last that question has troubled the railroads contributing to the surplus a good deal, and has been the subject of more than one controversy.

The bridge company treated it as belonging to the railroad companies contributing to it, in the proportion contributed by them respectively. It, therefore, rebated it to the railroads accordingly, that is, without collecting it, it was credited back in the proportions in which it had been originally charged. In no instance, so far as the records shows, was a dollar of it collected in fact, and then the money paid back. It was merely a matter of book keeping. Annually at the regular stockholders' meetings elaborate statements were submitted by the bridge company's fiscal officers, showing generally in detail among the other items that this system of "rebates" or "redistributions of surplus" was being indulged as shown. No protest or

complaint was made by the stockholders or any of them. From this we find that the stockholders of the bridge company likewise approved and ratified the scheme, and that its execution was a practical interpretation and fulfillment of those requirements of the contract.

Subsequently a controversy arose between the bridge company, the Pan Handle Co. and the Monon Co. over the surplus remaining after the discharge of the bonded indebtedness. This came up in an effort to settle an account of the bridge company against the Monon company for tolls, in which numerous matters were in dispute. A suit was instituted by the bridge company against the Monon company in the Jefferson Circuit Court.

Availing themselves of the contract, the parties submitted its final decision to the Hon. H. W. Blodgett, of Chicago. He adjudged that the surplus arising from excessive rates of bridge tolls belonged exclusively to the railroad companies contributing thereto in the proportion of their traffic, respectively, passing over the bridge and creating the surplus.

Later the Louisville & Nashville R. R. Co., conceiving that the continuance of this excessive rate was an unnecessary burden and a source of annoyance and trouble to the roads contributing it, as well as to the commerce bearing it, brought a suit in Jefferson Circuit Court against the bridge company and the other railroads to compel a reduction of the rates to a point where they would yield no more than enough to meet the requirements of the contract of June 5, 1872, as modified by the parties and above set out. The Hon. W. O. Harris, as special judge, granted the relief prayed for.

In another suit, in the Jefferson Circuit Court, Law and Equity division, the Louisville & Nashville R. R. Co. sued the bridge company and the other railroads to recover its share of the excessive tolls collected by the bridge company over and above the actual requirements of the bridge company under the contract of June 5, 1872, as modified as stated, and that court granted the relief and adjudged a recovery against the bridge company, which, upon appeal, was affirmed by this court. (Louisville Bridge Co. v. L. & N. R. R. Co., 21 Ky. Law Rep., 271.) Thus it will be seen that all who have had occasion to handle this subject have come to the same conclusion.

If the \$107,799.96 was in the sinking fund all this time, its accretions, in the way of interest or otherwise under the pooling arrangement of 1881, acquiesced in and continued all this while, was properly used in discharging the bonds and interest. Whatever may have been the technical rights of the parties on this subject under the original contract, they seem to have treated the matter in this manner as one satisfactory to themselves. Perhaps a reason was that as the railroad companies were paying 8 per cent. annually net to stockholders on the total capital of \$1,600,000, it was thought to be but right that they should have the use of the earning capacity of that total capital. This brings us to consider whether this \$107,799.96 is yet on hand. That it is not in cash is conceded. When the mortgage debt was paid off in 1888 by the sinking fund trustees they did not use the \$107,799.96 of capital alluded to above. From the proof in the record we find that the actual physical condition of the bridge has been maintained, and that it is in as good state of repair and preservation, so far as is known, as is possible.

On this item alone the railroad companies have provided, and the bridge company has expended, during the existence of the contract \$871,649.66 up to the closing of the proof in this case.

From the fact of this condition, and of the proven earning capacity of this property, we think it fair to assume that it is worth in money at least what it is shown to have cost, nothing appearing in the evidence to the contrary. In the record are annual statements made up from the bridge company's books. It is in evidence that the assets of the company shown in these statements, excepting the items of accounts against the Monon and Air Line companies for tolls, are absolutely good, and convertible into cash at at least the figures used. By deducting from these assets all the liabilities of the bridge company that it will be compelled to pay, it is shown that there would be left, on a liquidation of the company as of the date of the last statement in evidence (issued a short while before the judgment in this case) a sum that would pay to all stockholders about \$1.56 to the dollar of the company's capital. The assets so treated as good are, the bridge structure (including fender piers,) at the original cost of \$2,184,161.50; the new draw span, \$36,540.67; real estate, \$68,011.50; securities (Pennsylvania Co. 4¼ guaranteed bonds), \$63,412.75; cash and cash accounts, \$117,810.20.

The item on the liability side of the statement, "surplus of sinking fund divisible among the railroads contributing thereto," of \$12,929.45 is eliminated from consideration because if there was not a surplus, then there could not be a liability on that account. We are of opinion from the state of the record that the bridge company does not owe any part of this item to any one. It is true that there is owing a greater sum for taxes than is shown on this statement. At that time, however, the matter was in litigation. The railroad companies admit their liability for the difference, and say they are preparing to pay it, and the circuit court reserved control of the case to enforce their payment, if necessary. Therefore, if the \$800,000 of bonds paid off for the bridge company be treated as capitalized, it is clear that no part of the capital, either of the \$1,500,000 or of the \$800,000, has been withdrawn by either of the railroad companies, or anybody else, for the very sufficient reason that it appears to be yet there in the property, in the bridge company's custody and control. The last item on the "statement," viz.: "Balance to credit of income account, \$799,649.95," is vigorously attacked as being false in fact and in toto. To our mind it is but a bookkeeper's fancy. It is an arbitrary entry to produce a balance between the two sides of the general statement. It might as appropriately have been entered in one of several other ways. But the name given to it is not material.

There were two other pieces of real estate sold by the bridge company, one sold in 1874 for \$5,745.77, and the other for \$730, sold in 1885. It is not shown that either of these pieces of property ever represented a part of the capital stock of the company, nor is it clearly shown what became of the proceeds. There was also a balance of undivided earnings claimed to be on hand in 1872 when the railroad companies took charge of the bridge. We assume the theory to be sustained that all these proceeds were used in defraying operating expenses. If they were, those roads that received the benefit of the improper diversion of these funds would be liable therefor. But the plea

of limitation has been interposed against this recovery, and must be applied, as was done by the circuit court.

#### THE DRAW SPAN AND FENDER PIERS.

Included among the assets of the bridge company, chargeable to that extent to its capital, is the cost of the two fender piers and a draw span built since the contract of June 5, 1872, and within the last few years. The fender piers cost \$30,000, and the draw span \$36,540.67. It is the contention of appellees that by the terms of the contract of June 5, 1872, the contracting railroads were to build such improvements, or what is the same, furnish enough additional tolls to enable the bridge company to make them without using its other assets. Of course if the duty was upon appellants to provide for such improvements at their own expense, it must be because of the terms of the contract alone. The draw span and fender piers are entirely new, and have been made necessary because of conditions not existing, and evidently not contemplated by the parties, when the contract of June 5, 1872, was entered into. In recent years the canal at Louisville has been completed and materially altered, so that, during most of the year, nearly all of the boating traffic on the Ohio river at that point passes through the canal instead of using the river channels as was formerly more generally done. The bridge crosses the canal. The great increase of boating traffic at that point, and the widening of the canal, made it a source of constant danger to the bridge structure, because of the liability of passing boats coming in contact with the bridge work. To avert that danger the fender piers were found to be necessary, and were accordingly provided. The new draw span is what is called a "through span." The old span was a "deck span," on which the truss work was below the plane of the track. This necessitated quite frequent openings of the draw to allow boats to pass, which, with the span changed so that below the track it was free from obstruction, was obviated in a very considerable number of instances. Furthermore, complaint had been made to the secretary of war concerning the old span, it being claimed that it was an obstruction of navigation. The war department had required some such change. It was deemed expedient by the bridge directors, therefore, to substitute the more modern span, which was done. The old span was not out of repair, or apparently worse than when originally built. Changed conditions required, or at least made wise the substitution of the new one. Both of these improvements were substantial and permanent betterments of the bridge company's property, which must be left in good condition when the contract ends; they are not repairs, and are not charges by the terms of the contract to be provided for by the railroads. It was proper that their cost should have been paid by the bridge company out of its unexpended capital.

#### THE 10¼ ACRES CONVEYED TO J., M. & I. R. R. CO.

In the contract of 1872 reference is made to the fact that the J., M. & I. R. R. Co. then owned, and was by that contract conceded to own, the "northern approach" to the bridge. Exactly what is meant by that expression is uncertain. The J., M. & I. R. R. Co. owned an extension from its southern terminus, near Ninth and Broadway streets, Jeffersonville,



And., connecting with the bridge track; also a spur running north to New Albany. It may be that this is the approach referred to. It is argued for appellant, P., C., C. & St. L. R. R. Co. that the term was meant to describe the track over the ten and one-half acres in question, and extending about 1,700 feet northeast from the northern abutment of the bridge. This contention is not without force. That which inclines us, though, to the other one is the fact that the J., M. & I. R. R. Co. did not at that time own that part of the northern approach to the bridge located over this ten and one-half acres, nor had it ever owned or contracted for it so far as the record shows. It is claimed that the J., M. & I. R. R. Co. actually made the fill and built the track on this plat of land. Conceding that to be true, it would not confer ownership of the land, or of the track, upon the railroad company. It would, at the furthest, have created only a liability from the bridge company to the railroad company for the work and material furnished. Whether they have been paid for is not clear from the evidence. But whether the railroad company had or had not furnished the work and labor claimed, the account therefor was barred by limitation, for aught that the record shows, in 1885, when the bridge company attempted to convey to the J., M. & I. R. R. Co. the ten and one-half acres of land, including the track thereon.

The railroad company pleads and relies on the statute of limitation to defeat the recovery for the bridge company. It is charged in the petition seeking to have this conveyance set aside that it was ultra vires, and was in fraud of the rights of the stockholders. We do not think it necessary to elaborate the idea that if in fact this approach belonged to the bridge company its attempted conveyance by the directors, even by the stockholders' concurrence for that matter, would have been ultra vires. The approach of a bridge is as essentially a part of the bridge as any span or other part. To dispose of the approach is to dismember the bridge, and render it impossible for the bridge company to serve the public as required by its charter. (Thompson Corp., section 5373; Thomas v. R. R. Co., 101 U. S., 88; Wieher v. Somerville, 138 Mass., 455.)

Section 2519, Kentucky Statutes, is invoked by the railroad company. It is: "In actions for relief from fraud or mistake the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud."

We are of opinion that that section of the statute can not be applied to this part of appellees' suit. Although strictly speaking, the J., M. & I. R. R. Co. may not have been a tenant of the bridge company, its relation was so closely akin to that of tenant to landlord that the principles applicable to that relation ought to be applied.

The principles governing the rights of a tenant under such state of case are fairly stated thus in *Trabue v. Ramage*, 80 Ky., 325: "We understand the law to be that a tenant can, under no circumstances, after the lease and entry under his landlord, attorn to another without his consent, or deny the title or claim under which he entered, whether the title or claim be good or indifferent."

To this proposition appellant, P., C., C. & St. L. R. R. Co., responds that it has always been lawful for a tenant to acquire his landlord's title. True.

But he must get it from the landlord. The directors of the bridge company who acted for it in this transaction were also officers of the P., C., C. & St. L. R. R. Co. (and by reason thereof also represented the J., M. & I. R. R. Co.). It was not competent for these officials to transfer to the latter company the bridge company's property, in violation of its charter rights and duties, and, too, without adequate consideration. That is one of the acts of the directors that does not bind the corporation. Therefore, the J., M. & I. R. R. Co., taking the deed with full knowledge in law of the incapacity both of the corporation to execute it, and of the directors to represent the corporation in that transaction, acquired no title by the deed. In other words, it was not the act and deed of the corporation. As between the putative grantor and the grantee it was void. Nor can the lapse of time aid it, because the statute of limitation can never protect one in a right to property when his claim under the statute is not connected with a possession consistent with the claim. (*Sewell v. Nelson*, 23 Ky. Law Rep., 2433.) Appellant's deed was incompatible with its possession. It was hostile to the title by which, and under which, it had been let into the possession. It was inconsistent with the implied and continuous undertaking of the contracting railroads to hold and use the bridge as the property of the bridge company. Appellant's possession was not under the deed. It follows then, that as the deed was void and the possession not adverse, neither has conferred, or can confer, upon the J., M. & I. R. R. Co., or its successor, any title whatever against the bridge company. The circuit court correctly decided that the statute was not a bar to appellees' claim to have the lot conveyed to the bridge company so as to clear the record of the spurious deed. This relief, though, should have been only upon condition that the bridge company repaid to the J., M. & I. R. R. Co., or its successor, the consideration of \$10,286.91, paid by the railroad company for the conveyance.

**THE REDUCED AND OMITTED DIVIDENDS FOR YEARS JULY, 1896, TO JULY, 1899.**

Having found that the contract of June 5, 1872, has been modified by the parties so that 4 per cent. semi-annual dividends are provided for in lieu of the 6 per cent. named in the contract, we come to determine whether the contracting railroads are to pay that rate at all events. It is the contention of the railroads that they did not contract to pay any fixed dividend, or any sum; but that they agreed each for itself to pay the tolls charged against them for their use of the bridge, at a rate, or rates, to be fixed by the bridge company, but that such tolls "shall not be in excess of a toll or charge sufficient to produce in the aggregate a sum equal to the cost and expense of keeping in repair and taking care of said bridge and its approach, paying a dividend semi-annually of 6 (4) per cent. on said capital stock of \$1,500,000," the interest upon the bonds, provide a sinking fund to discharge its mortgage debt, the expense to maintain the bridge company's corporate existence, and to pay the taxes assessed against it.

Whatever may have been the correct construction of this undertaking, the parties have from the first given to it the construction that the railroads were to pay these charges, viz., the taxes; the cost of maintaining the organization; the repairs and operating expenses; the interest upon and the

principal of the mortgage debt, and at first 6 per cent., and latterly 4 per cent semi-annual dividends upon the capital of \$1,500,000. All of these undertakings seem to be of the same rank. As contracts are a meeting of the minds, or the agreement of the understandings, of those engaging in them, it is generally held to be not so material what words were used as what was meant and understood by the parties. In disputes over the construction of written contracts the words employed are first considered. But where the terms are not entirely clear, and the parties have themselves through a long term of years, by a consistent course of dealing under the contract, with full knowledge of all the facts affecting their rights, construed its meaning and accordingly applied it, the usual labor of the courts is done. We have but to accept and enforce their own construction.

Here the parties have construed that each of the contracting railroads using the bridge was bound to pay to the bridge company in proportion as the road's traffic over the bridge bore to the whole volume of traffic by all the contracting roads over the bridge, its proportion of a sum which would discharge the items named. This construction has been from 1872 till this suit was brought. In July, 1896, for the first time under the contract, the bridge company failed to pay its stockholders a semi-annual dividend of at least 4 per cent. It then paid them  $2\frac{1}{2}$  per cent. only. For each of the half years following, until 1899, only 3 per cent. was paid. The dividend of July 1, 1899, was passed entirely. These reductions and omissions, on the basis of 4 per cent, amounting to \$149,500.

The L., N., A. & C. Ry. Co. for some time prior to 1896 had been falling behind in the payment of its tolls under the contract. In 1896 it failed, owing a balance of \$128,009.15. The "Air Line" Co., about the same time, also fell behind in the payment of its tolls, and failed, owing a balance of \$11,331.86. But the whole of these two sums, amounting to \$139,341.11, against the railroad companies named was not actually going to the bridge company as tolls. Part of it represents a charge over and above the necessary requirements of the bridge company as fixed by the 1872 contract, and represents the tolls charged to the L. & N. R. R. Co., over and above those requirements, to the extent of about \$34,000. This item arises out of the facts stated in that part of this opinion dealing with the judgment of the L. & N. R. R. Co. against the bridge company.

We are of the opinion that the contracting roads undertook, and that all parties then understood it so, that the tonnage of freight would produce in the aggregate a sum sufficient to pay all the fixed charges named in the contract, dividends included. Each for itself agreed to pay its own share, but all undertook, in the proportion that their traffic respectively bore to the total traffic of the bridge, to pay the whole of the sum needed to be raised for the bridge company under the contract. The railroad companies must have so understood it, for they have, in every instance till 1896, acted upon that theory, and lived up to it. The failure of the Monon and of the Air Line to pay their proportions began long before 1896, yet the other roads, parties to the contract, continued to pay enough of tolls, without question or complaint, to provide for the payment of the regular semi-annual payments of 4 per cent. dividends. When the Monon finally became insolvent, for the first time appellants contended that their subsequent tolls should be

decreased; not because of the failure of the bridge company to collect current accounts, but because an old account, incurred some four years prior, could not be collected. That was an account, too, which, had it been collected, would, under the system in vogue, have merely "rebated" to the responsible contracting roads.

We are of opinion that for their failure to provide an income from tolls sufficient to pay the full dividend of 4 per cent. semi-annually for the years in litigation, appellants are liable, and that the circuit court has properly fixed and apportioned the liability between them.

#### L. & N. R. R. CO. v. BRIDGE CO., JUDGMENT.

Instead of reporting its tonnage of freight direct to the bridge company, the L. & N. R. R. Co. delivered its freight destined for the north by way of Louisville to, and received its northern freight crossing this bridge from, the northern roads using the bridge. These roads made up their accounts and reports of freight so as to include the L. & N. R. R. Co.'s. The latter settled and paid upon the basis of the reports made out by these roads, and they, in turn, paid the tolls to the bridge company. By the system of rebating above alluded to this matter resulted in the rebates being made to the northern roads alone. As these rebates were not in fact money paid out by the bridge company, but were credits entered on the current accounts against the respective railroads receiving them, the result was that to the extent of these rebates the L. & N. R. R. Co. was being required to pay a higher rate of tolls to the bridge company under the contract than other contracting roads were paying. The L. & N. R. R. Co. sued the bridge company and the railroads north of the river to recover the excess of freight so collected from it. A judgment was rendered in its favor against the bridge company for about \$168,000. On appeal to this court that judgment was affirmed. (21 Ky. Law Rep., 271.) In the opinion in that case it was said: "It was the plain duty of the defendant, bridge company, to have restricted its charges to such rates as would have produced a sum of money sufficient to pay its legitimate charges under the contract, and as it has violated this contract and collected from plaintiff tolls in excess of the amount authorized by the contract, it is liable therefor, with interest from the date of such illegal exactions, at least from the time it had accurate and distinct information of the amount due plaintiff from this excess."

That action was in court for some time before the final judgment. On appealing the judgment was superseded. The affirmance carried 10 per cent. damages to the appellee, L. & N. R. R. Co., against the bridge company. In the meantime a considerable sum of interest had accumulated. The bridge company then proceeded to collect from the railroad companies north of the river, to which the L. & N. R. R. Co.'s part of the "surplus" had been credited, the amount so wrongfully given over to them. These were not paid back at once, but in installments, and without interest. Appellant, P., C., C & St. L. R. R. Co., has paid back all that it received of money that should have gone to the L. & N. R. R. Co. Other roads have also paid back their part of the original sum. But none of them paid any interest, or cost, or any part of the damages. The bridge company has paid off the judgment, including damages, interest and costs. We are of opinion

that in so far as the roads north of the river procured and participated in this wrongful distribution of the fund charged by the bridge company against the L. & N. R. R. Co., and collected in the arrangement detailed, they should reimburse the bridge company not only the principal of the judgment incurred by it on this account, but the interests, costs and damages as well. We find that the bridge company defended the suit in the interest and at the request of the northern roads. The railroad companies receiving the credits in the wrongful distribution of the L. & N. R. R. Co.'s accounts should bear the burden imposed by the judgment in the proportion only in which they received the improper credits, and each one for itself. So much of this item as may be chargeable against the Monon and Air Line companies must be collected from them, or be a loss to the bridge company.

The L. & N. R. R. Co. can not, of course, be required to bear any part of this item or of this loss. Assuming that the Air Line and Monon accounts are insolvent (as they appear in fact to be), so far as they embrace parts of the liability for the L. & N. R. R. Co. judgment paid off by the bridge company (estimated at from \$34,000 to about \$37,158.89, plus their proportion of interest, costs and damages upon that judgment) these liabilities when ascertained are to be treated as if they had been collected by the bridge company and then lost. In other words, this sum has been once collected by the bridge company from appellants and other roads as tolls on traffic. Instead of applying it to paying dividends, it was used to pay a judgment against the bridge company for which the Air Line and the Monon companies were to that extent alone liable as among the railroads. Therefore, when ascertained, the amount of unsatisfied liabilities of the Air Line and Monon companies, on account of their part of the L. & N. R. R. Co. judgment, will be deducted from the sum herein directed to be paid in by appellants to enable the bridge company to pay the deficits in dividends for the years in litigation.

In providing for the \$142,500 of deficit in dividends, regard should be had also to the sums that may be collected from the roads north of the river under this item for reimbursing the bridge company for its payment of the L. & N. judgment, for whatever sum is collected will represent that much of tolls collected from the traffic by the bridge company, and which was available for dividends, but had been wrongfully diverted. So that when collected again, it should be applied to its original purpose.

#### THE TERMINATION OF THE 1872 CONTRACT.

The circuit court adjudged that the contract of 1872, as modified and heretofore explained, was still in full force and effect, and binding upon both appellants. The last clause of the contract provides for its termination as to all parties embraced in a two years' notice given by one of the parties to terminate it.

On the 25th of September, 1897, the P., C., C. & St. L. Ry. Co. (and the J., M. & I. R. R. Co.) gave notice to the bridge company of the former's intention to terminate the contract on September 25, 1899. On the latter date the parties acted upon that notice; but the railroad company has since continued to send its freight to and from Louisville over that bridge upon the terms fixed by the bridge company as to all other freight.

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We are of opinion that by the notice and action under it the contract was terminated on September 25, 1899, as to the parties included in the notice.

Wherefore, the judgment upon the cross appeal is affirmed. Upon the original appeal the judgment is reversed and the cause is remanded for proceedings and the entering of a judgment consistent with this opinion.

Whole court sitting.

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TOWN OF CENTRAL COVINGTON v. BELLONY.

(Filed March 20, 1908—Not to be reported.)

Simrall & Arthur and Orlando P. Schmidt for appellant.

James P. Tarvin and B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

On the original hearing this case was exhaustively considered by the whole court and on the petition for rehearing the record has been re-examined, and the case again considered by the whole court. The evidence for appellee tended to show that the sidewalk was not in a reasonably safe condition, and that by reason of this appellee received the injury complained of while walking along in the dark in ignorance of the danger. While the proof is conflicting, on the whole case we can not disturb the verdict of the jury; for they saw and heard the witnesses and the credibility of the testimony is for them. The proof for appellee, if true, took the case out of the rule laid down in the authorities relied on for appellant. We are unable to see that there was any error in the instructions, and while the verdict is large we can not disturb it on this ground under the evidence.

Petition overruled.

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SOMERSET NATIONAL BANKING CO.'S RECEIVER, &c. v. HAIL.

(Filed March 20, 1908—Not to be reported.)

Banks—Instructions—In an action against the receiver of a bank to recover the amount of a deposit, and the defense is that the amount of the deposit was invested in bank stock by order of the depositor, it was error to give a peremptory instruction to the jury to find for the plaintiff when there was evidence tending to prove the purchase of the bank stock.

O. H. Waddle and F. F. Oldham for appellants.

J. N. Sharp, V. P. Smith and W. A. Morrow for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted in the Pulaski Circuit Court by the appellee, G. L. Hall, against the appellants, Christopher L. Williams, receiver of the Somerset National Banking Co., and the Somerset National Banking Co., to recover the sum of \$300, which he placed on deposit in the Somerset National Banking Co., and which has never been repaid to him, as he alleges. All of the facts as to the organization of the appellant bank, the appointment

of a receiver, and the pleadings involved in this case, are substantially the same as in the case of the Somerset National Banking Co.'s Receiver v. Napier Adams, heretofore decided, of which it is a counterpart; and reference is now had to that opinion for the facts necessary to illustrate this case.

Upon the trial in the circuit court the judge ruled that the burden of proof was on the defendants, who are the appellants here, and at the close of their testimony sustained the motion made by appellee for a peremptory instruction to the jury to find for him in the sum of \$800, which they did. Appellants' motion for a new trial being overruled, they have appealed to this court. The correctness of this ruling of the circuit judge depends upon the question as to whether or not the appellants established the contract of purchase of the stock in question by appellee of the appellant bank. The opinion in the case of the Somerset National Banking Co.'s Receiver v. Napier Adams settles the law as applicable to this case, and it is not necessary to repeat here what was said there. There was abundance of testimony introduced by appellants to show that the appellee purchased the three shares of stock involved in this action from the bank, and if this testimony was true, they were entitled to a judgment dismissing the petition. The instruction of the court to the jury, to find for the plaintiff, was erroneous.

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

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LOUISVILLE AND EVANSVILLE MAIL CO. v. GILLILAND.

(Filed March 20, 1903—Not to be reported.)

Negligence—Verdict against evidence—Appellee in her action against appellant alleges that while she and her husband were standing on the bank of the Ohio river watching the landing of the steamboat "Tell City," belonging to appellant, the boat struck a tree and caused it to fall and the limbs thereof struck and injured appellee, for which she sought and recovered damages, from which this appeal is prosecuted, the ground relied on for a reversal being that the verdict is against the evidence. Held—That as the evidence shows that the river was very high and there was an eddy where the boat was compelled to land, and the persons in charge of the boat were not guilty of negligence in making the landing, the verdict in favor of plaintiff was flagrantly against the evidence.

Chas. F. Taylor and David R. Murray for appellant.

B. H. Young, N. M. Mercer and E. C. Walte for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, Louisville and Evansville Mail Co., owned and operated a line of steamers on the Ohio river between Louisville and Evansville, among which was a steamer known as the "Tell City," which carried passengers, freight and the United States mail. She was about 200 feet long and 35 feet wide. On April 25, 1901, the river was "bank full" when the boat was landed at a place well known as Addison's Landing. At this landing there was an eddy with a considerable current up stream; it was caused by some timber at the lower and by other conditions at the upper end; the eddy was 80 or 90 feet wide. The space between the lower and upper end of the

eddy was too short to admit the boat to land, except by approaching it from the current of the river bow foremost. There was a sycamore tree standing at the upper end of the eddy, and near it was some cord wood to be taken on board. The high waters had washed away nearly all of the dirt from around the roots of the tree. In making the landing the boat struck the tree and knocked it over, and it seems to have fallen on a stump and against a distillery which stood upon the bank, and which seem to have prevented it from falling to the ground. The appellee and her husband were on the bank to watch the boat make the landing. As the tree began to fall they endeavored to make their escape, but the small limbs of the tree caught them and knocked them down, and the appellee claims she was injured in consequence thereof.

This action was instituted to recover damages upon the ground that those in charge of the boat were guilty of gross negligence in handling it upon the occasion in question. The evidence offered by the appellee conduced to show that in landing the boat it was done with greater speed than was usual in landing boats. There was no other fact proven which tended to show negligence, upon the part of those in charge of the boat. The court permitted the case to go to the jury. Under the rule of this court, if there is any evidence from which a jury might infer negligence, it is the duty of the court to submit the question to the jury. Under this rule we are of the opinion that the court properly submitted the question to the jury.

The appellant offered evidence of those in charge of the boat, which showed that there was a current up stream in the eddy and on the outside of it there was a strong down current; that the only way the boat could be landed was to go in with considerable speed, so as to overcome the down current which swept the stern of the boat and the up current which tended to force the bow of the boat from the shore; that on the occasion in question there was a stiff wind blowing which also contributed to make the landing a difficult one.

The evidence further conduced to show that the boat was handled in the usual way in making the landing, and that the cause of the boat striking the tree was that the down and up currents forced the bow of the boat against the tree. There is evidence also to the effect that had the boat come in faster than it did it might have avoided striking the tree, but those in charge of the boat had the lives of the passengers within their keeping, and they had to guard against the boat striking the shore with too much force, and, therefore, the boat, after attaining the speed that was thought to be necessary to overcome the force of the currents, was backing when the tree was struck.

The testimony of the appellant shows that there was no negligence in the handling of the boat, and fully explained the evidence introduced by the appellee, which, unexplained, the jury might have inferred negligence from. Even when steamers do not encounter high water, high winds and troublesome currents, as in this case, they can not be handled with mathematical precision. The fact that they may approach the shore with more speed at one time than another may be easily explained so as to show it was not the result of negligence. Our opinion is that the verdict of the jury is palpably against the evidence, and for that reason a new trial should be granted.

The judgment is reversed for proceedings consistent with this opinion.



SOMERSET NATIONAL BANKING CO.'S RECEIVER, &c. v. ADAMS.

(Filed March 20, 1903—Not to be reported.)

**Contracts—Subscription for bank stock**—In this action by appellee, a depositor in a bank, to recover \$500 alleged to have been deposited with the plaintiff, in defense it is urged that said fund was invested in bank stock which was subscribed for by appellee, and that said sum of \$500 was charged to his account and his account for stock credited by said sum. Appellee insists that his contract of subscription was not binding on him as it was not in writing. Held—It is not necessary that the subscription should have been made by appellee in writing. Such subscription may be made by parol. Any agreement by which a person shows an intention to become a stockholder is sufficient to bind both him and the corporation, and although there may be no direct authority from the board to receive said subscription, their subsequent ratification of same was sufficient. The bank was entitled to a peremptory instruction in its favor.

O. H. Waddle and F. F. Oldham for appellants.

J. N. Sharp, V. P. Smith and W. A. Morrow for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the appellee, Napier Adams, who was the plaintiff below, against the appellants, Christopher L. Williams, receiver of the Somerset National Banking Co., and the Somerset National Banking Co., to recover the sum of \$500, alleged to have been deposited by him in the bank, and never repaid.

In the spring 1900 the stockholders of the Somerset Banking Co., a corporation doing a banking business in Somerset, Ky., concluded that it would be to their interest to change their bank, which was a State institution, into a national bank, and to that end, at a stockholders' meeting, in which a large majority of the stock was represented, a resolution was passed, authorizing the directors to place the Somerset Banking Co. in liquidation, for the purpose of organizing a national bank; and further authorizing them to fix such time as they might deem best for such liquidation to go into effect, and to take all necessary steps to perfect the liquidation, and to organize a national bank, to be called the Somerset National Banking Co., the capital stock of which was to be \$50,000, the stockholders of the old bank to have the privilege of taking stock in the new bank in an amount equal to 50 per cent. of their holdings in the old.

Afterwards the board of directors of the Somerset Banking Co. met and elected the following board of directors for the new institution: L. D. S. Patton, Will C. Curd, George W. Wait, M. D. Huffaker and Samuel Tate, who were to serve until the next annual election, to be held on the second Tuesday in January, 1901. At a subsequent meeting the board of directors of the Somerset Banking Co. fixed the 30th day of June, 1900, as the time at which it should go into liquidation.

On the 11th day of June, 1900, the directors of the Somerset National Banking Co. held a meeting, at which they elected George W. Wait, president; Will C. Curd, vice-president, and R. G. Hail, cashier. On motion, it was ordered that the president, George W. Wait, and the cashier, R. G.

Hall, "be, and they are hereby, authorized to proceed with the organization of this banking company, to purchase the required books and stationery, procure the issue of the currency, and, if possible, get matters in shape to begin business on the 2d day of July, 1900 (the 1st coming on Sunday), and inasmuch as the proposed stockholders are scattered over the country, and in order to facilitate the organization, it is further ordered that the capital stock be taken and subscribed by a limited number of stockholders, who will, after the organization is completed, apportion the same on a basis of 50 per cent. to the stockholders in the Somerset Banking Co. desiring the same. However, subject to the law requiring the directors of this banking company to hold a certain number of shares so as to qualify and make themselves eligible to hold said offices as directors."

In pursuance of this authority application was made to the United States Comptroller of the Currency, for the organization of the Somerset National Banking Co.; in order to comply with the National Bank Act, and the rules and regulations of the comptroller of the currency, formal application papers were made out, and in pursuance of the agreement that a limited number of persons should subscribe for all the stock, L. S. D. Patton, Samuel Tate, M. D. Huffaker, George W. Wait, R. G. Hall, Will C. Curd, James Denton, A. M. Girdler, H. Clay Newell and B. G. Newell, all residing in Somerset, Ky., subscribed for the whole capital stock of the proposed bank, each taking fifty shares; whereupon the Somerset National Banking Co. was duly and legally organized under the national bank act, and empowered to carry on a banking business at Somerset, Ky.

The subscriptions of the ten persons mentioned were only intended to effect the organization of the bank expeditiously, and to facilitate the arrangement by which the stockholders in the Somerset Banking Co. should have the privilege of subscribing for the new stock to the extent of 50 per cent. of their holdings of stock in the old bank; and also that at least \$10,000 worth of the stock in the new bank should, if possible, be sold to new subscribers, for the purpose of interesting them in the proposed bank. It was never intended that these subscriptions should be anything more than formal, the subscribers being, practically, trustees for the proposed new subscribers.

The new bank, being thus organized, was started in business. Among its depositors was appellee, Napier Adams, who entered into negotiations with the officers of the bank for the purchase of five shares of stock; he having agreed to subscribe for this number, it was paid for by charging his deposit account with the sum of \$500 and crediting him on the stock ledger with that sum; and in pursuance of this subscription a certificate of stock was made out for the five shares of stock, and in the expectation that he would call for it, was laid aside in the bank for him, but was never delivered. The new bank seems to have had an exceedingly short career; it commenced business on the 2d day of July, 1900, and was placed in the hands of a receiver by the comptroller of the currency on the 17th day of August, 1900; for what reason does not definitely appear, but presumably because it assumed the payment of the deposits of the old bank, which must have been insolvent.

It having been found necessary, by the comptroller of the currency, in

order to pay the indebtedness of the appellant bank, to make an assessment upon all the stockholders, this was done, and in default, an action was instituted by the receiver in the United States District Court for the eastern district of Kentucky, against a large number of stockholders, among whom was the appellee; whereupon the appellee instituted this action in the circuit court of Pulaski county, in order to test the question in the State court as to whether or no his subscription to the stock of the defunct bank was valid. To his action the receiver filed an answer, containing four paragraphs, in which he respectively denies the indebtedness as set out in the petition; pleads the subscription by appellee of the stock; the application of the \$500 deposited by appellee in the bank in payment therefor; the pendency of this action in the Federal court as a bar to this, and that the plaintiff is estopped to deny that he was a subscriber.

The burden of proof was upon the defendant; an examination of all the pleadings show that the money sued for was placed on deposit in the bank, and the plea that it was used in paying appellee's stock subscriptions is a plea of payment; nor do we think that the fact that plaintiff proved his deposit account before the receiver, without including the \$500 in question, or the fact that he paid several assessments on his stock, estopped him from denying that he was a stockholder, if the truth justified his so doing, as these acts did not place the receiver in any worse position than if they had not been made. The pendency of the action by the receiver against the plaintiff in the Federal court was not a bar to the prosecution of this action. When the case came on for trial the circuit judge held that the burden of proof was on the appellee, whereupon he testified in his own behalf, and rested. The appellants then moved the court for a peremptory instruction to the jury to find for them, which being overruled, they then introduced their testimony. At the close of all the evidence both sides moved for peremptory instructions to the jury to find for them respectively. The motion of the appellants was overruled, and that of the appellee was sustained; whereupon, in obedience to the instructions of the court, the jury found for the appellee in the sum of \$500, as prayed for in his petition. The appellant's motion for a new trial having been overruled, they have brought the case here on appeal.

We are of the opinion that the appellants' motion for a peremptory instruction should have been sustained, and that of appellee should have been overruled. The appellee admitted that he had agreed to subscribe for the stock; that he knew and acquiesced in his deposit account being charged with the sum of \$500 to pay for it, and that he regarded himself as a stockholder for a considerable time after the bank went into the hands of a receiver. We do not think that the arrangement made for the organization of the bank, whereby ten men nominally subscribed for all of the stock, made the subscription of the appellee for five shares an overissue, which would invalidate the subscription; the arrangement was merely one of convenience, it never being the intention, either of the subscribers or the bank, that they should really take it; but, on the contrary, they were looked upon simply as trustees for such new stockholders as could be induced to subscribe. The arrangement was a beneficial one, as it would have been impracticable to have organized the bank so as to give the old stockholders

the privilege of subscribing for the new stock in the proportion agreed on, except by adopting this plan, or some similar one.

The stockholders of the Somerset Banking Co. were scattered over the country at various places. It was necessary, under the national bank act, that the subscribers should be named, their residence given, and that they should acknowledge the articles of incorporation. It would have been an interminable labor to have procured this from the old stockholders, and, therefore, we think that the plan adopted, under the circumstances, was entirely reasonable. This very question arose in the case of *Talure Savings Bank v. Talbot*, 131 Cal., 45. In that case, in order to expedite the organization of the corporation, one Linder subscribed for 183 shares, not with the intention of actually taking them, but in order to effect the incorporation, and to hold them in trust for future subscribers. In a suit against the stockholders for their subscriptions this action of Linder's was charged as being an overissue of stock, rendering the subsequent subscriptions invalid. To this the court made answer: "The contention that the stock of these appellants was an overissue, and, therefore, void, is based upon figures rather than upon facts, for in truth there was never issued by the organization a single share more than the 500 authorized by its articles of incorporation. The argument of appellants here is that the aggregate subscription list showed more than 500 shares; that Linder, in the articles of incorporation, was down for 183 shares; that the subscribers and incorporators acquired rights to this stock of which they could not be deprived without their consent, and without the unanimous consent of the stockholders, and that casting up the total of the subscription list and the amount set down in the articles of incorporation, the result is a sum far exceeding 500 shares. The facts appear to be that at the time the articles of incorporation were drawn all the subscription lists were not at hand, and that Linder, the organizer and promoter of the organization, put his name down for 183 shares, to make up the full total of 500 shares. In so doing he constituted and regarded himself as the self appointed agent of other subscribers, whose names were not at hand, and the fact is that no subscriber was refused the amount of stock which he demanded, but such stock was issued to him directly by the corporation, it being taken in some instances from the amount of Linder's 183 shares. In this there was complete acquiescence upon the part of Linder and the other stockholders. \* \* \* There is not the slightest suggestion that Linder was acting, or attempting to act, in fraud of the rights of any one. Before the organization of the corporation Pope and Talbot had agreed to take stock in it. The amount had not been definitely decided upon. The stock subsequently taken by Pope and Talbot concluded the agreement, and in this subscription of 183 shares Linder may be regarded as having acted as their agent, as well as the agent of others to whom stock was afterwards issued." (Citing *San Joaquin, &c. v. Beecher*, 11 Cal., 79; *Burr v. Wilcox*, 22 N. Y., 551; *Terwilliger v. Great Western Tel. Co.*, 59 Ill., 249; *Bates v. Great Western Tel. Co.*, 134 Ill., 536.)

This doctrine is also upheld in the case of *Burt v. Bailey, &c.*, 78 Fed. Rep., 693.

No certificate was issued, or contemplated being issued, to the ten original subscribers for the full amount of their subscriptions; they were merely

conduits through whom the bank was to distribute its stock to its future subscribers in the manner contemplated by the original resolution of the stockholders of the Somerset Banking Co. It was not necessary that the subscription should have been made by appellee in writing. Subscriptions for the stock of corporations are made according to the principles governing contracts generally, and we know of no principle which forbids them being made by parol.

In the American & English Ency. of Law, chapter 23, title "Stockholders," 786, it is said: "No particular form is essential to the validity of a contract of subscription; any form by which an intent to effect a contract of membership is manifest will suffice, and even without a formal subscription, or where it is irregular, the contract may be inferred from acquiescence and acceptance of the benefits of membership."

In Cook on Corporations, volume 1, section 52: "The contract of subscription for shares of stock in an incorporated company may be entered into in various ways. Whenever an intent to become a subscriber is manifested the court is inclined, without particular reference to formality, to hold that the contract of subscription subsists. It is, as in the case of other contracts, a question of intent. Formal rules are, for the most part, disregarded. And in general, a contract of subscription may be made in any way in which other contracts may be made. Any agreement, by which a person shows an intention to become a stockholder, is sufficient to bind both him and the corporation. When one accepts or assumes the position and duties, and claims the rights, privileges and emoluments of a stockholder, and the corporation accepts or acquiesces therein, such person is estopped to deny that he is a subscriber, even though there may have been something irregular or defective in the formal manner of his subscription, or there may have been no formal subscription at all. \* \* \* There have been various dicta to the effect that a subscription can not be entered into by parol, but the later and better opinion is that such a subscription is valid and binding."

A verbal subscription for stock in a corporation was expressly upheld by this court in the case of *Tabler, &c. v. The Anglo-American Association, Limited*, 17 Ky. Law Rep., 815. We quote the following from the opinion: "The testimony shows that this was a verbal subscription of stock, and no written evidence is exhibited, except a writing evidencing a subscription by others, and to which neither of the appellants' names are attached. It is plain, however, that the appellant either purchased the stock or subscribed for it, and on this issue the testimony is so conflicting as not to justify a reversal on that ground for want of evidence to support the judgment; in fact it clearly appears that this stock, at the time of purchase, was in great demand, and it is scarcely to be supposed that a sale would be made so much below the market value, and by one, as he states, having no authority to dispose of the stock. The discrepancy in the testimony has arisen, no doubt, from the confidence the parties had in the success of the enterprise, and their inattention, therefore, to what actually transpired with reference to the transaction. It does appear singular that a verbal subscription involving so much should have been made, and equally so that the stock should have been purchased and the money paid, and no certificate of stock

ever issued or demanded, and this loose manner of doing business has caused this difficulty between the parties."

The trial court erred in refusing to allow appellants to show parol authority from the board of directors to the president and cashier to sell this stock to appellee, although we do not think it material in this case, as the acquiescence in the sale by the board of directors conclusively evidences their ratification of the transaction, even if there should be any doubt as to the original authority to make the sale. The directors are presumed to be informed of the ordinary business of the bank, and they would not be permitted, if they so desired, after receiving appellee's money in payment for his stock, to repudiate the transaction. The contention of appellee, that the stock issued to him belonged to B. G. Newell, who was one of the ten original subscribers for all of the capital stock, and that as no authority was shown by appellants from him for the sale and transfer, it was void, can not be maintained. The evidence conclusively shows, as said before, that B. G. Newell did not own all the stock which stood in his name under his original subscription; as to future subscribers he was simply a trustee, and could not refuse to transfer, if he would; a refusal on his part to permit the transfer would have been a gross breach of the original agreement under which he subscribed. There was no necessity of any special authority from him to issue the certificate to appellee; he had no certificate for the stock, and never intended to accept one, and could not have required the bank to transfer it to him if he had so desired. His subscription was only a matter of organization, and he and the bank so understood it. The issuance of the certificate of appellee was perfectly regular, and in conformity with original resolution for the placing of the stock. There can be no doubt that appellee subscribed for it, or that he knew it was paid for out of his money on deposit in the bank, and, as said before, he regarded himself as a stockholder until long after the failure of the bank. The court should have sustained appellants' motion for a peremptory instruction at the close of all the testimony.

Wherefore, the case is reversed for proceedings consistent with this opinion.

#### SOMERSET NATIONAL BANKING CO.'S RECEIVER v. BRINKLEY.

(Filed March 20, 1903—Not to be reported.)

**Banks—Liability to depositor—Instructions—Burden of proof—**In this action instituted by appellee to recover \$1,000 deposited with the banking company the defense was made that appellee purchased stock of the bank with same. The court correctly ruled that the appellant had the burden of proof, and at the close of his evidence properly gave to the jury an instruction to find for plaintiff, as the proof failed to show that the trade for the stock was consummated by her, or by an agent duly authorized by her to make said trade.

O. H. Waddle for appellant.

J. N. Sharp, V. P. Smith and W. A. Morrow for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted in the Pulaski Circuit Court by the appellee, Susie Brinkley, against the appellants, Christopher L. Williams, receiver of the Somerset National Banking Co., and the Somerset National Banking Co., to recover the sum of \$1,000, which she placed on deposit in the Somerset National Banking Co., and which has never been repaid, to her as she alleges.

All of the facts as to the organization of the appellant bank, the appointment of a receiver and the pleadings involved in this case are substantially the same as in the case of the Somerset National Banking Co.'s Rec'r v. Napier Adams, ante, 2033, heretofore decided, of which it is a counterpart; and reference is now had to that opinion for the facts necessary to illustrate this case. Upon the trial in the circuit court the judge, as we think, properly ruled that the burden of proof was on the defendants, who are the appellants here, and at the close of their testimony sustained the motion made by appellee for a peremptory instruction to the jury to find for her in the sum of \$1,000, which they did. Appellants' motion for a new trial being overruled, they have appealed to this court. The correctness of this ruling of the circuit judge, under the principles enunciated in the Somerset National Banking Co.'s Rec'r v. Napier Adams, depends upon the question as to whether or not the appellants established the contract of purchase of the stock in question by appellee of the appellant bank.

After the organization of the Somerset National Banking Co. the appellee, Susie Brinkley, entered into negotiations with its officers, looking to the purchase of ten shares of stock. She had on deposit in the bank \$1,266. No contract for the purchase of the stock was finally consummated by appellee, although the matter was discussed between her and the bank officers. The talk that she had concerning the stock was with R. G. Hall, the teller and cashier. Mr. Hall was introduced as a witness for appellants, and on cross-examination said there was no agreement between him and appellant as to the number of shares that she would take, and made it perfectly clear that there was no contract for the sale of the stock closed between him and appellee, but he says that, after his conversation with appellee, her brother-in-law, W. F. Tomlinson, told him that she would take ten shares, and that he settled the matter with Mr. Tomlinson.

Mr. Tomlinson was also introduced as a witness by appellants, and admitted that he told R. G. Hall that his sister-in-law would take the ten shares of stock, but said that he had no authority from her to close the contract, and that he was not her agent in any way, and had no right to act for her; that the talk he had with her, concerning the stock, was just a family matter, and when he told Hall that she would take the stock he assumed that she would accept his advice in the matter. The evidence did not show that the appellee ever knew that the contract was closed, or that her money had been taken to pay for the stock in question, or that a certificate for it had been issued to her; it was never delivered, and there was a total failure to show that she ever made any contract with appellant bank for the purchase of the stock; or authorized any one so to do for her, or that she ever knew that her name was on the stock book. We think the court properly instructed the jury at the close of the appellants' testimony to find for the appellee.

Wherefore, the judgment is affirmed.

## DARNALL v. JONES' EX'ORS, &amp;c.

(Filed March 20, 1903—Not to be reported.)

Improvements—Innocent purchaser—Occupying claimant—A. became the purchaser of a lot of land under execution sale and built a house on same and occupied it with his family. The purchase and improvements were made in good faith by A., under the belief that the title to the lot was in the debtor in the execution, when in fact the title was in appellant, his wife. Appellant instituted this action to recover said property. Pending the litigation A. removed his house from appellant's lot to a lot that the plaintiffs in the execution conveyed to him in lieu of the lot claimed by appellant. An amended petition was filed, claiming damages for removing the building from the lot. The verdict and judgment appealed from was in favor of appellant for the recovery of the lot and for one dollar for the rental thereof during the time it was held adversely to her. Held—That A. is not entitled to claim compensation for the value of his improvements under the occupying claimant's statute, as his title is not traced to the Commonwealth, but under the equitable rule that a bona fide occupying claimant should not suffer for the consequence of his innocent mistake as to the title, he is not liable to any greater extent than will fully repay the owner for any damage done by the mistake. The case should have been transferred to the equity docket, but as the verdict is in full accord with the finding of the chancellor, had the matter been submitted to him, no injury was done appellant.

Hobbs & Farmer for appellant.

Forman & Forman for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Barker.

The executors of Thomas Jones, deceased, and W. T. Sellers, the surviving partner of the firm of Jones & Sellers, recovered a judgment in the Fayette Circuit Court against J. R. Darnall, the husband of appellant, for the sum of \$162.81, with interest from May 18, 1893, until paid, and their costs of action. Upon this judgment they caused an execution to be issued which, coming into the hands of the sheriff of Fayette county, was by him levied upon two vacant lots of land in Forest Hill addition to the city of Lexington, Ky., as the property of J. R. Darnall. Both of these lots were sold by the sheriff under the execution, and the property purchased by the executors of Thomas Jones.

Afterwards the sheriff executed and delivered to the purchasers a conveyance of the two lots sold by him, and on the 8th day of August, 1900, they conveyed the eastern lot to appellee, Charles W. Clark, by a deed of general warranty: Clark having caused his deed to be recorded, took possession of the lot and erected thereon a small frame cottage, which he occupied as a home for himself and family. The lot thus sold by the executors to Charles W. Clark did not belong to J. R. Darnall, the defendant in the execution, but was the property of his wife, the appellant, Sallie Darnall, who, ascertaining that appellee Clark had taken possession of, and built a house upon her lot, instituted this action in the Fayette Circuit Court against him for its recovery. Upon the institution of the action appellee Clark seems, for the first time, to have learned the true condition as to his title, and reported



the facts to his vendors, the executors, who at once conveyed to him another lot in lieu of the one first sold to him, and he thereupon removed his house from the lot belonging to appellant to the second lot conveyed to him. Appellant then amended her petition, alleging the facts of the removal of the house by Clark, and praying for a judgment for recovery, in addition to her lot, of the sum of \$800 damages for the wrongful removal of the house from her property.

Appellees, the executors of Thomas Jones, defended the action thus instituted, both for themselves and for their co-defendant and vendee, Clark. Their answer admits the title of appellant to the lot in question, alleging that the sale by the sheriff of it, as the property of J. R. Darnall, was made under the mistaken belief that the property belonged to him; that they bought the same at the sheriff's sale, believing in good faith that they were acquiring a valid title thereto, and that upon receipt of the sheriff's deed they in good faith conveyed the lot to their co-defendant, Clark, who, also in good faith, believed that he was obtaining a valid title to it, and, so believing, erected thereon a small frame cottage. They allege that the lot in question was a part of an uninclosed and vacant commons in the suburbs of Lexington, and that the rental value thereof amounted to, practically, nothing; that after the institution of appellant's action they discovered that the title to the lot was in appellant, and at once secured the vacation thereof by their co-defendant, Clark, by giving him another lot, to which was removed the frame cottage which Clark had erected on appellant's lot. They alleged that the removal was made without injury or damage to appellant's lot, and denied that she was damaged in any sum whatever by the removal thereof from her property. They admit the appellant's title to the lot in question to be paramount to theirs, and allege that they had tendered her a quit-claim deed from their vendees, Charles W. Clark and his wife, to the property sold by them to him, and also a quit-claim deed from themselves to the remainder of the lot purchased by them at the sheriff's sale; and they paid into court the sum of \$3.50, subject to appellant's order, for the purpose of paying for the recording of the deeds. Appellant filed a reply to this answer, denying its affirmative allegations, and thus making up the issues.

There were two trials had in the case. On the first trial the jury returned a verdict in favor of appellant for the recovery of her lot, and the sum of \$250, as damage for the removal of the house by Clark. The court, upon motion of the appellees, set aside this judgment, and granted them a new trial. Upon the second trial the jury found a verdict for the appellant for the recovery of her lot, and the sum of one dollar for the rental thereof during the time it was held adversely to her. Her motion for a new trial having been overruled, she has appealed to this court. There was practically no contrariety in the evidence heard upon the trial of the case in the circuit court; the title of the lot in appellant was admitted; the value of the house removed by Clark was agreed by the parties to be \$284.50, and the evidence established the fact that there was no injury to the lot by Clark's having built the cottage thereon, or in removing it, except in the loss of the value of the house so removed, and that the rental value of the lot for the short time that it was occupied by appellee Clark was merely nominal. There

was, then, before the court only one question—whether, as a matter of law, appellant was entitled to recover the lot with the improvements made by Clark, who mistakenly, but in good faith, believed that he was the owner.

We do not think that there is any question of the good faith of any of the appellees in their taking possession and occupying appellant's property; they could have had no motive in taking possession of it, except the belief that it belonged to J. R. Darnall, appellant's husband, and that they obtained a valid title by the proceedings had in reference thereto; and their evidence establishes their good faith beyond question. This being the case, what were the rights of the respective parties with reference to the improvements thus made upon appellant's lot? Appellees can not recover for the improvements in question under the occupying claimant's statute, as they can not trace their title back to the Commonwealth of Kentucky. (*Fairbairns v. Means*, 4 Metcalf, 328; *Smith v. Price*, 28 Ky. Law Rep., 2005, and *Shively v. Gilpin*, 28 Ky. Law Rep., 2090.)

This being the rule with reference to the occupying claimant's statute, must appellee Clark lose entirely the value of the improvements erected upon the lot, in good faith, under the mistaken belief that he had a good title to it? Undoubtedly he has no remedy at common law, and if he is to have relief, he must seek it in the principles of equity. The rule on this subject is stated as follows, in the *American & English Ency. of Law*, volume 10, title, "Ejectment:" "By the ancient common law the owner of land recovered it in ejectment without any liability to pay for improvements which had been made by the occupant without title. Every occupant made improvements at his peril, although he acted under a bona fide belief of ownership, and the law would not compel the true owner to pay for improvements which he had never authorized. The rule of the civil law, however, was more equitable. By it the bona fide occupant was entitled to be reimbursed the expenses of beneficial improvements so far as they augmented the property in value, on the ground that no one ought to be enriched at the expense of another; and the English court of chancery, adopting this rule as its own, applied it whenever the real owner was for any reason compelled to come into a court of equity. This equity of the bona fide possessor who made lasting and permanent improvements upon the land which turned out to be another's, was so strong and persuasive as eventually to force its recognition upon courts of law, without the aid of statutes, and it came to be held that the occupant might set-off or recoup the value of his permanent improvements against the rents and profits demanded by the owner, but in some of the States statutes allowing the value of improvements as a set-off have been passed. This rule still left the occupant without redress if the value of his improvements exceeded the mesne profits due the owner, and to supply this deficiency statutes have been passed in some of our States making such excess a charge on the land."

In the case of *Parker v. Stevens*, 8 A. K. Marshall, 909, it is said, speaking of an occupant without title who had been ejected: "He appears to have entered under a claim in the name of Thomas Reed, by virtue of a bond from Alexander Reed, but is unable to show a connected title in law or equity with Thomas Reed's claim, although supposing, by his bond, the land to be his, he made improvements; he is, therefore, not entitled, unde

the act of the assembly, concerning occupying claimants of land; but is, we conceive, entitled on equitable principles to relief on this ground, to pay for all improvements made by himself." \* \* \*

In the case of *Barlow v. Bell*, 1 A. K. Marshall, 246, the court said: "As the labor bestowed in improving the land is sunk in the land, and was not done at appellee's request, it is plain that she can not, upon any common law proceedings, be subjected to the appellant's claim for compensation. Nor have we been able to find any adjudged case where the English courts of equity have, under such circumstances, decided upon the right to compensation; but regarding courts of equity in supplying the defects of the common law, as being governed by the principles of natural justice, in the absence of all precedent, we should have no hesitancy in relieving the purchaser for improvements made upon the land while he bona fide considered it as his own. The possessor, by bestowing his money and labor in meliorating the land advances its value, and consequently the rightful owner, unless liable to the claim of compensation, is so much gainer by the loss of the possessor. But to bring himself within the influence of this principle, it is not enough that the possessor shows himself to have meliorated the land, but his money and labor must be bestowed upon an honest conviction of his being the rightful owner of the land, for if he takes possession without title, and knowing the land belongs to another, he is himself guilty of a wrong, and although he may have expended his money and bestowed his labor, his claim for compensation ought not to be sanctioned by a court of equity."

In the case of *Chile v. Patterson*, 1 A. K. Marshall, 444, the court fully recognized the principle that a bona fide occupant under a claim of title, who makes lasting and beneficial improvements, will, upon ejectment, be entitled to pay for his improvements; but in this case, the occupying claimant knew that he had no claim to the property in question, and was not, therefore, entitled, either under the principles of equity or the occupying claimant's law, to be reimbursed for his improvements.

In the case of *Thomas v. Thomas' Ex'ors*, 16 B. Monroe, 490, it is said: "In *Bell's Heirs v. Barnett*, 2 J. J. Marshall, 516, the principle is laid down, broadly, that a person acquiring title to land and entering it bona fide, supposing it to be his own, must be paid for his improvements. And the same general doctrine is recognized throughout the books."

The court then goes on to show that the occupants in the case occupied a position that entitled them to the favorable consideration of a court of equity: "They were certainly bona fide purchasers, and the fact that the defective certificate of acknowledgment to the deed of 1824 was of record should not, by construction, and for the purpose of cutting off their equity, be regarded as affecting them with notice of her right to the land. An immediate vendee might be thus affected, but not so with a remote vendee for a full consideration for what they innocently, though erroneously, regarded as an absolute estate in the land. The appellee occupying, then, the attitude of a person acquiring land and entering upon it in good faith, we can perceive no valid reason why he should not be paid for his improvements, at least to the extent that he increased the vendible value of the land at the time recovered."

In *Bell's Heirs v. Barnet*, 2 J. J. Marshall, 531, the rule is thus stated: "But as one man should not be benefited by another's labor and money, without making an adequate return, and as Bell's heirs should do what is just before they exact equity from Barnet, they should be held accountable for the amelioration. If their land, when they receive it, shall be enhanced in value, or in its vendible price, by the improvements put upon it since 1816, to the extent of such augmented value they should be charged."

The rule thus laid down is fully sustained by the cases of *Proctor v. Smith*, 8 Bush, 83; *Burton v. Little*, 9 Bush, 308; *Hawkins v. Brown*, 80 Ky., 186; *Pomeroy's Equity*, 2d edition, section 1241.

In the case of *Floyd v. Mackey*, 23 Ky. Law Rep., 2030, the court said: "But in view of the fact that appellee has acted in good faith through this transaction, and has expended considerable sums of money in improvements upon the land, which will probably add to its vendible value, we are of opinion that he is equitably entitled to have refunded to him such an amount as these improvements have permanently increased the saleable value of the property. (Citing *Pomeroy's Equity and Jurisprudence*, 2d edition, section 1241.) And, as suggested by counsel for appellant, the chancellor, upon the return of the case, should require appellee either to surrender the land upon the conditions mentioned, or pay the purchase money, with interest from the day of sale, the rents being equivalent to the interest."

Undoubtedly there is authority for the principle that one making improvements upon the land of another, under the mistaken belief that he is the owner, is only entitled to recoup the value of his improvements against the claim for rent; but this has never been the rule in this State, and there is no foundation in reason for such limitation. The principle upon which the rule is based is the equitable one, that a bona fide occupying claimant should not suffer for the consequence of his innocent mistake as to the title, to any greater extent than will fully repay the owner for any damage done by the mistake. There is also authority for the contention that this equitable principle for the relief of the occupant can only be administered when the owner comes into equity to recover his property. But we can perceive no reason for holding that the right to relief, under such circumstances, should be limited by the fact that the owner happens to seek his remedy in equity. Under the Civil Code of Practice equitable defenses may be pleaded in common law actions, and, when necessary for their proper adjudication, the case may be transferred to the equity side of the docket.

This should have been done in this case, but as there was no practicable contrariety in the evidence, the jury found by their verdict what the chancellor would necessarily have to adjudge, under the principles herein announced, if the case was reversed and transferred to equity. No injury, therefore, has accrued to appellant by reason of the failure to transfer the action.

Wherefore, the case is affirmed.

BELL v. SMITH, &amp;c.

(Filed March 24, 1903—Not to be reported.)

R. C. Stoll for appellant.

Wm. Wood and J. Alexander Childs for appellees.

Appeal from Fayette Circuit Court.

The court delivered the following response to petition for rehearing:

The action of the court on the motion of Porter & Jackson is not a final order. The question as to how the proceeds of the sale shall be distributed is still before the lower court, since this court did not consider the action of the court in overruling the motion. Besides, it could not have considered the question because Porter & Jackson were not appellants, but were made appellees.

LANGDON-CREASY CO. v. ROUSE.

(Filed March 24, 1903—Not to be reported.)

1. Master and servant—Negligence—Unsafe lamp—Continuance—Appellee was manager of a store of appellant, and had held said position for several months, and was injured while lighting a gasoline lamp in the store, for which she recovered \$2,500 damages on the ground that same was unsafe and dangerous. On appeal appellant insists that the court erred to its prejudice in refusing to grant a continuance on account of the absence of one member of the firm who was in attendance at the bedside of his dying mother. Held—That a continuance should have been granted, as the reason therefor was sufficient, and the error was not cured by permitting the affidavit of the attorney as to the statements of the witness to be read as evidence, as the proper effect of his testimony could be had only by his personal presence.

2. Instructions—The court properly refused to give a peremptory instruction to find for appellant, as it is difficult to determine from the testimony whether the accident was the result of some defect in the lamp or negligence on the part of the appellee. The court properly instructed the jury that it was the duty of defendant to have furnished a reasonably safe lamp for lighting their store, and if the lamp furnished was unusual in its operation, or dangerous in its possibilities, to have instructed the plaintiff as to its proper use, and warned her of possible danger that might arise in lighting it. The instruction was misleading which required appellant to maintain the lamp in good condition. It was the duty of appellee to maintain it in good condition.

3. Evidence—The court properly refused to permit an expert witness to practically demonstrate before the jury the manner of filling and lighting the lamp. The admissibility of testimony of this character is one that should be left to the sound discretion of the trial court.

A. G. DeJarnette, Wade Cushing and T. L. Edelen for appellant.

W. W. Dickerson and O. H. Hogan for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Chief Justice Burnam.

This suit was brought by the appellee, Ella Rouse, against the appellant, the Langdon-Creasy Co., to recover damages for injuries sustained by her in

lighting a gasoline lamp in the storehouse of appellant at Williamstown, Ky., on the 22d day of March, 1901. The record discloses that appellee had been in the employ of Langdon & Creasy, a partnership, as manager of their grocery store, located at Williamstown, in Grant county, from some time in October, 1900, until the 7th day of March, 1901. On that day the store was transferred from the partnership of Langdon & Creasy to the Langdon-Creasy Co., a corporation organized under the laws of this State. After the transfer of the store to the new corporation appellant continued in its employ as general manager, having authority to employ a porter, and, when the necessities of the business required it, additional clerical assistance. The headquarters of the corporation was in Cincinnati, O., and they owned and operated quite a number of similar stores located at different points in the State of Kentucky. The gasoline lamp, which it is charged occasioned the injury, had been used for lighting the store for several months previous to the date of the accident, and had been under the special management of the appellee. It also appears that she had clerked in the store belonging to Langdon & Creasy at Eminence, Ky., for some months previous to her transfer to Williamstown as manager of the store there; the Eminence store was lighted in the same way, and she had observed the operation of the lamp there, although not specifically charged with any duty in connection therewith. It was also shown that some time in November, shortly after taking possession of the store as manager, that she complained to appellant that the lamp would not light, and at their instance it was forwarded to the manufacturers at Cincinnati for examination; and that on November 25 it was returned by them to her, with a letter in which they say they could find no trouble with the lamp, and at the same time inclosed to her printed instructions as to its management. This letter wound up with these words:

"The instruction on the first page of the circular carefully followed will give you perfect success. The whole thing in a nutshell is just this: Put two quarts of gasoline in the bowl, screw the filler tap on tight, attach the pump to the air valve, open the thumb-screw two or three turns and pump in twenty-five or thirty strokes of the pump. Before pumping in the air see that the light valve is firmly closed. Now heat the generator with the alcohol torch, as directed, then open the light valve, still holding the lighted torch above the top of the chimney; in about fifteen seconds the gas will form, pass around the gas tube to the burner, where it will light from the torch you are holding at the top of the chimney. All this is only a brief repetition of the directions on the circular, which if you will read and carefully follow, you will have no trouble.

"Very truly yours,

"THE PERFECTION BURNER CO.,

"A. B. TREMER, Manager."

Whilst these instructions appear somewhat confusing, it is very easy to understand them when we have the lamp itself before us, and for purposes of illustration a photographic copy of the lamp filed with the brief of counsel for appellant is filed with the opinion. The bowl of the lamp holds about six quarts of gasoline. It has two openings, one indicated by the letter B., the other by the letter C. The lower end of the gasoline tube at the left of the lamp is open near the bottom of the bowl. At A. is a valve which per-

mits the gasoline to flow into the metal tube D. The funnel encircles the end of the gas tube and into which vaporized gas flows, which furnishes the fuel for the light. The instructions require two quarts of gasoline to be poured into the opening in the side of the bowl at B. At C. is a valve which is closed by a screw, and upon the tube projecting therefrom the air pump is attached. The instructions direct that the gasoline should always stand below the opening at C. The air pressure forces the gasoline up the gasoline tube to the valve at A. The directions require that the hollow tube D. should be heated by a lighted sponge saturated with alcohol before the valve at A. is opened. When the liquid gasoline is forced into the hot tube it is converted into gas, which is carried across the open space between the tube D. and the gas tube at the right of the lamp, and from this point finds its way through the gas tube to the burner, where it is ignited.

The negligence in connection with this lamp with which appellant is charged by appellee is that the appliance was new to her, and that she was not familiar with its operation and management; that she did not know that it was dangerous; that appellant knew it was unsafe and dangerous and likely to explode, and failed to acquaint her with these facts, and the risks and hazard attending its lighting and use. Appellant denied that the lamp was dangerous, or that its management was difficult to understand, or that appellee did not thoroughly understand its management, and had not received full instruction with reference thereto, and alleges that she had been carefully instructed with reference to its management; that she was their manager in conducting the store, and charged that the injury resulted from her own negligence in disregarding the instruction given her with reference to its management, and also charged that it was the duty of the porter to light the lamp. A trial before a jury resulted in a verdict for plaintiff for \$2,500, which we are asked to reverse upon several grounds: First, upon the calling of the cause for trial the appellant moved for a continuance, and in support of the motion filed the affidavit of one of the attorneys, in which he says that H. C. Langdon, the president of the corporation, and who resided in Cincinnati, had expected to attend the trial and testify as a witness, but that on the day before he had been called to the bedside of his sick mother, who was reported to be dying; "that he would testify that he purchased the lamp, with about sixty others for the use of the various stores owned by Langdon & Creasy; and that previous to and at the time of the purchase he had been assured by large numbers of persons who were using them that they were perfectly safe and free from danger; and that he had tested and used them in many places and by many employes, and had always found them perfectly safe; and that neither he nor any member of the firm had been advised of any danger or hazard in lighting them previous to the accident complained of. The trial judge struck out of the affidavit the facts recited above, and permitted the rest of the affidavit to be read as the deposition of the absent witness, and then overruled the motion for a continuance. We are of the opinion that the trial court erred in refusing to allow evidence to show that appellant, before purchasing the lamps for use in the store, had acquainted himself with its character, operation and safety, and he was also entitled to show exactly what steps he had taken in this regard. Besides, we think it is apparent that the presence of appellant before the jury to ex-

plain these facts would have been very much more effectual than the mere affidavit of his attorney, and it seems to us that the dying condition of his mother was a good cause for his nonattendance at the trial. As said by this court in *Peebles v. Ralls*, 11 Ky., 26, in deciding the diligence necessary to be observed by suitors: "We should not altogether lose sight of the sympathies of our nature, and require a father or husband to abandon his child or wife at the moment of apprehended death for the purpose of attending the trial of a pecuniary contest."

The rule, it seems to us, also applies to the case of the mother. We are, therefore, of the opinion that the trial court erred in not granting the continuance, and also in excluding as incompetent evidence the portions of the affidavit which were stricken out.

It is difficult to determine from the testimony whether the accident was the result of some defect in the lamp or negligence on the part of appellee. No one was in the store when it occurred. She testifies in substance that when she attempted to pump air into the reservoir she discovered that the cylinder was too full, as the gasoline ran out of the pump tube; and that she thereupon poured out of the lamp two pints of gasoline and took them upstairs and poured them into the gasoline reservoir; and that when she returned she wiped the gasoline off the lamp; that she then pumped air into the lamp, as directed, and applied the alcohol torch to the generator until it was hot, then opened the lighting valve at A. to let the gasoline flow into the generator, and continued to hold the torch under the generator until it was burned out, but that it did not light; that she then turned the gas off, waited until the generator got cold, and took the same steps over again; that again the lamp failed to light; that for the third time after the generator got cold she pumped in air, heated the generator, and when she attempted to light it a quantity of "stuff" came out, and a little blaze fell on her jacket and skirt; that she did not know what caused it, but began to scream for help and try to extinguish the flame. Those who ran to appellee's assistance found the lamp burning all right on the counter, and the alcohol torch lighted upon the floor. Different theories are advanced as to the cause of the accident. Counsel for appellee says that it is clear from her testimony that the liquid gasoline had free passage to and through the generator, but that the gas tube on the right of the cylinder was so obstructed that the gas could not pass through it to the burner, and was, therefore, set free and permeated the atmosphere until it reached the torch, when it ignited. The fact, however, that the lamp was burning all right after the accident seems inconsistent with this theory, as no sufficient explanation is given why the gas immediately after the accident should have passed through the gas tube all right to the burner, if, as contended, it was obstructed. Besides, it is perfectly apparent from an examination of the lamp that it is easy to remove this gas tube and to have it cleaned out, if it was so obstructed. Counsel for appellant, on the other hand, in speculating as to the probable cause of the accident, says that appellee either failed to pump in enough air to force the gasoline through the gasoline tube, or that she allowed the gasoline to be forced into the generator before it was hot enough to convert it into gas; and that when the generator did get hot enough to vaporize the gasoline, it blew the liquid gasoline through the tube D. in liquid form; and some of



this gasoline fell upon the clothes of appellant and was ignited with the alcohol torch. This theory is, however, directly contrary to the sworn testimony of appellant. Under this state of fact the question of negligence was for the jury, and, we think, the court properly refused the motion for a peremptory instruction.

Upon the trial defendant produced before the jury as an expert witness one of the officers of the corporation engaged in the manufacture of the lamp, and asked that he be permitted to practically demonstrate before the jury the manner of filling and lighting the lamp. This testimony was objected to on the ground that the witness had had the possession of the lamp for several hours before the proposed experiment, and that it might not be in the same condition as when the accident occurred. For this reason the court refused to allow the experiment to be made in the presence of the jury. The admissibility of testimony of this character is one that should be left largely to the sound discretion of the trial court. Judge Thompson, in his work on Trials, volume 1, section 620, says that: "Experiments in the presence of the jury are generally discountenanced owing to the liability of the jurors being imposed upon by skillful manipulation or jugglery. But experiments coming within the range of ordinary knowledge may well be permitted."

In the note to *Leonard v. Southern Pacific Co.*, 15 L. R. A., 221, the annotator says: "This may be perhaps regarded as a correct theoretical statement of the rule, and if it is adopted the conflict will come in determining what matters come within the range of ordinary knowledge or experience, and what not."

In view of all the testimony in this case we are not prepared to say that the trial court erred in refusing to allow this demonstration to be made by the expert in this particular case.

In instruction A., given to the jury, they were told "that it was the duty of the defendant to furnish the plaintiff a reasonably safe lamp and appliance for lighting the store, and that the plaintiff had the right to rely upon the defendant to provide a reasonably safe and suitable appliance for that purpose and to maintain it in a reasonably safe condition, and to instruct the plaintiff in the proper use of same, and to warn her of any danger to her in lighting it, if there was any. And it was the duty of the plaintiff to exercise ordinary care in lighting and using the same to avoid danger. But if the jury shall believe from the evidence before them in this case that the defendant negligently and carelessly furnished to the plaintiff a lamp or appliance for lighting their store that was not reasonably safe to light or use, and failed to instruct her in the proper use of the same, or to warn her of the danger, if any, to her in lighting same; and that the plaintiff did not know, and could not by ordinary care discover, the danger in lighting same; and that while the plaintiff was exercising ordinary care in attempting to light the same, said lamp did expel from it burning gas or gasoline, which ignited and burned the face, hand, neck and clothing of the plaintiff, then the law is for the plaintiff, and the jury should find for the plaintiff such damages as will compensate for the burning, suffering, loss of time, any permanent impairment of her ability to earn money, and such sum she was compelled to expend for medical attention, nursing and board, not exceeding in all \$5,000, the amount claimed in the petition."

It was the duty of the defendant to have furnished a reasonably safe lamp for lighting their store, and if the lamp furnished was unusual in its operation, or dangerous in its possibilities, to have instructed the plaintiff as to its proper use and warned her of possible danger that might arise in lighting it. The instruction quoted supra was misleading in requiring them to have maintained the lamp in good condition. Appellee was the manager of appellant's business at Williamstown, and it was her duty to see that the lamp was kept in good condition, and if it failed to perform its office, to have it set aside and used the coal oil lamp provided for such an emergency. The testimony shows that it was only at intervals that the auditing agent of the defendant corporation visited the store for the purpose of taking stock and auditing the accounts of appellee as manager. All responsibility for the proper management of the store was upon her, and she should not be allowed to shift this responsibility to her employers, who lived in a distant city and could have no personal knowledge as to whether the lamp was maintained in good condition or not. Their duty was discharged when they furnished a safe appliance. Her duty required that it should be maintained in the same order, or its use discontinued. This principle is fully illustrated in the following cases: *Sullivan's Adm'r v. Louisville Bridge Co.*, 72 Ky., 81; *Alexander v. L. & N. R. R. Co.*, 83 Ky., 589; *Boganschutz v. Smith*, 84 Ky., 330; *Kelley v. Barber Asphalt Co.*, 93 Ky., 262; *The Lexington and Carter County Mining Co. v. Stevens' Adm'r*, 104 Ky., 502; *Hood v. Augnot*, 23 Ky. Law Rep., 460.

It, therefore, follows that the judgment appealed from must be reversed and cause remanded for proceedings not inconsistent with this opinion.

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LYON v. LYON, &c.

(Filed March 24, 1903—Not to be reported.)

Fraudulent conveyances—Mortgages—Husband and wife—A. having a second mortgage on a tract of land belonging to her son B., agreed with him to release that mortgage in order to enable him to borrow money from C. to pay off the first mortgage. This was done, and C. was secured by first mortgage on the property. B. and wife afterwards conveyed the land to C. for value. About the time this conveyance was made the wife of B. purchased a tract of land for \$600 cash, a part of which she borrowed from C. A. filed this suit against B. and C., alleging that at the time she released her mortgage B. agreed to execute to her a second mortgage to secure her debt, which he failed to do; also that C., before he purchased said property, had notice of this agreement, and that he and B. entered into this arrangement for the purpose of cheating and defrauding A. out of her debt, and asking that the conveyance be set aside and the land be subjected to her debt after satisfying C.'s debt. It is also sought to subject the land purchased by the wife of B. to said debt, on the ground that same was paid for out of the means of B. Held—That the proof fails to show that C. had any notice of any agreement between A. and B. by which she was to have a second mortgage on said land, or that said land was conveyed to him under any fraudulent arrangement to cheat or deprive A. of her debt, and C. should not be disturbed. The proof shows that considerable sums of money were donated to the wife of B., and that this money was invested by her in land. This money was separate property of the wife under the statute, and not subject

to the control or debts of the husband, and the conveyance to her should not be disturbed.

R. E. Johnston for appellant.

D. G. Park for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Mrs. M. F. Lyon, sold to her son, the appellee, O. D. Lyon, a tract of land, containing about thirty acres, near the town of Mayfield, Graves county, Kentucky, retaining a lien for the sum of \$350, the unpaid purchase money. Subsequently O. D. Lyon, desiring to borrow money from the Globe Building and Loan Association of Louisville, Kentucky, applied to his mother to release her vendor's lien, and in lieu thereof to accept a new note, secured by a mortgage second to that of the building and loan association on the same property. This arrangement was necessary in order to obtain the money from the building and loan association, and was carried into effect, M. F. Lyon accepting O. D. Lyon's note for the sum of \$350, secured by a second mortgage, as before stated.

Not having been able to pay off the debt due the building and loan association, and that corporation having begun to press him for payment, he applied to appellee, G. R. Allen, for the loan of sufficient money to discharge it. This Allen seems to have been willing to do provided Lyon could obtain the release of his mother's lien secured by the mortgage to her. Lyon again applied to his mother for the release of her lien. She appears again to have been willing to accommodate him, and executed to one Coulter a power of attorney for her, and in her name to release her lien in accordance with the wish of her son, which was done; and thereupon Allen loaned O. D. Lyon the sum of \$400, which was secured by first mortgage on the property in question, and the debt of the building and loan association was paid.

M. F. Lyon contends that O. D. Lyon promised and agreed to give her a second mortgage on the land, to secure her debt of \$350, which had never been paid; this he denies. Afterwards O. D. Lyon and his wife, Elizabeth, conveyed eleven acres of the land to G. R. Allen, for \$440 cash, and still later they conveyed the remainder of it to him for the sum of \$540 cash. About the time of this last conveyance Elizabeth S. Lyon purchased from Mary Albrighton a tract of land for \$600 cash, a part of which was borrowed by her from G. R. Allen, and a lien upon the property was given him to secure the payment thereof.

On the 14th day of February, 1900, the appellant, M. F. Lyon, instituted an equitable action in the Graves Circuit Court against O. D. Lyon and his wife, and G. R. Allen, in which she sought a personal judgment against O. D. Lyon for her debt of \$350, and set up his verbal promise to reinstate her mortgage lien against the land in question. She did not claim priority over the mortgage of G. R. Allen for the sum of \$440, but admitted that her rights only extended to have her debt secured by second mortgage. She charges in her petition that the absolute conveyances of the property from O. D. Lyon and wife to G. R. Allen were fraudulent, and made for the purpose of cheating, hindering and delaying her in enforcing her lien and the collection of her debt. By an amended petition she set up the lien retained in the orig-

inal deed from her to O. D. Lyon, claiming that it had never been released, and asking its enforcement against the land, thereby giving her a priority over G. R. Allen. She further charged that G. R. Allen had notice of the arrangement between herself and O. D. Lyon, by which her lien was to be reinstated, and that when he purchased, or pretended to purchase, the land in question he well knew of the arrangement; she prayed in her petition that the conveyances from O. D. Lyon and wife to Allen be set aside and held for naught; that the land be sold, and that out of the proceeds G. R. Allen should first be paid the sum of \$440; then that her debt should be paid, and if there was any balance, it should be applied to the extinguishment of Allen's remaining debt of \$540.

Both Allen and O. D. Lyon filed answers. G. R. Allen denied that he had any notice of the verbal arrangement between M. F. Lyon and her son, O. D. Lyon; denied that the conveyances to him were made for the purpose of cheating, hindering or delaying M. F. Lyon in the collection of her debt, and alleging that the sales were made to him bona fide, upon a valuable consideration, without notice of appellant's equity, if any she had. O. D. Lyon, in his answer, denied that he had ever made his mother a promise to reinstate her lien, or that the conveyances were made for the purpose of defrauding, cheating or hindering her, and reiterating the allegations of G. R. Allen, that the sales were made in good faith and upon a valuable consideration.

Pending this litigation in regard to the liens and conveyances on the land, M. F. Lyon was, on March 17, 1900, awarded a personal judgment against O. D. Lyon for the sum of \$220, with interest from May 5, 1893, until paid, and her costs. This execution came to the hands of S. R. Douthitt, the sheriff of Graves county, and was by him levied upon the forty acres of land purchased by Elizabeth S. Lyon from Mary Albrighton, as the property of her husband, O. D. Lyon, and was proceeding to sell it to satisfy the execution. On the 31st day of March, 1900, Elizabeth S. Lyon filed a petition in equity, in the Graves Circuit Court, against the execution creditor, M. F. Lyon, and the sheriff, S. R. Douthitt, setting up the facts as to the levy of the execution by the officer, her ownership of the land, the advertisement for sale, and prayed for an injunction restraining the officer from selling her land; that it be adjudged to be her property, and that her title thereto be quieted. To this M. F. Lyon filed an answer, denying that the land belonged to Elizabeth S. Lyon, or that it was purchased with her money, and alleging affirmatively that it was purchased by the money of her husband, O. D. Lyon, and that the conveyance thereof to the wife, Elizabeth S. Lyon, was a fraudulent arrangement to cheat, hinder and delay her and the other creditors of O. D. Lyon.

The affirmative allegations of this answer were controverted of record by agreement of the parties, and by an order of court the two actions were consolidated under the style of M. F. Lyon v. O. D. Lyon, &c. After the evidence had all been taken the action came on for trial, and on the 25th day of November, 1900, having been heard and submitted, the chancellor rendered a judgment, in substance, as follows: "It is adjudged that the action of M. F. Lyon against O. D. Lyon and others be, and the same is hereby, dismissed absolutely as against G. R. Allen and Elizabeth S. Lyon,

and as against the land herein, and that each of said defendants recover of her their costs herein, the expense for which is awarded. It is further adjudged in the action of Elizabeth S. Lyon against M. F. Lyon, &c., that plaintiff, Elizabeth Lyon, paid for and is the owner and in possession of the land described in her petition, to wit, west half of the north half of the northeast quarter of section 9, T. 3, R. 2, E., containing forty acres, more or less, in Graves county, Kentucky, purchased from Mary Albrighton, and that defendant, M. F. Lyon, acquired no lien thereon by virtue of the execution in her favor against O. D. Lyon, which was levied thereon by Sheriff S. R. Douthitt, and that such levy and such subsequent proceedings are illegal and in violation of Elizabeth S. Lyon's rights, and constitute a cloud upon her title, and the defendants, M. F. Lyon and Sheriff S. R. Douthitt, are perpetually enjoined from further proceedings under the execution or levy thereof against the land, and the title of the plaintiff, Elizabeth S. Lyon, is quieted thereto against all parties herein, except the unpaid purchase money of G. R. Allen, and that she recover her costs herein expended against M. F. Lyon, for which execution is awarded."

From this judgment M. F. Lyon has appealed. The vendor's lien of M. F. Lyon retained in the deed to O. D. Lyon was paid off and discharged by the execution of the note and the mortgage, in the arrangement by which the Globe Building and Loan Association obtained a first mortgage securing the amount loaned by it to O. D. Lyon. Appellant subsequently released this mortgage in order to permit O. D. Lyon to borrow the money from G. R. Allen to pay off the debt of the Globe Building and Loan Association. The evidence wholly fails to sustain appellant's allegations that G. R. Allen knew of the verbal arrangement between her and O. D. Lyon, by which her released lien was to be reinstated, and it also fails to sustain her allegation as to the fraud of G. R. Allen. The chancellor's judgment, therefore, dismissing her petition, as against him, being clearly sustained by the testimony, must be affirmed. The claim of Elizabeth S. Lyon to have owned the money with which the land from Mary Albrighton was purchased has given us more difficulty. It appears that on the 29th day of April, 1896, she gave birth to five children, which extraordinary freak created a great deal of interest, not only in the immediate community in which she lived, but, as an item of news, was heralded by the press throughout the country. She claims that many persons came to see her babies, and made contributions of money to her; that she also received many contributions of money by mail from persons living at distant points, who had read of her interesting case; these contributions, she said, amounted to about \$500, and they were all given to her; that her husband not only did not claim any interest in them, but specifically declined to claim any interest therein, or to exert any control or ownership over them. These facts were not only testified to by the appellee herself, but they were established by the testimony of her nurse, Mrs. Senter, who appears in the record as a woman of unimpeachable character, and without interest in the subject-matter of the litigation.

There is in the record on the other side some evidence tending to show declarations on the part of O. D. Lyon that he was hard pressed for money, and of his attempting to borrow small sums from several people; also declarations of appellee, Elizabeth S. Lyon, that she had only a small sum of money;

but these declarations may all be harmonized with the truth of her claim as to the contributions made to her. The declaration made at her sister-in-law's, that she only had \$5, evidently related to the money that she then had in her purse, and had no necessary connection with the fund which she claimed to have been saving for the purpose of purchasing a home. Her statement, that she made little or no money on the children, referred to the exhibition she made of them, after their death, they having been embalmed for this purpose. This evidence can not be permitted to outweigh the positive statements of the disinterested witness, Mrs. Senter, and the evidence of Fred Lyon, the son of O. D. Lyon and appellee. Assuming, then, the truth of this testimony relative to the contributions of strangers to the appellee, it only remains to be determined what her rights were with reference thereto.

Section 2127 of the Kentucky Statutes (the Weissenger act) provides as follows: "Marriage shall give to the husband, during the life of the wife, no estate or interest in the wife's property, real or personal, owned at the time or acquired after marriage. During the existence of the marriage relations the wife shall hold and own all her estate, to her separate and exclusive use, and free from the debts, liabilities or control of her husband."

Section 2128 provides: "A married woman may take, acquire and hold property, real and personal, by gift, devise or descent, or by purchase, and she may, in her own name, as if she were unmarried, sell and dispose of her personal property."

If contributions were made by visitors to Elizabeth S. Lyon under the circumstances detailed, it is clear that, under the statute, it became her separate estate, which she could hold, or, at her pleasure, invest in real property, free from the debts or liabilities of her husband. The question as to whether or not the burden of proof in this action was upon Elizabeth S. Lyon is immaterial. Assuming it to be true, that such burden was upon her, we think that the evidence abundantly sustained the judgment of the chancellor.

Wherefore, the case is affirmed.

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#### MORGAN v. WICKLIFFE.

(Filed March 24, 1908—Not to be reported.)

Husband and wife—Parties to actions—Construction of statutes—This appeal involves the question as to whether a wife, who has joined with her husband in the execution of a mortgage on his land to secure his debt, is a necessary party to an action to enforce said lien. Held—That under section 2135, Kentucky Statutes, where the wife has joined in mortgage with her husband to secure the payment of a debt, she is not entitled to dower in such land, but is only entitled to dower out of the surplus of the proceeds unless they were received or disposed of by the husband in his lifetime. The fact that the wife is not a party to the suit to enforce the lien is immaterial because at the time of the enforcement of the lien she has no present interest in the land which can be sold to satisfy the lien. The plaintiff has no right to the surplus proceeds because his demand has been satisfied when the lien or incumbrance has been discharged by the appropriation of enough of the proceeds of the sale to pay his debt. He is not compelled to look to the application of the surplus proceeds, hence he has no liability for its application. Neither is the purchaser compelled to look to the application of any part of

the purchase money. This rule applies alike to sales made by the husband or by order of court.

Thomas A. Morgan and Lucius P. Little for appellant.

Jep C. Johnson for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, Morgan, executed to appellee Wickliffe a note for the sum of \$2,127.40, and to secure the payment of it executed a mortgage upon a tract of land in Daviess county, Kentucky. The property belonged to Morgan, but his wife joined in the execution of the mortgage. This action was instituted to enforce it, to which the wife was made a party, and was proceeded against as a nonresident. The husband appeared and made a defense to the action. A warning order was made against the wife, but she never answered. The court rendered judgment decreeing a sale of the land to satisfy the mortgage debt, but made no reference to the wife's rights in the land, nor was a bond executed to her as a nonresident under section 410 of the Civil Code of Practice. A reversal is sought upon the ground that such bond was not executed.

The wife was not a necessary party to the action. The effect of the mortgage which she executed was to release her potential right of dower in the land, except the surplus proceeds arising from the sale of the land, if any.

Section 2135, Kentucky Statutes, reads as follows: "The wife shall not be endowed of land sold, in good faith, but not conveyed by the husband before marriage, nor of land sold, in good faith, after marriage, to satisfy a lien or incumbrance created before marriage, or created by deed in which she joined, or to satisfy a lien for the purchase money; but if there is a surplus of the land, or proceeds of the land, after satisfying the lien she may have dower out of such surplus of the proceeds, unless they were received or disposed of by the husband in his lifetime."

In this section it is expressly stated that the wife is not entitled to dower in land which is sold in satisfaction of a lien or incumbrance created before marriage or created by deed in which she joined, except, if there is a surplus of the land, or proceeds of the land, after satisfying the lien, she may have dower out of such surplus of the proceeds, unless they were received or disposed of by the husband in his lifetime.

In *Schweitzer v. Wagner*, 94 Ky., 458, the court had under consideration the construction of the statute above quoted. In that case it appeared that the wife joined in the mortgage; in the proceedings to sell the land she was not made a party; afterwards she brought a suit to have dower assigned her out of the land. It was claimed that she was not a party to the proceeding to enforce the lien, therefore, was entitled to recover dower. The court held that the mortgage in which she joined was a deed within the meaning of the statute; in effect the court held that she, by the mortgage, divested herself of any interest in the land, her interest being in the surplus proceeds which the statute gave her, and only in this if the husband did not dispose of it during his lifetime. In that case the court said: "It is urged by the appellee that by the term 'deed' in this statute is meant 'mortgage,' or rather that the former embraces the latter, and that the appellant having

joined in the mortgage or deed creating the lien, to satisfy which the sale was made, is not endowed of the land. There is much plausibility in this construction. The intention certainly seems to be that if the wife joins in a conveyance creating a lien, and the land so incumbered be sold to satisfy it, she shall not be endowed thereof, but may have compensation out of the surplus, etc. A deed, in the ordinary sense of that term, is not what is meant in the statute, as by it no lien is created against the grantors, to satisfy which a sale of the land can be made. A mortgage of land is a conveyance of it for the purpose of securing the payment of debt. It is a deed creating a lien, and seems to be the very instrument designated in the statute, in which, if the wife joins, she is divested of dower, save in the surplus proceeds of the sale, if one be made to satisfy the lien so created. Such has been the construction of this statute in cases of sales for purchase money. \* \* \* So it would seem if it be sold in good faith, because there is a lien for debt created by deed or mortgage, in which the wife has joined, and with a view to satisfy it, she should not be entitled to dower in the absence of any design to deprive her of her inchoate right. The statute makes no distinction between sales made under an order of court and those made by the owner; and liens for purchase money are placed in the same class with liens created by deed in which the wife joined. She occupies the same relation to the one class as to the other. In neither case has the husband or wife any beneficial interest in the lands not subordinate to the liens."

There is no distinction between a lien for purchase money and a lien created by mortgage or deed. The wife has a potential right of dower in the land in the one case as in the other. In each case it is subordinate to the lien.

In *Melone, &c. v. Armstrong*, 79 Ky., 248, it is said: "This statute evidently contemplated that a sale might be made by the husband, and that he might sell the whole or only so much as would satisfy the lien, but whether sold by the husband, or under the judgment of a court, if the whole be sold bona fide, because there is a lien for the purchase money, and with a view to satisfy it in the manner deemed by the husband to be most beneficial to him, and with no design to deprive the wife of her potential right of dower, she will not be entitled to dower, although less than the whole would have satisfied the lien."

In *Ratcliff v. Mason*, 92 Ky., 190, it was held that where land of the husband is sold in good faith to satisfy a lien for purchase money, the wife is not entitled to dower in the land, although it may have been sold for more than the amount of the lien, and that this is true whether the sale was made directly by the husband or under direction of the court, and it must be regarded as a sale in good faith whether it is made pursuant to a deed or assignment or directly by the husband, as that which a person is legally bound to do can not be said to have been done in bad faith.

It was held in *Johnson v. Cantrell*, 92 Ky., 59, that a widow is not entitled to dower in the land of the husband which has been sold to satisfy a lien for the purchase money.

These opinions relating to a case where land was sold to satisfy a lien for purchase money are identical in principle with the case where a mortgage lien is enforced because the statute is made to apply where sales are made directly



by the husband or under a judgment of court to satisfy a lien or incumbrance, whether it is created by deed or mortgage in which she joins or to satisfy a lien for purchase money. The only difference between the rights of the wife in land which the husband owns and incumbers by mortgage in which she joins, and land which the husband has purchased, and which is incumbered by lien for purchase money, is that the lien for purchase money is created by the operation of law, as it attaches when the land is conveyed and the purchase money remains unpaid, while in the case of a mortgage the potential right of dower exists, except when the wife has waived it by joining in the mortgage.

When either of the two transactions take place the wife's rights in the land are exactly the same, the difference being that in the one case she waives her right and makes it subordinate to the lien, in the other the law determines it and makes it subordinate to the lien. The fact that the wife is not a party to the suit is immaterial, because at the time of the enforcement of the lien she has no present interest in the land which can be sold to satisfy the lien.

In *Tisdale v. Risk*, 7 Bush, 141, the court expressly held that the widow's title can not be extended to the land purchased by a party from a court and conveyed to him by the court without incumbrance of lien in her favor.

The statute was intended to protect purchasers under such circumstances, but the wife loses her dower and compensation therefor in the surplus if it is received or disposed of by the husband in his lifetime. This is true whether the surplus proceeds are received by the husband as a result of a private or judicial sale of the property to satisfy a lien or incumbrance on it. The plaintiff has no right to the surplus proceeds, because his demand has been satisfied when the lien or incumbrance has been discharged by the appropriation of enough of the proceeds of the sale to pay his debt. He is not compelled to look to the application of the surplus proceeds, hence he has no liability for its application. Neither is the purchaser compelled to look to the application of any part of the purchase money. The plaintiff asserted no cause of action against the wife; he did not seek to appropriate her property for the payment of the debt, but only sought to subject the husband's property, in which she, by the mortgage, had waived her potential right of dower, and in effect had consented that the husband might directly sell it, without her joining with him, to satisfy the debt, and what he could do and failed to do the court had a right to do for him. Had the plaintiff given the wife a bond, it could not have protected her against the act of the husband in getting the surplus proceeds, if any. It would have been an idle thing to have executed it.

In this case only so much of the land was ordered sold as was necessary to satisfy the judgment and under which there could be no surplus proceeds, and, of course, no question could arise as to their application. It is a useless thing to make the wife a party to an action because her potential right to dower may never ripen into a dower interest, as she may not survive her husband. One desiring to purchase land at a judicial sale can examine the record to see whether the wife has joined in the deed or mortgage, and made her potential right of dower subordinate to the lien to satisfy which it is being sold. The purchaser must take notice of the condition of the record

with reference to her action. It has been suggested that she should have a right to show whether or not she joined in the mortgage before the land was ordered to be sold. So far as her rights are concerned, that is immaterial. If she has not executed a mortgage and her potential right has ripened into a dower interest, it will then be time enough to show that she did not join in the mortgage waiving it. It is suggested that the husband is interested in having the land bring as much as possible, and that it will bring more if there is a judgment barring her right to dower. As she signed the mortgage, the purchaser is presumed to have examined the record and to have concluded under the opinions of this court that her rights were subordinate to the plaintiff's lien.

If she had filed an answer and successfully shown that she did not execute the mortgage, it would not have helped the husband because the land would have brought less at the sale than it did bring. Doubtless there are cases of other courts which hold the wife is a necessary party to an action to enforce a lien upon the husband's property; they are not based upon a statute as are the opinions of this court. The previous opinion delivered herein is withdrawn.

Judgment is affirmed.

Whole court sitting.

Chief Justice Burnam and Judge O'Rear dissenting.

Dissenting opinion by Judge O'Rear follows above opinion.

Judge O'Rear delivered the following dissenting opinion March 25, 1893:

The petition for rehearing relied upon the cases of *Tisdale v. Risk*, 7 Bush, 141; *Malone v. Armstrong*, 79 Ky., 248; *Ratcliff v. Mason*, 92 Ky., 190; *Johnson v. Cantrill*, 92 Ky., 59.

Those cases were not overlooked on the former consideration of the case, but a reference to them will disclose that every one of them involved a sale of lands to satisfy a purchase money lien. The statute being construed and applied provided that the wife should not be endowed of land of her husband sold in good faith to satisfy a purchase-money lien thereon. (Section 2135, Kentucky Statutes.) Nor is she endowed of land sold by him, but not conveyed before the marriage. No right of hers was or could be affected by the proceedings if either the land had been sold by the husband before the marriage, but not conveyed, nor if it was sold in good faith to satisfy a purchase-money lien, for her right as potential doweress had never attached to the land. However, we apprehend that even in such state of case it would not be improper to join the wife as a party defendant under proper allegations, so that the complete title might be assured to the purchaser. But in the matter of a mortgage in which she has joined, or which purports to be signed by her, the case admits that she had a right in the premises; but asserts that she has divested herself of it by an act which, under the statute, when executed by her before certain officials and under certain formalities, extinguishes her right as against the plaintiff's debt. That is true, but it is no truer than that the husband is by a similar act alone divested of his right in the land as against that debt. Why should not she have her day in court, as well as he, before their rights shall be foreclosed? Perchance she did not sign the mortgage; or that she did so under duress, or by reason of the fraud or deceit of the mortgagee; or she may have been non compos at the time;

or an infant; or she may have executed it for a certain consideration from the mortgagee to her, which had failed. Can it be said that she should be precluded by a judgment, in an action to which she is not a party, from making any such defense?

There is an obvious distinction between one's never having had a title and having conveyed it as pledge or security for a debt. In the first instance, the person may well be ignored. In the second, there is always, under our practice, such an interest as permits the person whose property is to be taken in satisfaction of the debt to be heard and to redeem.

The case of *Helm v. Board*, 24 Ky. Law Rep., 1038, decided on the same day as was this case, was likewise a case where a purchase-money lien had been enforced. The statute gave the wife in that event dower only in the surplus of land or its proceeds at the sale to enforce the lien. *Helm v. Board* merely followed *Tisdale v. Risk*, *supra*, and the other cases cited, and was cited in the opinion in this case as being in harmony with its doctrine.

For these reasons, and those stated in the original opinion, I can not concur in the opinion now filed by the majority of the court in this case.

Chief Justice Burnam concurs in this dissent.

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FARLEY v. GILBERT.

(Filed March 25, 1908—Not to be reported.)

**Schools—Power of superintendent to abolish a district—**This appeal involves the right and power of a county superintendent of schools to abolish a school district and re-establish substantially the same district by a new number so as to deprive the old trustees, who still reside in the same district, of their office. Held—That the power given to the county superintendent of schools, under sections 4427 and 4433, to change districts, does not authorize him to deprive the trustees of their office. Such arbitrary and unlimited power in that officer is not conferred by any section of the statute.

W. F. Hall and Forester & Forester for appellant.

H. C. Clay for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge O'Rear.

This appeal involves the power of the county school superintendent of schools to abolish two adjacent school districts in his county, and immediately re-establish them by different numbers, comprising substantially the same territory, and thereby remove from office the trustees holding in the former district. The power is supposed to be derived from the authority contained in article 7 of chapter 118 of Kentucky Statutes, embraced in sections 4427-4433, inclusive.

Section 4427 provides that school districts shall remain, until altered or abolished pursuant to that chapter, as then described and numbered. Section 4428 looks to uniformity, as far as practicable, of the number of children within each district so as to provide all as near as may be possible with the same facilities for education. It requires that all districts should be made to contain not less than forty-five pupil children, and not more than a

hundred, "except in cases of extreme emergency," and in incorporated towns and cities.

In this case the district in question contained sixty pupil children. By the change it was reduced so as to contain but forty-five. The necessity for the superintendent's action is not shown, but the court will presume that there was a proper reason for it. At the time of the change there were acting trustees whose terms of office had not expired. It was supposed that the change of the districts and the change of the numbers was an abolishment of the old districts, and, therefore, of the offices. The mere alteration of the boundary of a district, by adding territory or taking from it territory would not abolish the district so as to remove its trustees from office, nor could the change of the numbers of the districts have such effect, for if that were so it would be within the legal power of the county superintendent to remove every trustee in his county from office by simply changing the numbers of the districts, or by slight and immaterial alterations of their boundaries, thereby substituting his selection of trustees for that of the patrons and voters of the county. Such an arbitrary and unlimited power in that officer is not conferred by any section of the statute, and ought not to be. It would be out of harmony with the whole spirit of our system of government which looks to local control of such matters by the constituents of the respective localities.

The old trustees in this case do not appear to have been without the territory of their district by the change referred to. The circuit court adjudged that they continued in office, and that their contract bound the school district. In this conclusion we concur, and the judgment is, therefore, affirmed.

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MAYES, &c. v. KARN.

(Filed March 25, 1903.)

Wills—The testator by his will devised his estate to his wife and child jointly, the one-half to his wife being for life only. The rule of construction is that in case of devises to a wife and children the court inclines to that construction which gives the estate to the wife for her life only.

Sweeney, Ellis & Sweeney and W. E. Aud for appellants.

Wilfred Carrico for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Nunn.

On the 15th day of August, 1900, Virginia Mayes, the appellant, filed this suit in the Daviess Circuit Court against appellees, Eva L. Hardwick and J. B. Karn, to obtain a construction of the will of John P. Fuqua, the former husband of appellant.

John P. Fuqua died in 1864. He left surviving him his widow, the appellant, and only one child, Sallie Lee Fuqua, who intermarried with appellee, J. B. Karn, and afterwards died and left one child, appellee, Eva L. Hardwick, the wife of H. S. Hardwick.

The following is the will of John P. Fuqua:

"In the name of God. Amen.

"I, John P. Fuqua, being of sound mind and disposing memory, but being aware of the uncertainty of life and the certainty of death, do make this my last will and testament:

"Item 1st. I bequeath my body to the tomb and my soul to God who gave it.

"Item 2d. It is my will and desire that my wife and children shall be supported from the proceeds or income of my estate, and that the sum of \$1,145, which I have in money, shall be invested in real estate for the benefit of my wife and children.

"Item 3d. Having purchased of my brother, R. C. Fuqua, a tract of 100 acres of land, it is my will that he convey the same to my wife and children.

"Item 4th. It is my will that my wife shall not have the power of disposing of any portion of my estate, but that her support and the education of the children shall be from the income of the estate and from the notes on hand.

"Item 5th. My executor shall have discretion as to any sum or surplus that may be on hand at any time.

"Item 6th. I constitute and appoint my brothers, R. C. Fuqua and William M. Fuqua, executors of this my last will and testament."

It appears from the record that the executors have long since settled their accounts as such, and ceased to act. The only question for the court's consideration is what interest, right or title did the appellant and Sallie Lee Karn, nee Fuqua, take under the will? It appears from the record that the testator left real estate in the city of Owensboro and the 100 acres of land that he purchased from R. C. Fuqua, and the executors purchased 102 acres of land, at about the price of \$4,000, with the cash and notes left by the testator. The lower court construed the will to have force and effect only until his child, Sallie Lee, was educated and arrived at the age of twenty-one years, and then the property to pass by descent under the statute, his widow, the appellant, taking one-third for life, and his daughter, Sallie Lee, taking two-thirds in fee and the other one-third in remainder.

The appellant contends that a proper construction of the will gives to her the whole estate for her natural life, subject only to the support and education of the daughter, Sallie Lee, until she arrived at the age of twenty-one years. We can not concur in either construction. We have been unable to find one word or sentence in the will limiting the force and effect of it to the time of the majority of his daughter, Sallie Lee, or that he intended that after such time that his estate should descend according to the statute. It is the presumption of law that the testator intended that his property should pass by virtue of his will and not by the statute. The authorities referred to by counsel for appellant do not meet the case at bar. The case of *Arnold's Ex'r v. Arnold's Adm'r*, 11 B. M., 81, the language of the testator was in substance this: I give and bequeath unto my beloved wife the farm on which I now reside, containing 800 acres, for and during her natural life, to be by her used for the benefit of, etc.

The case of *Jones, &c. v. Jones*, 93 Ky., 532, the testator used this language: "I give and devise all my property of every kind and description, real, personal and mixed, unto my beloved wife, Nancy M. Jones, to be by

her managed and controlled during her natural life and for the joint benefit of herself and my six children."

The case of *Koenig v. Kraft*, 9 Ky. Law Rep., 946, the testator used this language: "I give and bequeath to my beloved wife, Elizabeth Kraft, all my real, personal and mixed estate of which I may be possessed at the time of my demise for her and her child, Emma Kraft's, sole use and benefit."

In all these cases the whole of the estate is given to the wife for her natural life, to be used by her for the benefit of herself and children. We have not been cited to, and have not been able to find, any case construing a will like the one before us. In *Jarmon on Wills*, 5th edition, section 797, the author uses this language: "A devise of rents and profits or of the income of land passes the land itself, both at law and in equity." In 29 Am. & Eng. Ency. of Law, 1st edition, 404, this language appears: "A devise of rents and profits passes the title to land or encumbers or burdens the title with the use."

In the case before us the testator devised the whole of the proceeds or income of his estate, if necessary for the support of his wife and child and for the education of his child, which, under the ordinary rule of construction, made his wife and child joint tenants of his estate, and, under the authorities cited, passed the estate to them. And but for the 4th clause of the will the wife would own one-half and the daughter the other half of the estate in fee. It appears that under the 4th clause of his will that the testator was of the opinion that by the 2d clause he had devised one-half of his estate to his wife in fee, for he expressly prohibits his wife from disposing of any part of his estate, thereby limiting her half to a life estate. It also appears from the 4th clause that he had failed to make any provision for the education of his daughter, and in this clause encumbers his estate with her education. In our opinion the testator intended by his will to devise his estate to his wife and child jointly, one-half thereof to his wife for life, with remainder to his daughter, the other half in fee to his daughter.

In 9 Ky. Law Rep., 948, the court said: "While gifts and conveyances to a wife and her children under the ordinary rule would create a joint tenancy, the courts, in the construction of such instruments executed by the husband to the wife and children, are always inclined to construe the instrument as an estate for life in the wife, remainder to the children, and where there is any language used in the instrument from which an inference of such an intention appears, the chancellor will decline to follow the ordinary rule making them joint tenants."

In this case the testator willed his estate to his wife and child, and we have been unable to find in the instrument any language from which an inference may be deduced that it was the intention of the testator that his wife should have the whole estate for life and his child to take it in remainder. And we conclude that the ordinary rules of construction should prevail, making them joint tenants, the wife for life in her half.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting.

## ALEXANDER v. PARKS.

(Filed March 25, 1908—Not to be reported.)

Boundary—Parol evidence—Joint use of wall—P. was the owner of a lot on which was erected a brick building and sold it, reserving in the deed the right to attach a building to the lower wall if he should choose to do so, or to sell the right to so build to another. Afterwards D., who was the owner of the lot adjoining the lot of P., sold the lot to appellant, who built a house on this lot, but was previously notified by P. that he owned a three-foot strip on said lot next to the lot he had sold. Appellant erected his building across said strip, but not into the wall of the adjoining building. Appellee instituted this action in ejectment to recover said strip. On the trial it was proven by parol that previous to the sale of said lot by P. he and D. had agreed on the location of the line of the lots, leaving the strip in controversy as belonging to P. The trial resulted in a judgment in favor of P., directing that appellant pay him \$300 for the strip and \$150 for one-half of the wall of the house sold by P. On appeal, Held—That it was error to give judgment for any part of the wall as he had not purchased it or used it. The parol agreement locating the division line was binding on the parties and their vendees. The reservation in the deed of the right to attach a building to the house sold was a reservation for the individual use of P.

Kennedy & Williamson for appellant.

Owens & Burroughs for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Nunn.

On the 7th day of June, 1882, R. M. Parks, the appellee herein, was the sole owner of lot No. 23 in the city of Carlisle, Nicholas county, Kentucky. He was at the same time a member of the firm of Parks, Dorsey & Co., a copartnership composed of the appellee, T. A. Dorsey, M. A. Glenn and A. J. Banta. This firm was the owner of lot No. 26 in said city, which lay in the same block as lot No. 23, and the northern line of lot No. 26 was the southern line of lot No. 23. On this date there was then, as now, standing upon lot No. 23 a brick building, known as the "Handley Building."

On the 7th day of June, 1882, R. M. Parks and wife, by deed, conveyed lot No. 23, or that part covered by a brick building, known as the Handley Building, to Templeman & Mathers. Templeman & Mathers afterwards conveyed the same property, and it finally came to the hands of I. N. Handley, the present owner. In his deed to Templeman & Mathers, Parks inserted this clause, viz.: "The said Parks reserves the right to attach a building to the lower wall of the building herein sold, if he should choose to do so, or to sell the right to so build to another."

Thereafter Parks, Dorsey & Co. conveyed that portion of lot No. 26, which abuts upon the southern boundary of lot No. 23, to the Deposit Bank of Carlisle, Kentucky, and the bank, in July, 1896, conveyed the same portion of lot No. 26 to the appellant, J. M. Alexander, who erected a building on it and extended his building northward to the south wall of the "Handley Building" on lot No. 23, claiming that by reason of the reservation of the right to attach a building to the wall of the "Handley Building," contained in the deed from Parks to Templeman & Mathers, he, as the remote grantee of R. M. Parks, had the right to attach the northern extremity of his build-

ing to the southern wall of the "Handley Building." Before appellant erected his building appellee Parks notified him that he, Parks, owned a three-foot strip of ground lying between the southern wall of the "Handley Building" and the northern margin of appellant's lot No. 26. Notwithstanding this notice appellant erected his building and extended it across this strip, but not into the southern wall of the "Handley Building."

On the 19th day of January, 1901, appellee filed his suit in ejectment against appellant, in which he claimed to be the owner of a strip of two and one-half feet wide, afterwards amended to three feet, and about eighty-one feet long, lying between the northern line of lot No. 26 and the south wall of the "Handley Building" on lot No. 23, and asked judgment for the recovery of the land, and \$300 damages for the detention of it, and all proper relief.

Appellant answered, denying that appellee was the owner of the land in controversy, and claiming it himself. And by an amended answer set out the facts above stated with reference to the reservation contained in the deed from appellee to Templeman & Mathers, and claimed, as the remote grantee, of appellee, he was entitled to attach his wall to the south wall of the "Handley Building."

The affirmative allegations of the answer were controverted.

On the issues thus formed proof was taken, and upon submission of the case for judgment, the case having been transferred to the equity side of the docket by agreement, the court rendered the following judgment: "This cause coming on to be heard, and the court advised, it is adjudged that plaintiff is entitled to recover the strip of land or alleyway in contest in this action; but the defendant having erected a house thereon, it is further adjudged that he pay to plaintiff the sum of \$450, with legal interest from this date, February 1, 1902, until paid, as the value of the property taken, that is, \$300 for the alleyway and \$150, the value of one-half of the wall of the 'Handley Building,' and that plaintiff recover of defendant his costs herein expended, and he may have execution upon this judgment. \* \* \* The defendant, R. M. Parks, is ordered to convey the property in controversy upon the payment to him of the amount of the judgment herein, and the parties are hence dismissed."

From this judgment appellant has appealed. This court is of opinion that the lower court erred in giving judgment against the appellant for \$150, the value of one-half of the wall of the "Handley Building." Under the evidence he had not used it nor purchased it from appellee, and the appellee's pleading showed that he did not claim anything therefor, and the court had no power to enforce a sale thereof. Appellant contends that the true line between lots 23 and 26 is the south line of the "Handley Building;" also that the agreed line, made some two and one-half or three feet south of the "Handley Building," in 1879, by the owners of the two lots, was not binding and was invalid. As to the last proposition of appellant, we differ with him. The testimony shows that in 1879 appellee was the owner of the southern part of lot No. 23, on which was located the "Handley Building." That appellees, Dorsey, Glenn & Banta, were the joint owners of the northern part of lot No. 23 adjoining lot No. 23. These parties desired to, and did, erect a carpenter's shop on the northeast corner of lot No. 26, but before erecting it they met, took measurements and agreed upon the line between



the two lots, which line was about two and one-half or three feet south of the "Handley Building," and ever after that they recognized that as the true line between the two lots.

This agreed line was, and is, binding upon the parties thereto and their vendees, immediate and remote.

The case of Grigsby, &c. v. Combs, &c., 14 Ky. Law Rep., 661, was a case where the parties owned adjoining surveys of land, and they not knowing the true line between them, they verbally agreed that the true division line should be the top or ridge of the mountain between Lot and Second creeks. It was insisted by the appellants in that case that this agreement between the owners of the land was merely in the nature of an exchange of land, it being conceded that the calls of each patent ran over and beyond the ridge onto his neighbor's side, and that this exchange could not be maintained because of the statute of frauds. The court in that case said: "We are of opinion, however, that, both in principle and by authority, an agreement of this nature can be upheld. It is no more a swap of lands than results by reason of agreed corners between neighbors, or agreed division fences, and these amicable arrangements have been sanctioned by repeated adjudications." (8 Bush, 670; 5 Ky. Law Rep., 770; 23 Ky. Law Rep., 297-870; 13 Ky. Law Rep., 516; 16 Ky. Law Rep., 767.)

We do not mean that such an agreement is irrevocable. Any party to the agreement may renounce it, within the proper time, or avoid it by the institution of proper proceedings, by allegation and proof of fraud or mistake, and establish the true line. We are of the opinion that the reservation in the deed from appellee to Templeman & Mathers was a reservation for his individual use, or for the use of his vendee, and there is nothing in the record showing that he has ever parted with the rights secured by this reservation. If the proof is correct with reference to the agreed line referred to, then the appellee is entitled to recover this strip of land, together with the damages for its detention.

Wherefore, the judgment of the lower court is reversed and the cause remanded, with directions to grant appellant a new trial, and for further proceedings consistent herewith.

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MERSMAN v. WORTHINGTON'S EX'ORS.

(Filed March 25, 1903—Not to be reported.)

Wills—Powers of executors—W., by the terms of his will, directed and empowered his executors to sell, lease or otherwise dispose of his estate for the purpose of paying his debts and for the benefit of the estate. Litigation having arisen between the heirs and devisees a compromise was made, but the executors were authorized to continue in the management of the estate. A debt having been asserted against the estate, the executors sold all the real estate at public sale, and appellant became the purchaser of one of the lots sold, but refused to complete his purchase, denying the authority of the executors to sell the property or vest a perfect title to same. Held—That the executors had full power to sell and convey said property, and their power under the will was not impaired by the contract of compromise.

W. A. Price for appellant.

John Bryan for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

The will of Henry Worthington was probated in the Kenton County Court on the 12th day of November, 1896. It disposed of an estate, which amounted in the aggregate to about \$725,000, but which was charged with liabilities of about \$408,000. The bulk of the estate, after the payment of the debts due by intestate, was devised to George G. Hamilton, as trustee for Mrs. Lillie W. Stewart and Mattie Worthington, daughters of the deceased, and Roberta Hamilton, a granddaughter of the deceased, with a large special bequest to H. S. Worthington, a son of the deceased. By the 14th clause of the will George G. and Carrol Hamilton were appointed executors, with full power to sell, convey, exchange, rent, lease, build houses, etc., and do all and everything which, in their opinion, might be proper for the benefit of the estate for a period of ten years, but were required at least once a year to make full and complete statements of their accounts.

A sharp controversy, which promised interminable litigation, soon arose between the devisees and the executors, and Mattie Worthington died soon after her father. On the 24th day of May, 1896, an agreement was entered into between the executors, devisees and heirs at law of Henry Worthington, in which these controversies were compromised and settled, it being, however, expressly stipulated that the executors named in the will were to administer the estate so as to pay the debts as soon as practicable, and their power to sell and convey the real and personal estate was continued in full force until they had made provision for the payment of the indebtedness of the decedent. Under this agreement the executors reduced to cash the bulk of the personal estate left by decedent, and appropriated the proceeds to the payment of his debts. They also sold various tracts of real estate for the same purpose. On the 27th of September, 1903, the executors of Rachel S. Gaff instituted a suit in the Kenton Circuit Court against the executors, and alleged that their intestate was a creditor of the estate, and asked that a settlement thereof be had in that proceeding. After the institution of this suit the plaintiffs, as executors, advertised and sold at public outcry to the highest bidder all the real property of the decedent situated in the city of Covington, and among other pieces of property there was sold to the appellant, J. H. Mersman, a parcel of ground known as the Casey property, consisting of a three-story brick building, fronting on the south side of Park Place and two double brick stores, situated on the southeast corner of Court avenue and Park Place, and a frame livery stable situated on the northeast corner of Fourth and Court avenue, the entire property being 63 feet on Park Place and 153 feet on Fourth street, at the price of \$5,800, of which one-third was to be paid in cash, and the balance in one and two years, with 6 per cent. interest from date. The contract of sale was reduced to writing and signed by the parties. The defendant, however, refused to take the property, or to comply with the contract of purchase, upon the ground that the executors had no power to sell and convey the property after the compromise agreement of May, 1896, and also because of the pendency of the suit brought by the executors of Mrs. Gaff. Thereupon appellees instituted this suit for a

specific compliance with the terms of the contract of sale. It was adjudged by the chancellor that Geo. G. and J. Carroll Hamilton, as executors and trustees of and under the will of Henry Worthington, had the right and power to sell and convey all the right, title and interest in and to the real estate, and defendant appeals. To pay off and discharge the large indebtedness due by testator without unduly sacrificing it required good judgment, time and opportunity, and testator fully realized this fact and it was also understood by the devisees at the time of the compromise. This was manifestly the reason why it was expressly stipulated in that compromise and the judgment rendered pursuant thereto that the executors were to continue to wind up the estate and to pay off the indebtedness, and to enable them to accomplish this their power to sell and convey the real and personal property, provided for in the will, was continued in full force. Nor do we think that this power was affected by the mere pendency of the suit of Gaff's executor against them. If they had refused to discharge their duty, or had unduly procrastinated the payment of debts due creditors, the estate could have been taken out of their hands and administered through other agencies. But in this case no steps looking to such a course had been taken by the court and no creditor has complained. The action of the executors in advertising the sale of the real estate secured more speedily the relief sought by Mrs. Gaff's suit than could have been attained in any other way. We, therefore, conclude that the defendants, as executors of H. Worthington, had the power to sell and convey the real estate in question under the will of testator and convey the fee-simple title to the property bought by appellant.

Judgment affirmed.

Whole court sitting, except Judge O'Rear.

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MORGAN v. COMMONWEALTH.

(Filed March 25, 1903—Not to be reported.)

Criminal law—Evidence—On cross-examination of appellant, who offered herself as a witness on her trial for a felony, she was asked if she was not a daughter of old 'Squire Spalding and the sister of this notorious Mary Lou Spalding, and if she had not been convicted and sentenced to the penitentiary for a similar offense to that for which she was being tried. Held—That these were proper subjects of inquiry, but the Commonwealth's attorney should not have used the term notorious. It was error to permit a witness to testify that she was a notorious blackmailer and thief, and it was error to permit witness to state that "the whole push is bad." It was also error to permit witness to testify that her business was "doing everybody she can."

C. J. Pratt and M. R. Todd for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, on her trial under a charge of felony, offered herself as a witness in her own behalf. She was asked on cross-examination if she was not the daughter of old 'Squire Spalding and the sister of "this notorious Mary Lou Spalding," to which she was, over objection, required to answer. She was also asked if she had not been convicted and sentenced to the peniten-

tiary for a similar offense to that for which she was being tried. The court is of opinion that it was competent to cross-examine this witness on the points above named, except that the Commonwealth attorney should not have used the expression "notorious" in describing Mary Lou Spalding.

A witness for the Commonwealth, introduced for the purpose of impeaching appellant, was permitted, over her objection, to state that she was a notorious blackmailer and thief, and in answer to the question "she is a daughter of 'Squire Spalding and the sister of Mary Lou Spalding, is she not?" answered: "Yes; the whole push is bad." In answer to the question what business appellant was engaged in he answered, "doing everybody she can."

All the foregoing answers were irrelevant and improper, and the court erred to the prejudice of appellant in suffering them to be considered by the jury. (*Welsh v. Commonwealth*, 23 Ky. Law Rep., 151; *Howard v. Commonwealth*, 22 Ky. Law Rep., 1845.)

For the errors indicated the judgment is reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

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ASHER, &c. v. HOWARD.

(Filed March 26, 1908—Not to be reported.)

A. G. Patterson, W. S. Pryor and Wm. Low for appellants.

Cook & Jones for appellee.

Appeal from Bell Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

The calls of the older survey owned by Maria Mott Davis are as follows: "Beginning on Crank's creek, on two beeches and two sugar trees, beginning corner to said Smith 1,500-acre survey; thence S. 70 W. 664 poles to three beeches, beginning corner to Smith's 600-acre survey; thence S. 28 W. 400 poles to a stake on the top of the Cumberland mountain; thence S. 60 W. 8,320 poles to a stake near Cumberland Gap; thence N. 15 E. 3,200 poles to a stake; thence N. 50 E. 8,820 poles to a stake; thence S. 5 W. 3,150 poles to the beginning."

The beginning corner is undisputed, and the second and third corners are also established without trouble. But when we run from the third corner by the patent call "S. 60 W. 8,320 poles," it takes us out across the State of Virginia and stops in the State of Tennessee seven miles from Cumberland Gap. The patent calls for the land in the county of Harlan, Kentucky. It also calls for the corner as a stake near Cumberland Gap. We know, therefore, that the point in Tennessee, seven miles from Cumberland Gap, can not be the patent corner. But if we locate the corner at Cumberland Gap, or near it on the State line, and then run out the other calls of the patent from that corner, it takes in a large number of older grants, including the county seat of the county, and the town of Harlan. Besides, the last line of the patent has in this event to be run twice as long as it calls for to make it close.

On the other hand, if we start at the beginning corner of the patent and reverse its calls, stopping the fourth line when we reach the State line near

Cumberland Gap and then run with the State line to the stake on top of the Cumberland mountain, the patent will close; and as one line of a patent is entitled to as much regard ordinarily as another, whether the patent should be run out in this manner or in the manner first indicated would depend upon the evidence that might be adduced as to its actual location. This case was not prepared by appellants with a view to locating the patent or furnishing the court with any intelligent data to pass upon the question. Appellee, B. F. Howard, testified as a witness that the 350 acres in controversy lies within the boundary of the older patent, and while he has never seen it surveyed, he seems to be familiar with the general geography of the country, and bases his testimony on this knowledge and the length of the patent calls. He introduced as a witness on his behalf L. K. Rice, who had never surveyed the patent himself, but was present as a chainman when it was surveyed by Gen. Duffield. He seems simply to have carried the chain on that survey and to know little more about it. He testified that if the patent is run out in the manner first indicated it will include all the Howard survey, and if the calls of the patent are reversed and the patent is run out in the second way above indicated it is a close question, and he is unable to say whether it will include or not the 350 acres in controversy. Appellants took no testimony as to the actual location of the patent, or as to how the lines will run if surveyed in either manner; or as to what land the patent includes. The clear equity of the case is with appellee. The entire conduct of the parties from the beginning to the end tends to sustain his statement that the land in controversy lies within the senior grant, and without committing ourselves in any way as to the proper location of this patent on other and better evidence, we simply decline to disturb the chancellor's judgment under the facts of this case.

The petition for rehearing is, therefore, overruled.

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LOUISVILLE, HENDERSON & ST. LOUIS RY. CO. v. McCUNE.

(Filed March 25, 1903—Not to be reported.)

Helm, Bruce & Helm and Chapeze Wathen for appellant.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Response to petition for rehearing per curiam:

The second instruction referred to in the opinion, wherein the jury were permitted "to consider the expenses incurred for medical or surgical treatment," was error as a matter of law, for the reason that it was not pleaded. But what we held was that the error was a harmless one, as frequently occurs in jury trials, and which this court, by express mandate of the statute, (section 135, Code) must disregard. We concluded that it was harmless because, first, it only authorized the jury to consider such expenses as had been incurred; and as there was no evidence of any such expense it was not at all likely that the jury did include compensation therefor in their verdict; second, the damages found by the jury, under the facts shown in this case, were no more than adequate compensation for appellee's injuries and loss of time,

without reference to medical expenses. If the verdict had found any sum suggestive that the jury had been influenced by the consideration of probable medical bills, we would not have hesitated to award a new trial. Counsel misunderstand the court if they infer that we hold that an "inadvertance" of the trial court relieves its errors of their effect in law.

The petition is overruled.

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JACOB v. CLARK, &c.

(Filed March 25, 1908.)

Parties to actions—Gaming—H., as a committee for Clark, a lunatic, recovered a judgment on notes aggregating \$1,000 against Cooke. The defense made was payment, and Cooke prosecuted an appeal and executed a supersedeas bond with A. and B. as sureties. The judgment was affirmed and a suit was instituted on the bond, to which it was urged as a defense that the notes were given for a gaming consideration. This defense was adjudged insufficient, and judgment against A. was finally rendered for the amount of the debt, interest and costs. A. paid the debt to H., the committee. Appellant afterwards instituted this action under sections 1956-1958, Kentucky Statutes, to recover treble the amount of the notes. Held—That the petition was defective as it did not allege that the gaming transaction took place in this State, and in the absence of such allegation it will be presumed that said notes were executed in some State where the same were legal. Under the statute the informer can recover only of the "winner" in a gaming transaction, and the winner must have received or collected the money or property won by him. It is not alleged that Clark ever collected of Cooke, or any one else, the sum, or any part thereof, represented by the notes. The money paid H. was received by him as a fiduciary, and by judgment of court. Neither the notes nor judgment were ever merged in the supersedeas bond. The stay of proceedings on the judgment constituted a valid consideration for the bond as the surety on the supersedeas bond could not raise the objection that the notes on which judgment was entered were executed for a gaming consideration. The informer can not raise such question.

C. B. Seymour, A. E. Willson and M. B. Gifford for appellant.

Simrall & Doolan for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Settle.

One W. W. Hill, as committee for William Clark, a lunatic, recovered judgment in the Jefferson Circuit Court (Law and Equity division) against J. Esten Cooke on two promissory notes aggregating \$1,000. Cooke made defense on the ground of payment, but judgment going against him, he appealed to this court, in doing which he executed a supersedeas bond upon which R. T. Jacob and Mary F. Cooke became his sureties. Upon the appeal this court reversed the judgment of the lower court because of an error in the matter of interest allowed, but remanded the case, with directions to the lower court to correct the error, which left the judgment in other respects as originally entered. After the correction of the judgment in the lower court execution was issued thereon and returned "no property found." Hill, as committee of Clark, then brought suit upon the supersedeas bond against the sureties therein, and defense was interposed by R. T. Jacob upon the ground

that the notes for which the judgment was rendered against Cooke in the first suit had been given for a gaming consideration, which rendered them, as well as the judgment into which they had been merged, void.

A demurrer to Jacob's answer was sustained by the lower court and judgment then went against him for the amount due on the supersedeas bond. From that judgment an appeal was prosecuted by Jacob, but the judgment of the lower court was affirmed by this court in an opinion which is reported in 23 Ky. Law Rep., 1529. Jacob thereupon paid the judgment in full, with costs. Something over six months after such payment one W. J. Jacob, a stranger, brought suit against W. W. Hill, as committee of Wm. Clark, to recover three times the amount of the notes which Cooke had executed to Clark. A demurrer was filed to the petition by Clark's committee, which was sustained by the lower court, and Jacob refusing to plead further, his petition was dismissed, from which judgment this appeal was prosecuted.

This court, on December 11, 1901, reversed the judgment of the lower court in a majority opinion which, on June 14, 1902, was withdrawn, and the judgment of reversal set aside, and the court thereupon ordered a reargument of the case, which reargument took place on February 4 of the present term. The case is, therefore, again before us for adjudication.

The action was instituted under sections 1956 and 1958 of the Kentucky Statutes, which are as follows:

"Section 1956. If any person shall lose to another at one time, or within twenty-four hours, \$5 or more, or property or other thing of that value, and shall pay, transfer or deliver the same, such loser or any creditor of his may recover the same, or the value thereof, from the winner, or any transferee of the winner, having notice of the consideration, by suit brought within five years after the payment, transfer or delivery. \* \* \*

"Section 1958. If any such loser, or his creditor, does not sue for the money or thing lost within six months after its payment or delivery, and prosecute the suit to recover with due diligence, any other person may sue the winner and recover treble the amount of value of the money or thing lost, if suit be so brought within five years from the delivery or payment."

The action here allowed is in the nature of a penalty for a violation of the law, otherwise the legislature would have had no constitutional power to enact the statute which authorizes it. That body may not take private property for private use except by way of punishment for an offense. All gaming statutes are necessarily penal, and the one under which appellant seeks a recovery in this case is highly so. It is, therefore, to be strictly construed, especially when its harsh provisions are invoked by a mere stranger and informer to enforce a penalty against the estate of a lunatic who is as helpless as if he was dead.

We find a deliverance of this court made as far back as 1881 which announced the rule of construction herein expressed. We refer to the case of Greathouse v. Throckmorton, 7 J. J. M., 28, in which Chief Justice Robertson said: "We can not think that any of the statutes against gaming can be made available to the plaintiff in error. These statutes have hitherto been, and should ever be, construed strictly. Such was the judicial interpretation of the statutes of Charles II and of Anne of England, and the Statute of

Virginia and of this State have never been constructively extended beyond their direct and obvious import." \* \* \*

We are clearly of opinion that the petition of appellant is defective and insufficient, in that it fails to aver that the alleged gaming transactions between Cooke and Clark, out of which the execution of the notes resulted, occurred in this State, nor is it alleged that the notes were executed or delivered in this State. We quite agree with counsel for appellee that these omissions were not unintentional, in view of the refusal of appellant to employ the necessary averments when his attention was called to these defects by appellee's motion to make the petition more specific. The statute *supra* is only operative in Kentucky, and the extraordinary right of action conferred by it can only be applied to gaming transactions occurring within the territorial limits embraced by the terms of the statute.

The law has been so held by this court in the case of *Martin v. Richardson*, 91 Ky., 183, which was an action to recover a lottery ticket which had been purchased by Richardson of Martin, as the law of this State then, as now, forbade the sale or purchase of lottery tickets. Martin relied upon the illegality of the sale of the ticket in controversy as a defense to the action, but failed to allege in his answer that the ticket had been bought in Kentucky. Upon these facts this court said: "We must assume, in the absence of anything to the contrary, that this purchase or exchange of ticket No. 93,262 occurred in some place where it was legal and lawful to purchase or exchange it."

So we conclude that it must be taken as true, in the absence of an averment in the petition to the contrary, that the transaction by reason of which the notes held by Clark upon Cooke were executed occurred at a place where the law would have permitted the enforcement of their payment, and that the legality of the transactions carried into the notes will be presumed. Certainly a recovery will not be allowed in a purely penal action unless every fact essential to such recovery be alleged and proved with the same particularity that would be required in a proceeding by indictment or information, except that in a civil action the plaintiff will not be required to make out his case to the exclusion of a reasonable doubt, as in a criminal prosecution. (Ency. Pleading and Practice, volume 1, page 248; *Manz v. St. Louis, &c., Ry. Co.*, 87 Mo., 278; *Cole v. Smith*, 4 Johnson, N. Y., 108.)

Under the statute *supra* the informer can recover only of the winner in a gaming transaction, and the winner must have received or collected the money or property won by him; until he has done so he does not become liable to the informer, or any one else, in an action for reimbursement, or to recover the statutory penalty. The fact, if it be one, that the notes in question were taken for gaming debts which Clark had won of Cooke, did not make the former liable in an action brought by the informer. In order to constitute the offense for which the penalty may be exacted under the statute, it is necessary that the winner must have collected the money or received the property from the loser.

It is not alleged in the petition, or claimed in argument, that Clark ever collected of Cooke, or any one else, the sum, or any part thereof, represented by the notes. What is true of Clark is likewise true of his committee, Hill, who took no part in the games of chance alleged to have been played. The



money paid Hill was received by him as a fiduciary, and by judgment of the lower court, and this court as well, he was bound to take the money as he was not the winner of it. The statute gives the informer no right of action against him.

We are also of opinion that no cause of action exists in appellant's behalf against Hill as committee of Clark because of the payment by R. T. Jacob of the amount due on the supersedeas bond. It is not alleged in the petition of appellant that Cooke has paid any part of the notes given by him to Clark, or the judgment rendered against him thereon. Neither notes nor judgment were ever merged in the supersedeas bond, and they constituted no part of the consideration of the bond. The bond was based upon an entirely different consideration. It was given solely to stay proceedings on the judgment of the lower court pending the appeal, and was executed nearly twenty years after the execution of the notes. By the execution of the bond R. T. Jacob did not in any sense become a party to the original notes or their consideration, nor did the supersedeas bond merge the judgment against Cooke, or take the place of it as a replevin bond. (*Hughes v. Hardesty*, 18 Bush, 367.)

In the suit which Hill, as committee of Clark, brought against R. T. Jacob on the supersedeas bond this court held that though the notes executed by Cooke to Clark may have been given for a gaming consideration, yet the judgment rendered on them was not void, nor was the supersedeas bond void, and that the stay of proceedings on the judgment constituted a valid consideration for the bond, and so R. T. Jacob was compelled to pay it by the judgment of the lower court and of this court, not because he was bound in any way on the notes, but because his bond was his own obligation, and it imposed a liability independent of the notes, notwithstanding the vicious and illegal consideration for which the notes were given. So it is clear that the payment made by R. T. Jacob in satisfaction of the supersedeas bond was not money paid for a gaming consideration at all; neither he nor Cooke has ever paid any money upon any of the transactions embraced by sections 1956-1958 of the statute supra.

¶ All that Cooke ever lost to Clark was his two notes, and they were given to Clark twenty years before this suit was brought. If the right ever existed in any one to sue for and recover these notes, or their value, that right was barred by limitation more than fifteen years before this suit was brought. This court has heretofore held that R. T. Jacob could not go behind the judgment rendered against Cooke, to show that the notes were given for a gaming consideration, and we are unable to see why a stranger and informer, under the facts of this case, should be permitted to do so.

For the reasons given the judgment of the lower court is affirmed.

Whole court sitting.

2124 C., ST. L., & C., RY. CO., & C. V. COMMONWEALTH.

CHICAGO, ST. LOUIS & NEW ORLEANS RY. CO., & C. V. COMMONWEALTH, & C.

(Filed March 25, 1903.)

1. Taxation—Assessment of franchises—Statute of limitation—This proceeding was instituted in the county court by the auditor's agent to have assessed as omitted property for 1893 to 1899, inclusive, the franchise of the bridge crossing the Ohio river near Cairo, which was built by the Chicago, St. Louis & New Orleans Ry. Co., and was leased to the Illinois Central Ry. Co. It is insisted that this bridge has a franchise value separable from the general franchise of the railway company which built it. Held—That the bridge has no franchise value separate from the franchise of the railway. The entire earnings and earning capacity of this bridge was considered in arriving at the franchise value of the railway, and the taxes thereon paid. It is insisted that the taxes for 1893 and 1894 are barred by the five-year statute of limitation. Held—That under sections 2523, 2515, 4021, 469, Kentucky Statutes, also under the act of 1890, the right to assess omitted property is limited to five years from the time when it should have been assessed. The judgment assessing the franchise value of the bridge for the years 1893 and 1894 is reversed, and the judgment refusing to assess same for the years 1895, 1896, 1897, 1898 and 1899 is affirmed. It is the policy of the law to put at rest stale claims of whatever character. This applies to taxes.

2. Removal of action to Federal court—Appellant filed its petition and bond in the county court, and asked that the case be removed to the Federal court on the ground of diverse citizenship, as authorized by the act of August 13, 1888, which motion was overruled. Held—That said act applies only where a citizen of a State is a party, and not where the State is a party. The State is the real party in interest in this action. Besides, it was not such an action as might have been brought originally in the United States Circuit Court, and was, therefore, an action of which that tribunal has no jurisdiction.

J. M. Dickinson, Pirtle & Trabue and Corbett & White for appellants.

John W. Ray for appellees.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge O'Rear.

This proceeding was instituted June, 1900, in the Ballard County Court by A. L. Shelbourne, auditor's agent, on behalf of the Commonwealth, against the Chicago, St. Louis & New Orleans Ry. Co., and its lessee, the Illinois Central R. R. Co., to cause the assessment, as omitted property, of the franchise of the first-named railway company represented by the net value of the intangible property in its bridge across the Ohio river near Cairo, and known as the Cairo bridge. The taxes claimed were for the years 1893 to 1899, inclusive.

By an act of the legislature of 1885-6 (chapter 446) the railroad companies named were authorized to build the bridge. It was done by the Chicago, St. Louis & New Orleans Ry. Co., and became part of its line of road, the whole of which is being operated by the Illinois Central R. R. Co. under a 400-year lease. It is the contention of appellee that this bridge has a franchise value separable from the general franchise of the railway company. We think not. When a bridge is a part of one system, built and operated under one charter, and owned by the same company as the railway line with

which it is connected, it does not have a separate franchise value for the purpose of assessment for taxation. The whole scheme of such assessment under our statute contemplates the valuation of the franchises of railway companies as entireties. It was shown by the facts in this case that the State Board of Assessment and Valuation had included the earning capacity and earnings of this bridge, together with appellant's other property and earnings, in arriving at the valuation placed upon the franchises of the companies for each of the years since 1895 to 1899, inclusive. The record of the board's action was kept in a uniform manner during those years, and the taxes levied upon the valuation of the franchises, fixed as stated, were paid to the State by appellants before this proceeding was begun. Under the authority of *Coulter, Auditor v. Louisville Bridge Co.*, 24 Ky. Law Rep., 809, we hold that the action of the board was conclusive, and after the expiration of the time for hearing complaints for reduction, was binding alike upon the State and the railway companies. For the years 1896 and 1894 the plea of the statute of limitation interposed by appellants must prevail. The act of May 23, 1890, held by this court in *Louisville Water Co. v. Commonwealth*, 18 Ky. Law Rep., 2, and *Commonwealth v. City of Louisville*, 20 Ky. Law Rep., 898, to be yet in force, and not repealed by the chapter on revenue and taxation, adopted November 11, 1892, is cited in argument by appellants as being applicable in part. It is as follows: "That the right and power is hereby vested in the Commonwealth to institute and maintain its action to recover all taxes which may heretofore have accrued to the Commonwealth, or which may hereafter accrue, and which can not be collected by the ordinary methods of distraint and sale. Said suits may be instituted in courts of equity jurisdiction for the purpose of enforcing the State's lien on property which, for any reason, can not be sold, or for the purpose of reaching intangible property which can not be otherwise reached; but no action shall be instituted or maintained under the provisions of this act upon any claims for taxes that have been assessed, or might have been assessed, more than five years before the commencement of the same."

Railroad and other public service property had been held not subject to ordinary distraint for taxes. (*Louisville Water Co. v. Commonwealth*, 89 Ky., 244; *Louisville Water Co. v. Hamilton*, 81 Ky., 517; *Clark v. Louisville Water Co.*, 90 Ky., 515.) It was to meet this precise condition that the act quoted was enacted.

This act really deals more directly with actions to recover taxes, where the assessment and levy have been made. Although it says that no action shall be instituted or maintained under the provisions of the act upon any claim for taxes which have been, or might have been, assessed more than five years before, the words "might have been assessed" is merely a recognition of the limitation elsewhere provided by the statute law of the State. What the legislature was providing by the act just quoted was a means of coercing the payment of taxes by that class of property not subject to distraint. It is the policy of the law to put at rest stale demands of whatever character. This applies as well to taxes as to other matters.

On the subject of limitations generally it is declared by section 2523, Kentucky Statutes: "The limitations prescribed in this chapter shall apply to actions brought by or in the name of the Commonwealth, in the same man-

ner as to actions by private persons, except where a different time is prescribed by some other chapter in this revision."

One of the actions mentioned in that chapter is section 2515: "An action upon a liability created by statute, when no other time is fixed by the statute creating the liability."

By section 469, Kentucky Statutes, in the chapter on "Construction of Statutes," it is provided: "The term 'action,' when used in this revision, shall be construed to include all proceedings in any court of this Commonwealth."

By section 4021 it is provided: "The Commonwealth, and each county, incorporated city, town and taxing district shall have a lien on the property assessed for the taxes due them respectively, which shall not be defeated by gift, devise, sale, alienation, or any means whatever, unless the gift, devise, sale or alienation shall have been made for more than five years before the institution of proceedings to enforce the lien, and nothing shall be exempt from levy and sale for taxes and cost incident to the sale. When any lands or improvements shall not be assessed in any one year, it may be assessed retrospectively, in the manner provided by law for that year, at any time not later than five years thereafter; but the lien thereby accruing shall not prejudice the rights of purchasers acquired in the meantime."

The section of the General Statutes (the act of 1886) of which section 4021 is a re-enactment of, and amendment to, reads: "The Commonwealth shall have a lien for all taxes, and the counties for the county levy and other taxes due the county, on the property assessed, and on all other property of each person, which shall not be defeated by gift, devise, sales, alienation, or by any means whatever, provided the lien herein provided for shall not exist longer than five years." (Chapter 92, article 1, section 2, General Statutes.)

It will be noted that the subject in hand and under treatment by the sections last quoted is the one of the lien of the taxing district, or State, even after the property has passed into the hands of others than the person owning it when it should have been assessed. The last clause of section 4021, referring to the power of the State to assess omitted property for back taxes for five years, must be understood as referring to that class of property. That section recognizes, as does the act of 1890, that the right to assess omitted property is limited to five years from the time when it should have been assessed. This limitation is found in sections 2523, 2515 and 469 of Kentucky Statutes, above quoted.

The cases of Louisville & Nashville R. R. Co. v. Commonwealth, 1 Bush, 250; McAllister's Ex'or v. Commonwealth, 6 Bush, 581; Baldwin v. Shine, 84 Ky., 502; and Louisville & Nashville R. R. Co. v. Commonwealth, 85 Ky., 211, arose under statutes having different provisions, and when the policy of the State appears to have been different from that embodied in our present statutes. In the case of Louisville and Jeffersonville Ferry Co. v. Commonwealth, 24 Ky. Law Rep., 1339, the question of the limitation applicable to proceedings to list omitted property was not involved, and, of course, was not intended to be decided.

We are of opinion that a proceeding to compel a taxpayer to list property for any one year is such a proceeding as is embraced by the statute *supra*, and if not begun in the proper court within five years from the time when

the action could first have been instituted the State is barred of her right to thereafter maintain the action. A question of practice is presented upon the record and argued that we deem of importance to notice. After the service of the summons on appellant they tendered their petition and bond to the county court, and moved to transfer the proceeding to the circuit court of the United States for the Western District of Kentucky upon an allegation of diverse citizenship. It was asserted that the only necessary and actual parties to the litigation were Shelbourne, auditor's agent, a citizen of Kentucky, on the one side, and the Illinois Central R. R. Co., a citizen of the State of Illinois, upon the other. The value of the matter in dispute was over \$2,000. We are of opinion that the act of congress providing for the removal of causes from a State to the Federal court does not apply to this case.

The Commonwealth of Kentucky is the real party plaintiff, the only one beneficially interested as plaintiff. A State is not a "citizen," and actions by it are not removable under the act of August 18, 1888. (*Stone v. South Carolina*, 117 U. S., 430; *In re Ayres*, 123 U. S., 448; *Ferguson v. Ross*, 83 Fed., 161; 8 L. R. A., 822; *Postal Teleg. Cable Co. v. Alabama*, 155 U. S., 482.)

Furthermore, this proceeding was in the county court, a tribunal exercising ministerial, as well as quasi judicial, functions in the matter of listing omitted property for assessment. (*Baldwin v. Shine*, 84 Ky., 502; *Baldwin v. Hewitt*, 88 Ky., 673.) It was not such an action as might have been brought originally in the United States Circuit Court, and was, therefore, an action of which that tribunal has not jurisdiction. The motion to transfer was properly overruled. The judgment of the county and of the circuit courts assessing the franchise value of appellant's bridge for the years 1893 and 1894 is reversed. The cross appeal of the Commonwealth and of Shelbourne, auditor's agent, because of the refusal of the courts to list the property for the years 1895, 1896, 1897, 1898 and 1899, is affirmed.

The cause is remanded, with directions to dismiss the proceeding.

Whole court sitting.

#### ILLINOIS CENTRAL R. R. CO. v. WALDROP.

(Filed March 25, 1903—Not to be reported.)

**Railroads—Negligence**—The county road leading from Mayfield to Pryorsburg crosses the track of appellant's road twice, making a considerable crook between the two crossings. For many years persons, to shorten the distance of travel, used the right of way of the railroad. In May, 1900, appellant, for the purpose of stopping this travel, built a fence across the road some distance from either crossing. It was visible from one crossing, but not from both. The company put up two or three wires across the right of way; also a post to support same near one of these crossings, which prevented travelers from passing. These wires remained in place until September following, and were then displaced and knocked down near the ground, where they remained until December following, when appellee was riding over the wires on horseback, was thrown and greatly injured, for which he sued and recovered damages from appellant. On appeal, Held—That although the company may have permitted travelers to use its right of way, yet the public acquired no rights in same, but it was the duty of said company, if it desired to re-

voke this license, to erect such obstruction as would notify the public of said revocation; but if this notice existed for a sufficient time to inform the public of same, it was not under obligation to keep such barricade in repair in order to prevent travelers from being injured by disregarding same. In this case the barricade was continued for such a time as to give notice to the public of the revocation of the passway over the right of way, and the company owed no duty to appellee or the public to keep up said wires, and appellee was not entitled to recover damages for his injuries received.

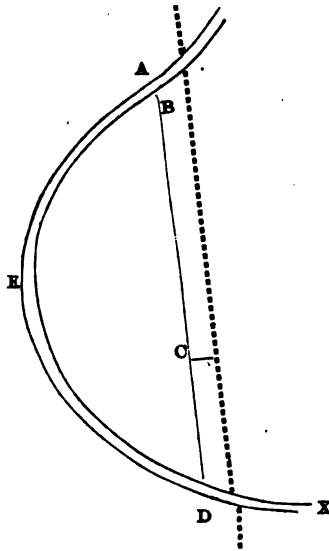
J. M. Dickerson, Pirtle & Trabue and Robertson & Thomas for appellant.

J. C. Speight and M. B. Hollfield for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Hobson.

The county road leading from Mayfield to Pryorsburg crosses the track of the Illinois Central R. R. Co. about a half mile from Pryorsburg in a direct line and makes a considerable crook to the west. To avoid this, for many years, persons drove along the right of way of the railroad from the point where the road crossed the track to the point where it struck the limits of Pryorsburg. The situation is illustrated by the following map:



The dotted line indicates the railroad track; the curved line, A. E. X. the county road; the straight line, B. C. D. the traveled passway over the railroad right of way. The proof for appellant showed these facts: "With a view to stop this passway the railroad company, in May, 1900, erected a substantial fence across it at the point C., built of wire, with plank at the top. The fence was plainly visible to those entering the passway at the south, but it could not be seen so plainly by those entering it at the north end, although it could be seen by one on horseback if he looked, the distance being something like

a half mile. To keep people from going down in there the company at the same time placed two wires across the passway at the point B., near the north end. One of the wires was fastened to the garden fence of the adjoining proprietor and ran across the passway to a telegraph pole and was fastened to it. This wire was four feet high, and in the passway a small cedar post was planted three feet deep and the wire was also fastened to it. The distance from the telegraph pole to the post was sixteen feet, and from the post to the garden fence was also about sixteen feet. Another wire was then fastened to the telegraph pole about two feet lower down, and also fastened to the post in the passway. The end of this wire was not fastened to the fence, but the bale of wire was just dropped over the fence on the idea that the weight of the bale would hold it at that end. The top wire was fastened with a staple and the other with a wire nail, No. 6 or 8, driven in and bent over to make a kind of staple out of it. The wires remained up as they were fastened until some time in September, 1900; after this, from the trespassing of stock or some other cause, both the wires were mashed down near the ground and persons occasionally, not knowing that the passway was closed, drove over them and when they got further down and saw the fence at C., turned around and came back. In this way the wires were mashed pretty close to the ground; a cow could step over them without trouble.

The proof for appellant showed that the distance from the cedar post to the fence was thirty feet or more; that a nail was driven into the post straight and the wire was simply laid upon it; and that by reason of a rise in the ground the fence at C. could not be seen from B. It also showed that on December 22 appellee, who was an officer riding in pursuit of a fugitive whom he wished to arrest, undertook to pass along the passway from A. to D., not observing the wires at B. or the fence at C. There was another man with him who was riding in front. They were going in a gallop or lope, and appellee's horse stumbled over the wire, throwing him to the ground and falling on him, so as to inflict a serious injury, to recover for which he brought this suit against the railroad company. The acquiescence on the part of a railroad company in the use of its right of way as a passway does not confer authority or right; the use is merely permissive, and the company may close up the passway at any time. (*Brown's Adm'r v. L. & N. R. R. Co.*, 97 Ky., 228; *Embry v. L. & N. R. R. Co.*, 18 Ky. Law Rep., 434; *Thornton v. L. & N. R. R. Co.*, 19 Ky. Law Rep., 96; *C. & O. R. R. Co. v. Perkins*, 20 Ky. Law Rep., 680.)

Appellant, therefore, is not liable for placing the obstructions across the passway for the purpose of closing it up, unless in doing so it violated some duty to appellee. The passway ran over its property, and in closing it up it had the same right and was under the same obligation as any other land owner. The two wires placed across the passway at B., with the cedar post set firmly in the traveled way and the wires fastened to it, were sufficient as originally put up to apprise any one that this way was closed. But for something like three months before the injury these wires had been down, and it is insisted for appellee that it was incumbent on the railroad company to put the wires up and keep them up. We are referred to authorities holding that where the owner, after allowing the public to drive across his property for several years, stretches a barbed-wire across the track without othe

notice that the license to use the road has terminated, he is liable for an injury to a traveler who is injured after dark. (*Carscadin v. Mills*, 5 Ind. Ap., 22; *Morrow v. Sweeney*, 10 Ind. Ap., 696.) Authorities are also cited to the effect that while mere permission to cross the premises will not place any duty upon the owner to make them safe for this purpose, still if they are safe, and he makes any change rendering them unsafe after they have been used for a long time by the public, those using it are entitled to be protected from such dangers created by him in so far as ordinary care on his part should provide. (*Groves v. Thompson*, 95 Ind., 364, 48 Am. Rep., 727; *Vanderbeck v. Hendry*, 34 N. J. Law, 471; *Lepniok v. Gaddis*, 26 L. R. A., 686.) In an exhaustive note to the last case the rule is thus stated: "The decisions are not entirely harmonious upon this question. But the weight of authority is in favor of the following rules: The owner of private property is not obliged to make it safe for trespassers or even for mere licensees. If, however, the circumstances have been such as to amount to a devotion of the property temporarily to the public use, care must be taken not to make it unsafe until proper notice of the change has been given. Nothing which amounts to a trap can be placed where the public has been in the habit of resorting, and excavations can not be made so near the line of an existing highway as to render travel on the highway unsafe."

In this case the accident happened in the forenoon of a bright day. If the two wires had remained at the height at which they were placed with the cedar post standing in the road, they would have given reasonable warning that the passway was closed. They remained in this condition for something like three months, and the question is, was appellant liable to appellee because they afterwards got down and were allowed to remain down? In *Louisville & Portland Canal Co. v. Murphy*, Adm'r, 72 Ky., 522, it was held that the owner of a private bridge was not liable for the death of a child from a defect in the bridge, although it permitted the public to walk over the bridge. This decision is rested on the ground that the mere acquiescence of the owner of the property in the use of the bridge by the public did not impose any obligation on him to keep it in repair for those so using it.

It is insisted for appellee that this case has no application to the one before us, for the reason that the complaint here is not that the railroad company allowed the passway to get out of repair, but that the complaint is that after it had allowed the public for years to use the passway, it placed an obstruction across it, which was dangerous and not proper to be used, to give notice that the passway was closed, and that it failed to maintain in a safe condition for a reasonable time the obstruction so placed in the passway, and thus did not give the traveling public notice of the closing of the passway, but, on the contrary, in substance, set a trap for the unwary. In considering whether the proper obstruction was placed across the passway to give notice to the public that the license to use it was withdrawn, we must bear in mind, not only the two wires and the post at B., but the fence at C. Considering the fence at C., and the post in the traveled passway with the two wires fastened to it, one two feet from the ground, and the other four feet from the ground, and extending from the garden fence to the telegraph pole, we are of opinion the structure was reasonably sufficient as it originally stood to notify the traveling public the passway was closed. Appellant was



not bound to keep this obstruction in its original condition permanently, but only to use ordinary care in its construction to make it safe and sufficient for a reasonable time to give notice to the traveling public that authority to use the passway had been withdrawn. After this those who used the passway were not licensees, but trespassers, for the fact that the passway had once been used by consent did not authorize its continued use after the permission to use it had been withdrawn. As the obstruction across the passway at B. was maintained in its original condition from the time it was erected until September following, and as the accident to appellee did not occur until three months later, in December, we are of opinion that a reasonable time for such notice had elapsed. In *1 Thompson on Negligence*, section 946, it is said: "As a general rule the owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, intruders; idlers, bare licensees, or others who came upon them not by any invitation, express or implied, but for their own purposes, their pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be."

Again, in section 1016, it is said: "It is a sound and just conclusion that an owner or occupier of land who has given to the public, or to a particular person or corporation, a license to come upon or to cross his premises, or to establish a private way or even a railway thereon, must, before exercising his power to revoke such license, anticipate that danger may accrue therefrom to those who have been accustomed to use the license, and is, therefore, bound to notify them of such revocation and to warn them of any fence, obstruction or other dangerous means to which he may have resorted to exclude them from his premises. So if the public have been accustomed to drive, though without right, across the land of a proprietor, who, in order to stop them from doing so, stretches across the traveled way, without any warning to the public, a barb-wire fence which is invisible after dark, and, not knowing the existence of the obstruction, a traveler drives upon it, injuring his horse, he will have an action for damages against the landowner. On the other hand, if an old road on private property within the limits of a city has been fenced for three months, the land owner will not be liable to one injured by driving upon the fence while attempting to use the road, especially where there were other streets regularly laid out for such public use along which he might have driven to his destination. The reason is that the open and notorious fencing-up of the private way for such a length of time is of itself tantamount to a public warning of the fact, and creates a presumption that the fact is known."

In the case before us, if the passway had run over a farm and the owner had constructed a fence of logs across the passway, and this, after three months, had been thrown down so that appellee, while galloping over it in the dark, had been thrown to the ground by reason of his horse stumbling over one of the logs, it would hardly be maintained that the farmer would be answerable for the injury. The wire was no more likely to throw a horse down than a log or pole after dark, and the case seems to us to rest in the end on the idea, that can not be maintained, that it was the duty of the railroad company to keep the fence up. For the reasons indicated the court, under all the evidence, should have instructed the jury peremptorily to find for the defendant.

Judgment reversed and cause remanded for a new trial.

## BLUE GRASS INSURANCE CO. v. COBB.

(Filed March 25, 1903—Not to be reported.)

Insurance—Contracts—Appellant brought this action to recover for a loss by fire under a policy issued by appellant, a co-operative fire insurance company. Under the statute providing for the organization of such companies any person owning property within a given territory, and signing an application and holding a policy in the company, should thereby become a member of the same. It was urged in defense that there was no liability on the company as the contract of insurance was never completed by a delivery of the policy or the payment of a \$1.50 fee. Afterwards appellant set up as a different cause of action, to the effect that it was agreed that the contract of insurance was to become effective and operative when the company was chartered. On the trial of the issue joined the proof failed to show that appellee was entitled to recover on this ground; besides, the proof shows that the contract was not perfected as the insured was to have the right to reject the policy if it did not suit him.

John S. Gaunt, C. Strother and F. C. Greene for appellant.

Lindsey & Botts for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Settle.

This case is now before this court on second appeal. The opinion rendered on the former appeal is reported in 22 Kentucky Law Rep., 357.

The appellant is an assessment, or co-operative fire insurance company, organized under section 702, Kentucky Statutes and doing business in the ten counties of this State named in its articles of incorporation. The form of policy in use by appellant is framed in accordance with the terms and meaning of the statute supra, and it contains, among other provisions, one to the effect that "any person owning property in territory embraced by our charter, who shall sign an application and hold a policy in this company, shall thereby become a member of the same."

It appears that appellee, J. T. Cobb, on March 28, 1897, signed a written application for a policy of insurance upon his dwelling house and contents in the appellant company pursuant to its rules and regulations, which required that the application should be forwarded to the company's office in the city of Lexington, and if accepted by the company a policy was to be written and delivered to appellee, through the agent of appellant residing in his county, upon the payment by appellee of \$1.50. The application also provided that certain assessments to meet losses were to be paid the company by appellee in common with all of its members, from time to time, as called for. It further appears that the policy applied for by appellee was placed by appellant in the hands of its agent to be delivered to appellee, but that before it could be so delivered the latter's house, named in the application, was totally destroyed by fire, and the agent did not, therefore, offer to deliver the policy.

The appellee then brought suit in the Owen Circuit Court against the appellant to recover of it the loss sustained by reason of the destruction of his house. The ground of recovery as set forth in the petition is that when he made his written application for insurance in the appellant company the

latter accepted the application, wrote the policy, and that appellee became thereby a member of the company, and entitled to the rights of such membership; and that the company became liable for the loss sustained by him in the destruction of his house by fire, notwithstanding the nondelivery of the policy, and his failure to pay the premium or membership fee. In the answer of appellant all liability was denied, and the further defense made that the policy to be obtained on the application was, when issued by the company, to be submitted to the appellee for his approval, when he was to have the right to either accept or refuse it as he pleased; that he was not to become a member of the company by virtue of his application, and the policy was to have no force until and unless accepted by appellee, and the \$1.50 was paid by him. On the trial, which took place before the lower court without the intervention of a jury, judgment was given allowing appellee the sum claimed by him.

The case was appealed to this court by the appellant, and the judgment of the lower court was reversed. In the opinion delivered it was held by this court that "there was no payment of premium and no delivery of the policy, and we think the rule laid down in *May on Insurance*, section 56, is correct. If there has been no payment of the premium, and no delivery in fact of the policy, the contract is prima facie incomplete, and he who claims under it must show that it was the intention of the parties that it should be operative notwithstanding these facts. The presumption of law is that the delivery of the policy and the payment of the premium are dependent upon each other, but this presumption may be rebutted," etc.

Upon the return of the case to the circuit court reply was filed by appellee, in which it was averred that when the application was made and signed by him it was with the agreement between himself and appellant's agent that his property was to become, and remain, insured from that time until the policy should be issued and sent to him, and if he then desired to continue the insurance he was to accept the policy and pay the \$1.50, otherwise the insurance would cease upon his refusal to accept the policy. The court sustained a demurrer to the reply, and thereafter, on July 10, 1901, more than three years after the institution of his suit, and over four years after the making of the application, appellee filed an amended reply, whereby a new cause of action was attempted to be set up, differing in whole from the contract as originally claimed. In other words, in the amended reply it is averred in substance that by the terms of the contract made between appellee and the agent of appellant it was agreed that the contract of insurance was to become effective and operative when the company was chartered, and that the company was chartered at the time of the making of the contract, which fact was, however, then unknown to both appellee and appellant's agent. The reply as thus amended was controverted by the rejoinder thereafter filed, and the case having proceeded to the second trial without the intervention of a jury, a second judgment was rendered in appellee's behalf by the court, allowing him the full amount of the loss sued for. From that judgment and the subsequent refusal of the court to grant it a new trial appellant prosecutes this appeal.

Waiving the question of whether the new cause of action could have been set up as a reply instead of by amended petition, we are unable to see how

the facts testified to on the trial by appellee could have authorized the judgment rendered by the lower court. His testimony was to the effect that when his application was taken appellant's agent, Kenny, said to him that he did not know whether the company was chartered or not, but that as soon as it was chartered he (appellee) was insured. It does not appear from the statements of appellee whether this statement was made by the agent before or after the application was signed, nor does he say that he was induced by such statement of the agent to sign the application, or that he would not have done so but for same. Upon the contrary, he further testified on cross-examination that when he gave his application to the agent the latter told him that when the policy came he would not have to take it unless it was as he represented it.

It would seem, therefore, from appellee's own statements, that the signing of the application by him did not complete the contract, and whatever else may be in doubt, there can be no question from the evidence that he had the right to reject the policy, and to refuse payment of the membership fee upon the tender of the policy to him. In other words, it is shown by the evidence that it was, and is, the custom of the insurance company to issue the policy after receiving at its Lexington office the application; the policy is then sent to the person to be insured, through the agent residing in the county, who submits it to him, and he then has the right to accept or reject the policy; and if accepted, he pays the agent the membership fee of \$1.50, and thus the contract is consummated. The evidence further shows that the uniform rule of the company was to insure in this manner, and no other, the property of those seeking membership with it.

We will not undertake to comment in detail upon the findings of fact made by the lower court, but after a careful examination of the evidence found in the record we are unable to reach the conclusion, as did the lower court, that the contract between appellant and appellee was to be operative upon the appellant's becoming incorporated, for the incorporation had been accomplished nearly a month before, nor are we able to conclude either that it was understood by the parties that this insurance was a part of the \$100,000 which was necessary for the appellant company to obtain before it could secure a charter, or that the alleged assistance which appellee rendered appellant in raising the requisite amount to enable it to commence business was the consideration for the contract, as there was no evidence tending to establish these propositions; upon the contrary, we think it is shown by the evidence that the \$100,000 had been made up before the appellee signed his application for membership, and we have been able to find nothing in the evidence conducing to prove that he rendered any assistance to appellant in raising the sum necessary to secure its charter. We are, therefore, of the opinion that the conclusions of fact reached by the lower court are not sustained by the evidence, consequently the judgment was unauthorized. We think the case, on the facts now presented by the record, stands practically as it did when this court decided the former appeal, and in addition to the quotation already made herein, from the opinion in that case, we also quote the following, which expresses the mind of this court as to the meaning of the statute from which the appellant derives its corporate existence: "The person (insured) must not only sign the application for insurance, but must

be insured in such corporation, and while the language of the section is awkward in disregarding the order of the two events in point of time, it seems undoubtedly to require two things to concur in order to make such person a member of the company *vide licet*, that he shall sign the application for insurance, and shall become insured."

This view of the statute is embodied in one of the provisions of the policy set out in the petition, to wit, "any person owning property embraced by our charter, who shall sign an application and hold a policy in this company, shall thereby become a member of the same."

Being of the opinion, from the facts presented by the record, that the contract between appellant and appellee was never completed, the judgment of the lower court is reversed and the cause remanded, with directions to set aside the judgment and grant appellants a new trial and for such further necessary proceedings as may not be inconsistent with the opinion herein.

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YOUNG, &c. v. BECKHAM.

(Filed March 25, 1903.)

Primary elections—Mandamus to compel placing of name of candidate on ballot—Construction of statutes—Pleading—The petition alleging that a primary election was called by the governing authority of the Democratic party, and not being denied by answer, the Court of Appeals must proceed upon the idea that the primary was called by the governing authority of the party. Under sections 1550 and 1555, Kentucky Statutes, it is manifest that the legislature intended to provide for a primary election for the nomination of State officers. But the primary election should be held in conformity to the statute regulating the holding of primary elections. Some of the rules prescribed by the committee for holding the primary are in violation of the statute. The committee had no right to raise the question of the appellee's eligibility to re-election to the office of governor. The governing authority of the party has no right to determine who is eligible under the laws of the land to hold offices. It can call primary elections and make proper rules for their government, but has no right to say who is eligible to be a candidate before the primary. The persons who are entitled to vote at the primary are the ones to determine who shall be selected as their candidates for a particular office. The court has the power by mandamus to compel the committee to perform any of its duties.

Breckinridge & Shelby and White & Ray for appellants.

Louis McQuown, W. S. Pryor, J. C. Beckham and John Fulton for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Paynter.

The purpose of this proceeding is to compel the Democratic committee to place the name of the appellee, J. C. W. Beckham, on the ballot as a candidate for the office of governor before the Democratic primary election called for May 9, 1903.

The question of his eligibility has been raised and the committee refuses to place his name upon the ballot. The question to be determined from the pleading is whether the governing authority of the party has called a primary election, and, if so (a), whether the statute authorizes the holding of

primary election to nominate candidates for State offices; (b) whether the committee can refuse to place his name upon the ballot, because they think he is ineligible to re-election; (c) whether by proceeding in mandamus the committee may be compelled to place his name upon the ballot used at the primary as a candidate for governor. The first question is easily disposed of. It is averred in the petition that the governing authority of the party has called a primary election, and it is not denied by the answer, therefore, the court must proceed upon the idea that the primary has been called by the governing authority of the party. Sections 1550, and 1555 inclusive, of article 12, chapter 41, Kentucky Statutes, embrace the law upon the subject of primary elections.

Section 1550 reads as follows: "A primary election, within the meaning of this article, and as used in this chapter, is an election held within the State, county, city, district, or subdivision thereof, as the case may be, by the members of any political party, or by the voters of some political faith, for the purpose of nominating candidates for office."

Section 1555 reads as follows: "The provisions of this article shall apply to all primary elections held for the purpose of nominating candidates for State, county, district or municipal offices hereafter held in the Commonwealth, except those held in the year 1892."

From these sections it is manifest that the legislature intended to provide for a primary election for the nomination of State officers. Section 1555 expressly provides that the article shall apply to primary elections held for the purpose of nominating candidates for State, county, district or municipal officers. A difficulty arises from the fact that the law is not definite and certain as to how the result of a primary election shall be ascertained and certified to the secretary of state for the purpose of having the names of the successful candidates placed by him upon the official ballot for the regular election. When section 1555 says that the article shall apply to all elections held for the purpose of nominating candidates for State, county, district or municipal officers, it must have meant that the committee or governing authority of the party can ascertain and certify the result of the primary held to nominate candidates for such offices to the secretary of state, because it is provided in section 1558 that the committee or governing authority of the party may order a primary election. In addition to that section 1568 provides that the committee or governing authority in the county or district are empowered to count the votes. In view of section 1565, making the article which includes section 1563 applicable, we must read in that section the word State. If the committee or governing authority can call and hold a primary election, the same authority can certify to the secretary of state the names of the parties who are entitled to be placed upon the official ballot. This power is necessarily implied. Some of the rules prescribed for the conduct of the primary are in violation of the statute. The committee should follow strictly the provisions of the statute regulating the holding of the primary election; unless this is done the risk is taken that they may not be able to have those who are declared to be the nominees placed upon the ballot at the regular election. The court in *Brown v. Republican County Executive Committee, &c.*, 23 Ky. Law Rep., 2421, held that there can be no lawful primary unless it is held as prescribed by the statute.

In this case we deem it unnecessary to point out wherein the rules of the primary differ from the provisions of the statutes, presuming that the committee will conform its action to its provisions. We are of the opinion that the committee had no right to raise the question of the appellee's eligibility to re-election to the office of governor. The governing authority of the party has no right to determine who is eligible under the laws of the land to hold offices. It can call primary elections and make proper rules for their government, but has no right to say who is eligible to be a candidate before the primary. The persons who are entitled to vote at the primary are the ones to determine who shall be selected as their candidates for a particular office. If the committee can say who is and who is not eligible to be nominated as a party's candidate for office, they can, on the very last day before the ballots are printed, refuse to allow a person's name to go on the ballot upon the pretext that he is ineligible, and thus prevent his name from appearing upon the official ballot. They could thus destroy one's prospect to be nominated, for the rules of procedure in courts are necessarily such that no adequate relief could be afforded the party complaining, if at all, until after the primary election had been held. If the committee or governing authority has the authority to decide the question as to who is eligible to hold an office or be a candidate before a primary election, then they would have a discretion and judgment to exercise that could not be controlled by a mandamus. The most that could be done by such a writ would be to compel them to act upon the question.

The next question is, is a writ of mandamus the proper remedy in a case like this? Section 477 of the Civil Code of Practice provides: "The writ of mandamus, as treated in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or admission of which is enjoined by law; and is granted on a motion of the party aggrieved, or of the Commonwealth when the public interest is affected."

It is urged that the committee or governing authority of a party are not executive or ministerial officers, therefore, the writ can not be issued against them. A primary election called by the committee or the governing authority of a party is to be conducted under the statute law of the State regulating such elections. The legislature has seen proper, as it were, to take charge of them, and, to secure fairness in the conduct of same, has provided penalties for the violation of the law.

It is provided in section 1563, Kentucky Statutes, that: "Before entering upon the discharge of the duties set forth in this article the committee or governing authority shall be sworn by some officer authorized by law to administer an oath to faithfully and honestly discharge the duties herein imposed; and the failure upon the part of any member of the committee or governing authority to discharge such duties faithfully and honestly shall be deemed a misdemeanor, and the person so offending shall, upon indictment and conviction in the circuit court of the county or district, be fined not less than \$100 nor more than \$500, and be imprisoned in the county jail not less than sixty days and not more than one year."

A cursory reading of the section might make an impression upon the reader that this only required that the committee or governing authority

should take this oath when organized to determine a contest, but a more careful reading of the section shows that it must be taken before entering upon the discharge of the duties set forth in this article. Many duties are required to be performed by the committee or governing authority of a party under the article. The article is composed of several sections, in which these various duties are designated. It must be understood that the only question decided is that the committee has no right to raise the question as to the eligibility of one who desires to become a candidate before the primary, and for that reason refuse to place his name upon the ballot.

The judgment is affirmed.

### COMMONWEALTH, &c. v. NUTE.

(Filed March 25, 1908.)

1. **Taxation—Assessment—Statute of limitation**—This was a proceeding in the county court by an auditor's agent to have assessed for taxation an annuity for ten years prior thereto belonging to appellee. The county court and circuit court dismissed said proceedings, from which this appeal is prosecuted. It is insisted that section 2515, Kentucky Statutes, providing a limitation of five years as a bar to an action upon a liability created by statute, prevents an assessment of personal property for more than five years after the cause of action accrues. Held—That this proceeding is an action within the meaning of section 469, Kentucky Statutes, and that the provision of the statute of limitation applies to this action as provided by section 2523, Kentucky Statutes, that property can not be retrospectively assessed for taxation for more than five years before the institution of a proceeding like this. While there are several decisions of this court holding, or seeming to hold, the contrary opinion, most of them were rendered when statutes were different from those that now exist, and some of them were mere dicta. All such opinions are in conflict with this opinion and are no longer authority on the question herein decided.

2. **Overruled cases**—*L. & N. R. R. Co. v. Commonwealth*, 1 Bush, 250; *McAllister's Ex'or v. Commonwealth*, 6 Bush, 581; *Franklin County Court v. L. & N. R. R. Co.*, 84 Ky., 64; *Baldwin v. Shine, Presiding Judge, &c.*, 84 Ky., 512; *L. & N. R. R. Co. v. Commonwealth*, 85 Ky., 210; *Louisville & Jeffersonville Ferry Co. v. Commonwealth*, 24 Ky. Law Rep., 1339.

B. S. Grannis and G. A. Cassidy for appellants.

John P. McCartney for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Nunn.

On the 3d day of April, 1901, the auditor's agent for Fleming county instituted this action or proceeding in the Fleming County Court to have certain property belonging to appellee assessed for taxation, alleging that she had failed to assess the property as required by law. A trial was had in the county court and that court dismissed the proceedings. The appellant appealed to the circuit court and another trial was had. On this trial the proof showed the following facts. That appellee had, in each and every year at the proper time, listed her money and all property owned by her except the following annuity, obtained as follows: She was the owner of a dower



interest in 218 acres of land, and on the 20th day of August, 1890, she sold and conveyed her interest therein to Chas. Nute and J. B. Glasscock for and in consideration of the sum of \$500, due and payable on the 1st day of March, 1892, and \$500 each succeeding 1st day of March thereafter during the natural life of appellee. It is conceded that she received \$500 on the 1st day of March each year since that time on this contract and paid the taxes thereon, or the balance on hand, on the 15th day of September each year. The circuit court dismissed the proceedings, from which judgment appellant appeals to this court.

The appellant contends that the appellee should have listed for taxation for each of the ten preceding years the present worth or the actual value of the obligation of Nute and Glasscock, valued under the life tables. We are of the opinion that the appellant was correct in its contention; the appellee should have listed this obligation according to its present value for each year according to the life table. If she had retained her dower interest in the land she would have been compelled to pay the taxes on it, and this obligation represented her interest therein. There is a very important question involved in this proceeding and in cases of like character, and that is as to whether or not there is any law as to limiting the time for retrospective assessments of property for taxation. This court is of the opinion that the statute laws of the State settle the question that limitations do apply, and that property can not be retrospectively assessed for taxation for more than five years from the institution of a proceeding like this.

Section 469 of the Kentucky Statutes is as follows: "The term 'action,' when used in this revision, shall be construed to include all proceedings in any court of this Commonwealth."

By this section it will be seen that this proceeding by the auditor's agent to back assess for taxes is an action within the meaning of the statutes.

Section 2623 of the Kentucky Statutes is as follows: "The limitations prescribed in this chapter shall apply to actions brought by or in the name of the Commonwealth, in the same manner as to actions by private persons, except where a different time is prescribed by some other chapter of this revision."

Section 2515 of the Kentucky Statutes, of the same chapter as the above section, in so far as applicable to the question before us, is as follows: "An action upon a liability created by statute, when no other time is fixed by the statute creating the liability, \* \* \* shall be commenced within five years next after the cause of action accrued."

Thus it will be seen from the statutes quoted that this proceeding is an action in the name of the Commonwealth and for the benefit of the Commonwealth, and that the statutes of limitations run against it the same as against a private person; that a liability created by the statutes is barred after five years from the accrual of the cause of action or proceeding; and there being no provision in the statutes prescribing a different time for the commencement of proceedings of this kind, the five-year rule must apply. And there can be no question but that this proceeding is to enforce a liability created by statute, and comes within the rule prescribed by section 2515 of the Kentucky Statutes.

Section 4021 of the Kentucky Statutes declares that counties, cities, etc.,

shall have a lien on the property assessed for the taxes, which shall not be defeated by gift, devise, sale or alienation unless the gift, devise, etc., shall have been made for more than five years before the institution of proceedings to enforce the lien, and also says when any lands shall not be assessed in any one year it may be assessed retrospectively for that year at any time not later than five years thereafter; but the lien thereby accruing shall not thereby prejudice the rights of purchasers acquired in the meantime or before the assessment. It will be observed that this section is preserving the State's lien for taxes and protecting innocent purchasers, and the sentence "that land can be retrospectively assessed at any time not later than five years thereafter" simply declares, as to lands, the general limitation law on the subject.

By an act approved May 23, 1890, page 149, Acts 1889-1890, volume 1, the Commonwealth was given power to institute and maintain actions to recover all taxes which had accrued or might thereafter accrue, on property which could not be collected by the ordinary methods of distraint and sale, for the purpose of enforcing the State's lien on the property which for any reason could not be sold. This had reference to railroads, waterworks, wharf property and other like property. Said act concludes as follows: "But no action shall be instituted upon any claim for taxes that has been assessed, or might have been assessed, more than five years before the commencement of same."

As will be seen, this act authorizes an action for the purpose of collecting taxes due the State on property which could not be sold under the ordinary methods, and as to this class of property the five years' limitation was declared, which agreed with the general limitation law for the assessment of property for taxation.

It will hardly be contended that the legislature intended by section 4021 and the act of 1890, above referred to, to give lands and the property referred to in the act of 1890 a preference over other property. We can see no reason why the State, counties, etc., should be allowed to retrospectively assess for taxation money, notes, bonds, horses, mules, cattle and other personal property without any limitation as to time and be limited to five years in retrospectively assessing lands, railroads, waterworks, wharf property in cities and other like property, and we do not believe that the statutes referred to will authorize any such construction. We are aware of several decisions of this court in the past holding, or seeming to hold, the contrary opinion, but the most of them were rendered when the statutes were different from those that now exist, and some of them were mere dicta. But all such as are in conflict with this opinion are no longer authority on the question herein decided.

For these reasons the case is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting.

MEACHAM v. YOUNG, &c.

(Filed March 25, 1903—Not to be reported.)

Primary elections—Injunction—The courts have no authority to enjoin the Democratic Executive Committee from holding a State primary election. The calling of a primary election is a party matter, to be determined by the party authorities, and the court has no power to interfere with their action. A primary election must be held under article 12, chapter 41, Kentucky Statutes.

White & Ray and Breckinridge & Shelby for appellants.

L. McQuown, W. S. Pryor, John Fulton and J. C. Beckham for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hobson.

The appellant, a member of the Democratic party and of the State Executive Committee of that party, seeks to enjoin the holding of a Democratic primary election alleged to be called for May 9, 1903.

This court in the case of Young, &c. v. Beckham, ante, 2125, opinion delivered March 25, 1903, decided that the committee or governing authority of a political party in the State was authorized, under article 12, chapter 41, Kentucky Statutes, to hold a primary election to nominate candidates for State offices. If the committee or governing authority called the primary, then it would have to be held under the statute, and the court has no jurisdiction to enjoin the holding of it. The court has no more right to enjoin the holding of a primary election, if called by the governing authorities of the party, than it would have to enjoin a regular election. The calling of a primary is a party matter, to be determined by the party authorities, and the court has no power to interfere with their action. It is a matter to be settled by the party and by the authorities of the party, and if complaint is made of the action of the party, it must be made to the proper party authorities. Under the facts as shown we are of opinion the primary was lawfully called.

Judgment affirmed.

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RUDD, TRUSTEE, &c. v. TRAVELERS INSURANCE CO.

(Filed April 15, 1903—Not to be reported.)

Judgment—Mortgages—Infants—In this action to enforce a loan secured by mortgage on real property, executed under defective proceedings in court, the lower court properly decided that the remainder interest owned by an infant under the will of his grandfather was not bound for the loan, but that the remainder interest of the adult heirs was bound by reason of a mortgage executed by them, embracing all their interest of whatsoever nature. The judgment following the terms of the mortgage vests in the purchaser nothing more than the interest of the parties named in the judgment, whatever that interest may be.

W. Scott Morrison for appellants.

John Allen Dean and Pirtle & Trabue for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Nunn.

Many years ago James Rudd, Sr., died, having made a will, which was duly admitted to probate in the Jefferson County Court. In the 11th clause of the will the testator used this language: "I give and devise to my son, James C. Rudd, during his life, and for his lifetime only, and no longer, my tract of land beginning on the Ohio river in Daviess county, Kentucky, containing 300 acres, it being the same tract of land that was deeded to me by David Todd and wife. He is to be charged with the same on the final division and settlement of my estate at the price of \$15,000. Said tract of land is hereby declared, and the products thereof, to be for my son, James C. Rudd's, use and benefit, for the support and maintenance of himself and wife and children during his life, and in no way or event to be liable for his debts or engagements in any way whatever, and at the death of my son, James C. Rudd, said tract of land is to go, belong and become the property equally of his children. In the event, however, at his death any of his children have died leaving a lawful child, or children, then such to take the part of their parent."

By a codicil he lessened the quantity of land devised to 100 acres, and gave in lieu of it certain property in the city of Owensboro, as follows: "My son, James, is to have and to hold my city property in Owensboro, on St. Ann street, opposite the courthouse and jail in said city. The property in Owensboro herein devised to my said son is for the benefit of himself, wife and children, and is to be held subject to the same limitations, restrictions, etc., as are imposed on the 300 acres named in the 11th clause of this will."

In the year 1839 the children of James C. Rudd and his wife brought an action against him, in the Daviess Circuit Court, alleging the ownership of the property to be as provided in the will, and that as James C. Rudd and his wife were still living, it was uncertain as to the ultimate ownership of the property, that is to say, what part and who would own it at the death of James C. Rudd and his wife. It was sought to improve the property in the city of Owensboro. The allegation being that by reason of a loss by fire the buildings thereon were destroyed and that the insurance money received thereon would not be sufficient to rebuild; that the beneficiaries under the will of James Rudd, Sr., had theretofore, by James C. Rudd, trustee, borrowed some \$14,000, and with this sum and the insurance money from the buildings destroyed, they, through their trustee, James C. Rudd, had begun and were erecting a valuable improvement or hotel on the property in the city of Owensboro; that to secure the \$14,000 borrowed a mortgage had been executed on the property to one H. A. Williams. They allege that they had already contracted to lease the hotel, when completed, at a very advantageous rental, and they asked the court to permit a mortgage to be executed on the farm for additional sums of money to complete the building, and that the mortgage already executed to Williams be ratified, and both the mortgages be adjudged a lien on the property. The court granted the prayer of the petition, and directed W. M. Rudd, one of the appellants here, to take charge of the hotel and other property and to superintend the completion of the hotel, and after it was completed, by an order of the Daviess Circuit Court, a mortgage for \$30,000 was executed to the Travelers Insurance Co. This money was directed to be used in discharging the other mortgage debts already incurred.

This hotel was destroyed by fire, and in the year 1891 the court, by its judgment, directed W. M. Rudd, agent, to negotiate a loan with the Travelers Insurance Co. for \$40,000, to run for five years, at 6 per cent., and to execute a mortgage to the Travelers Insurance Co. to secure the loan on all the property mentioned in the record, the judgment reciting that Rudd had paid off all liens and encumbrances on the property except \$4,000, due the Travelers Insurance Co. on the \$30,000 loan.

In June, 1892, by the report of the agent, W. M. Rudd, the court adjudged that a substantial and valuable hotel had been erected on the trust property, and that the sum borrowed had been insufficient to pay for the cost of the hotel; the agent, W. M. Rudd, was directed to negotiate a further loan of \$10,000 from the Travelers Insurance Co., to be secured by a like mortgage, and was directed out of this sum to pay the Travelers Insurance Co. \$4,000, balance on the \$30,000 loan, and to use the \$6,000 in paying bills and liabilities incurred in the erection of the hotel.

The loans of \$30,000, \$40,000 and \$10,000 made by the appellee to the appellant were authorized and directed by the court without any amended pleading filed in the action referred to, or any pleading or proof of any kind asking or authorizing the court to make any such order or orders. It appears from the record that James C. Rudd and his wife are still living and have four, and only four, children living, viz., W. M. Rudd, R. H. Rudd, James C. Rudd, Jr., and C. B. Rudd, the first three of whom are over the age of twenty-one years, and are married. The first two named have children. C. B. Rudd is under the age of twenty-one years. All of the appellants named above, with the exception of C. B. Rudd, the infant, together with their wives, duly signed and executed the mortgages, before named, to the Travelers Insurance Co.

Appellee, after the maturity of their mortgage debts, sought to enforce in this action their mortgage lien. The appellants resisted same, and claimed that by reason of the defects in the proceedings in the court, in the direction of said loans and the 11th clause of the will of James Rudd, Sr., no lien existed for the payment of appellee's claim. The lower court sustained their contention with reference to the first proposition, because the pleadings and proof did not authorize the order directing the loans to be made, under an amendment to section 496 of the Civil Code, passed in 1883, and, therefore, released the interest of C. B. Rudd, the infant, from the payment of any part of appellee's claim. The court held that the adult children were bound because they themselves had the power and right to do as they thought proper with their property or their interest in it, as they, with their wives, had all united with the trustee in the execution of the mortgages. And it is admitted by all the parties that the money loaned went into the improvement of the property of appellants.

Under the will of James Rudd, Sr., James C. Rudd and wife took only a life estate in the property, their children a vested remainder, and their grandchildren a contingent remainder, the grandchildren's interest depending upon their parents dying before their grandparents. A will similar to this was construed by this court in the case of *Mercantile Bank of New York v. Ballard's Ass'ee*, 83 Ky., 481.

The appellants complain that the judgment of the lower court was errone-

ous in not only selling all the interest of the adult appellants then held and owned by them in said property, but directing a sale of all the interest that might thereafter accrue to them under the will of James Rudd, Sr., or otherwise. We think that the court was correct in this. In the mortgages referred to, after the usual form of such conveyances, this language is found: "And the said grantors further hereby covenant and agree with the said grantee, the Travelers Insurance Co., that they are well-seized of the said premises as a good and indefeasible estate in fee simple, and have good right to convey and encumber the same in manner and form as is above written."

The judgment foreclosing the mortgages gives full notice of what is sold, and the purchaser under that judgment would take no more than is conveyed by the mortgages as construed and defined by the court, and if the vested remaindermen, the children of James C. Rudd, should die before him, leaving children, there is nothing in the judgment to bind the children, and, therefore, of course, nothing to bind any one claiming through the children. The purchaser takes nothing more than the interest of the parties named in the judgment, whatever that interest may be.

Wherefore, the judgment is affirmed.

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WOOD v. CARR, &c.

(Filed April 15, 1903.)

Judgment—Attachment—Bankruptcy—Res judicata—Appellees recovered a judgment in the Maysville Police Court and an attachment was sustained which had been levied on a horse. The defense offered was that the horse was exempt from said debt. Appellee prosecuted an appeal to the quarterly court from said judgment. Pending said appeal appellee obtained a discharge in bankruptcy, and said horse was claimed by him and adjudged to be exempt. The judgment in bankruptcy was pleaded as a bar on the trial in the quarterly court, but was rejected and the horse ordered to be sold to satisfy the debt and this action was instituted to enjoin said sale. Held—That the judgment in bankruptcy was a bar to the proceedings in the quarterly court as the bankrupt act affects all liens obtained by proceedings in State courts which were commenced against an insolvent within four months prior to the institution of the proceeding in bankruptcy.

W. G. Dearing and O. R. Bright for appellant.

Slattery & Collins for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Burnam.

This suit was instituted in the Mason Circuit Court by the appellant, H. R. Wood, against the appellees, Charles Newell, presiding judge of the Mason Quarterly Court, and R. A. Carr, to prohibit the collection of a judgment recovered against him by the defendant, Carr, in such court by the sale of a horse claimed by him as exempt, and for the recovery of the horse which had been taken under attachment, and damages for his detention. The defendants filed a general demurrer to the petition, which was sustained, and the plaintiff declining to plead further, it was adjudged that his peti-

tion be dismissed, and that defendants recover their costs. And from this judgment this appeal is prosecuted.

The plaintiff alleged in substance that on the — day of September, 1899, the defendant, H. R. Wood, instituted a suit against him in the police court of the city of Maysville, and at the same time sued out an attachment which was levied upon a gray horse belonging to him; that he appeared in the police court on the day the case was set for trial and claimed to be a house-keeper with a family, and that the horse was exempt from attachment and sale; that the police court decided that it was not exempt and adjudged it be sold to satisfy the debt of the defendant, Carr; that on the 30th day of October, 1899, he appealed from the judgment of the police court to the Mason Quarterly Court, and executed a supersedeas bond suspending the collection of the judgment; that on the 24th day of October, 1899, he filed his petition in the United States District Court at Covington, Ky., to be declared a bankrupt, in which he claimed the horse upon which the defendant, Carr, had levied his attachment as exempt property; that notice of this proceeding was served upon the defendant, Carr, who appeared in the office of the referee in bankruptcy on the morning designated for the appointment of a trustee; and that he made no objection to plaintiff's claim of the horse as exempt property; that on the 10th day of February, 1900, he obtained his discharge in bankruptcy, and that subsequently thereto, and before the trial of the appeal in the Mason Quarterly Court, he filed therein a certified copy of the order adjudging him a bankrupt and his certificate of discharge, and moved that the petition of Carr be dismissed and the attachment discharged. He also alleges that he was insolvent when the attachment of the defendant, Carr, was levied upon his horse, and also at the time he was adjudged a bankrupt; that the defendant, Newell, as presiding judge of the Mason Quarterly Court, in disregard of his certificate of discharge in bankruptcy, gave a judgment against him in favor of the defendant, and ordered the horse sold under the judgment to satisfy it; that he appealed from this judgment to the Mason Circuit Court, and all the papers and orders were transferred to the circuit court, but that the Mason Circuit Court dismissed his appeal for want of jurisdiction; that the defendants are proceeding to enforce the judgment of the Mason Quarterly Court by a sale of his horse. It is further alleged that at the time Carr sued out the order of attachment in the Mason Quarterly Court he was a married man, with a family residing in this Commonwealth and that he was the owner of only two horses.

Subsection F. of Section 67 of the Bankruptcy Act of 1868 provides that: "All levies, judgments, attachment or other liens, obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void, in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien, shall be preserved for the benefit of the estate, and thereupon the same may pass to, and shall be preserved by, the trustee for the benefit of the estate as aforesaid."

The proceedings in bankruptcy were commenced by plaintiff within less

than four months after the levy of the defendant's attachment upon the horse in controversy, and under the express letter of the statute, if plaintiff was insolvent, all rights acquired thereunder became null and void, and the jurisdiction to determine all questions growing out of it was transferred to the Federal court. In *Bank of Columbia v. Overstreet, &c.*, 71 Ky., 150, the court, through Judge Lindsay, said: "It is insisted by the appellant that the provisions of this section do not apply to attachments sued out in State courts. This position can not be maintained. The Federal congress had undoubted power to establish 'uniform laws on the subject of bankruptcy throughout the United States.' All laws of congress enacted pursuant to the powers delegated to it by the Federal Constitution are binding as well upon the State as the Federal courts. It may be that the State Courts are not bound to administer the Federal laws, but they are bound to respect all rights acquired under them. There is nothing in the act of congress from which it can be inferred that an exception was made in favor of creditors prosecuting their claims against a bankrupt in State courts; and if the law had been so framed as that a proceeding in bankruptcy would dissolve attachments sued out in the Federal courts and leave unaffected those sued out in the State courts, it would not have been uniform in the constitutional sense of that term, nor are we able to perceive that the dissolution of appellant's attachment in any sense impaired the obligation of a contract or divested it of a vested right. The attachment lien was secured by legal diligence, and not by contract. The right to subject the attached property to the payment of its debt vested long after the bankrupt act had gone into effect. It was, therefore, a conditional right, subject to be defeated by the debtors being thrown into bankruptcy. In this case no particular hardship results to appellant. Its debt was contracted after the bankrupt act became a law. The credit was extended to Overstreet, with notice of the fact that the remedies afforded by the State laws for the enforcement of the contract were liable to be interrupted or superseded by proceedings in bankruptcy which might be instituted by the debtor, or by one of his creditors, in case he should be guilty of an act of bankruptcy."

And the opinion of the court in this case is in accord with the rulings of other courts who have passed upon this question. (In *re Hopkins*, 1 Am. Bankruptcy Rep., 112; In *re Richards*, 2 Am. Bankruptcy Rep., 520; In *re Rhoads*, 8 Am. Bankruptcy Rep., 180; *Levier v. Selter*, 5 Am. Bankruptcy Rep., 576.) Section 17 of the bankrupt act of 1898 provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, with certain exception, to which defendant's claim does not belong. His debt might have been proven in the bankruptcy proceedings, and is, therefore, embraced by the language of the act. The judge of the Mason Quarterly Court was bound to take notice of plaintiff's discharge in bankruptcy. It had the effect to release the plaintiff from all debts which were, or might have been, proven against his estate in bankruptcy, and when properly pleaded was a conclusive bar to any action on such debt. The debt of this defendant having been wiped out, the attachment necessarily failed also.

The trial court erred in sustaining a demurrer to plaintiff's petition, and the judgment is reversed and cause remanded for proceedings consistent with this opinion.



**COMMONWEALTH, BY, &C. V. ZWEIGART'S ADM'R, &C. 2147**

**COMMONWEALTH, BY, &c. v. LONGNECKER, &c.**

(Filed April 15, 1908—Not to be reported.)

G. A. Cassidy for appellants.

G. S. Wall, E. L. Worthington, W. H. Wadsworth, W. D. Cochran and L. W. Robertson for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Nunn.

This case grows out of an effort by the auditor's agent to retrospectively assess the property of a decedent and to charge the devisees with the liability for the payment of the taxes thereon.

The same principles govern this case as in the case of Commonwealth, By, &c. v. John G. Zweigart, &c., ante, 2055, this day decided. In that case the appellees were distributees and in this devisees. In this case there was no apparent effort on the part of the appellees to prevent the disclosure of the kind and character of the property received by them. But these differences do not alter the principles under which the appellees are liable, and for the reasons given in that case this case is reversed and the cause remanded for further proceedings consistent therewith.

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**COMMONWEALTH, BY, &c. v. ZWEIGART'S ADM'R., &c.**

(Filed April 15, 1908.)

Taxation—Description of property—Pleading—Liability of heirs for taxes—Limitation, statute of—This was a proceeding by an auditor's agent on information filed in the circuit court to require appellee, as administrator of Z., to assess for a number of years property omitted from assessment, amounting to more than \$200,000. The information described the property as consisting of notes, mortgages, choses in action and money. Demurrers to this information were sustained on the ground of insufficiency of description of property. Held—That said objection should have been raised by motion to make more specific and not by demurrer. Said description of the property was sufficient. The heirs having received property from their ancestor amounting to about \$200,000, which was subject to and had escaped taxation and which was received with this liability against it, they should be compelled out of the property so received to pay all the taxes on such property, the collection of which is not barred by the statute of limitations.

G. A. Cassidy for appellants.

Garrett S. Wall, E. L. Worthington, W. H. Wadsworth, M. D. Cochran and L. W. Robertson for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Nunn.

On the 30th day of July, 1901, F. S. Watson, as auditor's agent, filed in the county court of Mason county, Kentucky, a statement or information alleging that certain property belonging to Christian F. Zweigart, amounting to about \$210,000, each year, for several years prior to the death of Christian F. Zweigart (which occurred in April, 1897), was by him omitted to be assessed

2148 COMMONWEALTH, BY, &C. V. ZWEIFGART'S ADM'R, &C.

or listed for taxation, and that the defendant, John G. Zweigart, qualified as administrator of the decedent at the April term of the Mason County Court in the year 1897; that he never at any time filed with the county court, an inventory or report of any kind showing what estate came into his hands as such administrator.

On the 9th day of August, 1897, the year in which he qualified, he made a settlement with the Mason County Court of the estate which came into his hands, but by this settlement he failed to disclose the amount of the estate, and merely took the receipt of the widow and each of the five children in full of their interest, without naming any amount, and closes the settlement with these words: "Which winds up the affairs of the estate. The estate amounted to more than \$500."

The county court and the circuit court on appeal sustained demurrers to this information because the plaintiff failed to sufficiently describe the property sought to be listed for taxation. The appellees further contend that they are not liable for the taxes which were failed to be assessed against their ancestor. We can not agree with the action of the lower court nor with the appellees' contention. The property, as described in the statement or information filed by appellant is as follows: "That Christian F. Zweigart, deceased, was possessed of a large estate in the county of Mason, consisting of notes, mortgages, choses in action and money, and that he failed, omitted and refused to assess a large portion of said property for taxation, and failed to pay taxes on same from and including the year 1876 up to and including the year 1896."

They contend that the information should have stated how much cash, how much notes and how much of each. If this was error the proper way to have reached it was by motion to make the information more specific and not by demurrer. By their demurrer appellees admitted that they had received the property of their ancestor to the amount of \$210,000, which had escaped taxation for each of the years named, and that it was subject to taxation, nor had any tax been paid thereon. They were in a better position to know the truth or falsity of this allegation and the kind and character of such property and the amounts of each, if any, than the appellant, and if the allegations contained in the information are true, it is evident that the appellees intentionally and studiously avoided the disclosure of the kind and character of the estate that they received in the distribution of their ancestor's estate, and it comes with very bad grace from appellees to come now and ask appellant to more specifically describe the property which they had received from their ancestor, which they had failed to make a record of as the statute required. For a full discussion of this question see the case of Commonwealth, By, &c. v. Collins, ante, 2042, recently decided by this court.

According to the allegations of the information the appellees received \$210,000 worth of property from their father's estate which was subject to and had escaped taxation, and they received this property with this liability to taxation existing against it, and, therefore, they should be compelled, out of the property so received, to pay all the taxes on such property, the collection of which is not barred by the statute of limitations. (Commonwealth, By, &c. v. Nute, ante, 2133.)

For the foregoing reasons the case is reversed and the cause remanded for further proceedings consistent herewith.

## COCKERELL v. COMMONWEALTH.

(Filed April 15, 1908.)

1. Criminal law—Local option—Indictment—This appeal is prosecuted from a conviction under indictment for a violation of a local option law. The indictment was sufficient under section 124, Criminal Code of Practice, as it apprised appellant of the fact that the intoxicating liquor which he was charged with selling contained one or more of the liquors mentioned.

2. Instructions—Evidence—The instruction given which authorized the jury to convict appellant, if they believed that he sold "hop tonic" or "tonica," and that same contained spirituous, vinous or malt liquors, was not objectionable because those words were not in the indictment. Witnesses were properly permitted to testify that hop tonic or tonica is an intoxicating drink. As the offense was committed prior to the time the amendment to the "local option" law of 1902 took effect, an instruction authorizing the infliction of the penalty under the old law was properly given.

Ben Chapeze and N. W. Halstead for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Settle.

The appellant, J. L. Cockrell, was indicted, tried and convicted in the Bullitt Circuit Court for selling intoxicating liquors, in violation of the local option law, and his punishment fixed by verdict of the jury at a fine of \$100. He was refused a new trial by the lower court, and from the judgment of that court refusing him a new trial he prosecutes this appeal.

It is contended for appellant that the indictment is defective, and that the lower court should have sustained the demurrer filed thereto. We are of opinion that the indictment is sufficient, in that it substantially conforms to section 124 of the Criminal Code, which provides that "the indictment must be direct and certain as regards, first, the party charged; second, the offense charged; third, the county in which the offense was committed; fourth, the particular circumstances of the offense charged, if they be necessary to constitute a complete offense."

That part of the indictment describing the offense charges that the appellant "did then and there unlawfully, without license so to do, sell to P. G. Trunnell intoxicating liquors, to wit, whisky, brandy, ale, beer and wine, a mixture thereof, etc." This language in direct and explicit terms informed appellant of the offense charged. It apprised him of the fact that the intoxicating liquor which he was charged with selling contained one or more of the liquids mentioned. It will not be denied that a drink containing any one of them, or composed of two or more of them, would be an intoxicating liquor in the meaning of the law, so a sale of such liquor, or mixture, in territory where local option is in force would constitute a violation of the law. It must be presumed that appellant would know whether the liquid sold by him contained whisky, brandy, ale, beer, wine or any mixture thereof, and if so he was as well prepared to make defense to the charge presented by the language contained in the indictment as if it had been confined to an averment of the sale of any one of them. We are, there-

fore, of opinion that the lower court did not err in overruling the demurrer to the indictment.

It is also contended for appellant that the lower court erred in instructing the jury. Instruction No. 1 is, however, the only one complained of, the language of which is as follows: "If the jury believe from the evidence, to the exclusion of a reasonable doubt, that in Bullitt county, within twelve months before the finding of the indictment herein, the defendant, J. L. Cockerell, sold to P. G. Trunnell hop tonic, or tonica, in a quantity less than five gallons at one time, and that said hop tonic, or tonica, was whisky, brandy, beer, or wine, or a mixture of any two or more of said liquors, they should find him guilty as charged in the indictment and fix his punishment at a fine in any sum not less than \$100 nor more than \$200."

It is claimed by counsel for appellant that this instruction was improper because of the use therein of the words "hop tonic," or "tonica," as those words do not appear in the indictment. It is true that the words in question are not found in the indictment, but their use in the instruction was nevertheless proper, as spirituous, vinous and malt liquors are often sold under other than their true names in violation of law, and there could certainly have been nothing misleading in these terms as used in the instruction, for the jury were in effect therein told that in order to convict appellant they must believe from the evidence, beyond a reasonable doubt, that the drink sold by him as hop tonic, or tonica, was in fact whisky, brandy, beer, wine, or a mixture of any two or more of such liquors. It is further contended by counsel for appellant that the lower court erred in allowing the testimony of Fort, Hall and others, to go to the jury.

P. G. Trunnell, to whom the appellant sold the hop tonic, upon being introduced, admitted the sale to him by appellant of the drink called hop tonic, or tonica, and that hop tonic, or tonica, whether called by the one name or the other, is the same drink; but gave it as his opinion that it would not produce intoxication; he testified, however, that he was not a chemist, though a physician, and that he had never seen a chemical analysis made of the liquid. So the witnesses of whose testimony appellant complains were introduced by appellee to prove that hop tonic, or tonica, is an intoxicating drink, and many of them so stated. According to the testimony of these witnesses it would seem that hop tonic is a well known drink; that it contains some ingredient that will intoxicate in the manner in which intoxication is produced by spirituous, vinous or malt liquors. Upon the other hand, witnesses were introduced by appellant who testified that the drink called hop tonic, or tonica, does not contain spirituous, vinous or malt liquors, and is incapable, therefore, of producing intoxication. It was the province of the jury to determine whether or not hop tonic would produce intoxication, and, if so, whether its intoxicating effects were caused by the presence therein of spirituous, vinous or malt liquors, such as are named in the indictment, or a mixture thereof.

It was, therefore, relevant and proper for the appellee to show by the witnesses whose testimony is complained of that hop tonic, or tonica, is an intoxicating drink, and in view of the verdict returned by the jury it is manifest that they were convinced, by the evidence, beyond a reasonable doubt, that the drink which was sold by appellant as hop tonic, or tonica,

was an intoxicating drink, composed of, or containing, spirituous, vinous or malt liquors, or a mixture thereof.

It is charged in the indictment, and was admitted upon the trial, that the local option law was in force in Bullitt county when appellant sold the liquid mentioned in the indictment. We deem it proper to state in this connection that the statute known as the "local option law" was amended by act of the general assembly at its last session, which amendment may be found on pages 41-2-8 of the volume containing the acts of 1902. The amendment provides that any person who shall sell, barter or loan, directly or indirectly, any spirituous, vinous or malt liquors in any territory where local option is in force, shall, upon conviction, be fined in any sum not less than \$60 nor more than \$100, or confined in the county jail not less than ten nor more than forty days, or both so fined and imprisoned in the discretion of the jury. Whereas, the punishment under the old statute was only a fine of not less than \$100 nor more than \$200.

The sale of spirituous liquors of which the appellant was convicted was made in 1901, and before the enactment of the amendment referred to, although his trial did not take place until after the amendment went into effect. The record discloses the fact that the instructions given on the trial in the lower court directed the jury, in the event that they found appellant guilty, to fix his punishment as provided by the old statute. Section 465, Kentucky Statutes, provides that "no new law shall be construed to repeal a former law as to any offense committed against the former law, nor as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense, or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter had shall conform so far as practicable to the laws in force at the time of such proceedings. If any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, by consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

It will be observed that though the amendment in question mitigates the punishment provided in the original statute, by reducing the fine that was imposed thereby, it allows the jury in addition to, or in lieu of, the fine of not less than \$60 nor more than \$100, to inflict upon the offender against the local option law imprisonment in the county jail not less than ten, nor more than forty, days. In view of the imprisonment that may be imposed under the statute as amended, and which was not permitted to be inflicted under the former statute, it may well be doubted whether the new law mitigates the punishment provided by the former statute. At any rate, it can not be said that the appellant was prejudiced by the failure of the lower court to instruct the jury to inflict the penalty found in the amendment or new law, as that could not have been done without the consent of appellant, and such consent is not disclosed by the record.

We are unable to see that any error was committed by the lower court to appellant's prejudice, and the judgment is, therefore, affirmed.

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CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO., &c. v.  
COOK'S ADM'R.

(Filed April 16, 1903—Not to be reported.)

Railroads—Negligence—Instructions—On this, the second, appeal of this case appellant seeks a reversal on the ground that the court refused to give a peremptory instruction at the close of plaintiff's testimony. Held—That plaintiff's evidence was insufficient to support a recovery, and a reversal is ordered. The court should instruct the jury that if deceased, as brakeman, failed to use ordinary care, and but for this would not have been hurt, they should find for defendant.

Gaither & Vanarsdall and John Galvin for appellants.

Robt. Harding, Thos. Shay and E. M. Hardin for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hobson.

On the former appeal the facts of this case were stated as follows: "The engineer, fireman and two brakemen were engaged in transferring cars from the main line to the side track in the yards of the company in Burgin, Ky., the intestate being one of the brakemen. The purpose was to leave a car on the side track. To do this, the engineer was required to back the cars in on the side track, there being a number of cars between the engine and the car intended to be left. The cars were provided with automatic couplers, which were operated by a bar extending out from the coupler to the side of the car, so that the brakemen could take hold of it while standing on the outside of the car and couple the cars without danger. The intestate was on the fireman's side of the engine, and went down on this side to uncouple the car in question. The other brakeman was on the other side of the train to turn the switch so that when the car was uncoupled it might be pushed on the side track. The engineer could see this brakeman, but he could not see the intestate, Cook, who was on the other side of the train from him, and neither could his fellow brakeman. Cook communicated to the engineer by signals to the fireman, who reported them to the engineer. When Cook got to the car that was to be cut off he signaled for slack, which meant that the engineer must back the train a little. The engineer did this; Cook gave the stop signal, and the engineer stopped after the train had only moved from three to six feet. The iron bar of the automatic coupler was bent and would not work the coupler; so Cook went in between the cars after he got the slack to raise the pin with his hand, as it was his duty to do. While he was doing this the other brakeman, who had turned the switch, and did not know of the difficulty Cook had met with in uncoupling the car, gave a signal to the engineer to come on, and the engineer, without a signal from Cook, or without knowing whether he was out or not, began backing the train down to the switch. In this way Cook was caught between the cars, and dragged some twenty feet; his breast bone and ribs were crushed and smashed, and he died in a few minutes."

On these facts it was held that the case was properly submitted to the jury, and that if the engineer in charge of the train knew, or had reasonable grounds to know, that Cook was between the cars, engaged in making the uncoupling, and with this knowledge, received a signal to move the cars

from the other brakeman, and negligently obeyed this signal, not exercising proper care for Cook's safety while he was in between the cars uncoupling, and thus injured him, the defendants were liable. (L. & N. R. R. Co. v. Adams' Adm'r, 21 Ky. Law Rep., 428; L. & N. R. R. Co. v. Earle's Adm'r, 94 Ky., 368.)

But the judgment was reversed for an error in one of the instructions. On the return of the case to the circuit court it was tried anew, and a verdict having been again rendered in favor of the plaintiff, the defendants have appealed. The only question we deem it necessary to consider is whether the evidence introduced on the last trial was sufficient to submit the case to the jury or to sustain the verdict. On the former appeal the defendants introduced their testimony, and thus all the facts of the case were brought out; but on the second trial the defendants introduced no testimony, and the case was submitted to the jury on the testimony introduced by the plaintiff alone, the defendants standing on their motion for a peremptory instruction. The rule is that where the defendant moves for a peremptory instruction at the conclusion of the plaintiff's evidence, and his motion being overruled, introduces his testimony, if that testimony supplies any fact or facts not shown by the evidence for the plaintiff, and thus makes out a case, this court will not reverse because these facts were not shown by the plaintiff before the motion for a peremptory instruction was made. To avoid this rule the defendants on the last trial of the case did not introduce any evidence, this court on the former appeal having considered the case under all the evidence before it.

The evidence for the plaintiff on the second trial falls far short of showing the facts set out in the former opinion. But one witness who saw the occurrence was introduced, and he knew nothing more about it than that the train was backing in obedience to the signal of Sinkhorn, and about this time he saw Cook lying on the side of the track, wounded. The other testimony for the plaintiff added nothing to the testimony of this witness as to the facts of the occurrence, except to show that Cook was dragged along the track, as shown by the signs on the ballast, and was crushed between two cars, as shown by signs on the cars. It was not shown that Cook went between the cars for the purpose of uncoupling them, or in fact why he went between the cars, or for what purpose, or that the engineer knew he was between the cars, or ought to have known it, or that there was any failure on his part to exercise proper care for Cook's safety. It was not shown that Cook gave the engineer any signal, and to sustain a verdict under such evidence would be in substance to hold that Cook's injury made out a *prima facie* case against the defendants. The law does not presume negligence, and to recover the plaintiff must show facts establishing negligence on the part of the defendant.

As the case may be tried again, we deem it proper to say that the court should instruct the jury that if Cook failed to use ordinary care, and but for this would not have been hurt, they should find for the defendants. The court should also instruct the jury that the admissions of Milligan were only competent against him, and that no fact so admitted by Milligan should be considered against the railroad company, unless shown by other evidence in the case.

Judgment reversed and cause remanded for a new trial, and for further proceedings consistent herewith.

## KENTUCKY DISTILLERIES AND WAREHOUSE CO. v. COMMONWEALTH.

(Filed April 16, 1903—Not to be reported.)

Criminal law—Nuisance—Evidence—Appellant was convicted under an indictment for a nuisance committed by polluting a stream with offal from its distillery and cattle pens, from which it has prosecuted an appeal, insisting that the conviction could not be sustained as the evidence was not sufficient to show that the cattle pen did not belong to the appellant. Held—That the evidence was sufficient to show that the pens were used in connection with the distillery, and that the distillery was operated by appellant. The jury having found these facts under proper instructions, their finding will not be disturbed. Appellant was not prejudiced by the evidence of W., who was one of the supervisors of appellant, explaining what he meant by the "Commonwealth Distillery Co."

George R. Hunt and C. H. Stoll for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Paynter.

The grand jury of Fayette county returned an indictment against the appellant for creating a nuisance, by polluting a stream with the offal from its distillery and cattle pen used in connection therewith.

The grounds urged for a reversal are as follows: First, that the testimony was not sufficient to establish the guilt of the appellant beyond a reasonable doubt; second, error in instructing the jury; third, in admitting incompetent evidence.

The testimony conduces to show that the stream was polluted by the offal from the distillery and cattle pen in which the cattle were fed with its product. The rule is that when there is any evidence conducing to establish the guilt of a defendant, the court will not disturb the verdict. Certainly there was evidence tending to establish the guilt of appellant. It is suggested that the cattle pen did not belong to the appellant, but the evidence shows that it was used in connection with the distillery, because the slop was conveyed to receptacles in the cattle pen. It is urged that the proof is not sufficient to show that the distillery was operated by the appellant. The evidence shows that W. J. Wilmore was one of the supervisors of the appellant, and that the reports of the grain mashed were made to him, besides, the admissions of Wilmore were sufficient to authorize the jury to infer that the distillery was operated by the appellant. The court certainly gave the law of the case. Under the instructions the jury could not have found against the appellant unless it believed, beyond a reasonable doubt, that it operated the distillery and used the cattle pen in connection therewith, and further, that the stream was polluted by it.

It is claimed that the court erred in allowing Wilmore to explain what he meant by "Commonwealth Distillery Co." He had said that the distillery was operated by the Commonwealth Distillery Co., and the Commonwealth's attorney then asked him what he meant by the Commonwealth Distillery Co. He answered substantially that the distillery had been previously operated by that company, but that he did not know but what it had changed



to the Kentucky Distilleries and Warehouse Co., which was in effect a withdrawal or modification of the statement that the distillery was at the time in question operated by the Commonwealth Distillery Co. The jury was the judge of the weight to be given the statements made by the witnesses.

The judgment is affirmed.

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COMMONWEALTH v. NELSON.

(Filed April 16, 1908—Not to be reported.)

**Criminal law—Appeals—**Under sections 334 and 337, Criminal Code of Practice, an appeal may be prosecuted by the Commonwealth only when the transcript is filed in the Court of Appeals within sixty days after the appeal is prayed.

Clifton J. Pratt and M. R. Todd for appellant.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Paynter.

The defendant was indicted and tried on the charge of perjury, and was acquitted under a peremptory instruction of the court. From that action of the court this appeal is prosecuted by the Commonwealth. The judgment from which this appeal is prosecuted was rendered in September, and an appeal was granted by the circuit court at the same term it was rendered. More than sixty days had elapsed from the time the judgment was rendered from which the appeal is prosecuted until the filing of the transcript in the office of the clerk of this court.

By section 334, Criminal Code of Practice, the court in only given appellate jurisdiction in prosecutions for felonies subject to restrictions contained in the article of the Code, of which that section is a part. Section 337, Criminal Code of Practice, reads as follows: "If an appeal on behalf of the Commonwealth be desired, the Commonwealth's attorney shall pray the appeal during the term at which the decision is rendered, whereupon the clerk shall immediately make transcript of the record and transmit the same to the attorney general, or deliver the transcript to the Commonwealth's attorney, to be transmitted by him. If the attorney-general, on inspecting the record, be satisfied that error has been committed "to the prejudice of the Commonwealth, upon which it is important to the correct and uniform administration of the criminal law that the Court of Appeals should decide, he may, by lodging the transcript in the clerk's office of the Court of Appeals, within sixty days after the decision, take the appeal."

Section 338 provides that no summons or notice shall be necessary upon an appeal.

As the transcript was not filed in the clerk's office of the Court of Appeals within sixty days after the decision from which the appeal is prosecuted, the court has no jurisdiction to review the action of the court below, therefore, the appeal is dismissed.

## COYNE v. ANDERSON'S EX'ORS.

(Filed April 16, 1908—Not to be reported.)

Bills and notes—Defense of joint makers—Notice—A. and B. executed their joint note for \$1,500, negotiable and payable at a designated bank. The note was assigned by the cashier of the bank as agent of the holder to C., who discounted it to the bank. At maturity it was not paid, and by agreement of parties it was renewed by the execution of two notes, one for \$500 and the other for \$1,000. These renewal notes becoming due were protested for non-payment; the executors of C. took up same and instituted suit against A. and B. on same, and on the trial a peremptory instruction to find for plaintiffs was given, from which this appeal is prosecuted. B. filed an answer, denying the sale of the notes to C., and pleaded that he was not indebted to A. or C.; that he had joined in the making of the note for the accommodation of A., and under his agreement was bound merely as surety to the bank at which they were or might be discounted, and was to be bound in no other way and to no other person, and charged that the cashier of the bank knew of this agreement between him and A., and that C. also had notice thereof, and that the notes were obtained from him by covin and fraud. Held—That the peremptory instruction was properly given. There was no proof of fraud or deceit in the obtention of the notes from B., and neither the cashier nor C. had any notice of any such agreement affecting the liability of B. on the original notes, and as the notes were discounted by the bank they were placed on the footing of foreign bills of exchange, and any knowledge obtained by the cashier or by C. affecting on the relation of B. to the notes can not prevent a recovery by C., who had no notice of any infirmity in the original notes

E. MacPherson for appellant.

Helm, Bruce & Helm for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Barker.

Appellant, Joseph Coyne, and one Joseph Clark, executed their joint note, payable to the order of Joseph Clark, for the sum of \$1,500, negotiable and payable at the Louisville City National Bank. This note was assigned through W. S. Parker, the cashier of the bank, to L. L. Anderson, for whom Parker was agent. Clark's endorsement to Anderson is as follows:

"For value received, I hereby assign the within note to L. L. Anderson.

(Signed) "JOSEPH CLARK."

After the expiration of several months, and before maturity, Anderson discounted the note to the Louisville City National Bank, which thereby became its owner and holder. When this note became due it was not paid, but by arrangement of all the parties it was renewed, and for convenience was separated into two notes, one for \$500 and the other for \$1,000. The renewal notes not being paid by the makers at maturity, were protested for non-payment, and thereafter paid off and taken up by Anderson's executor, he having in the meantime died. Suit having been instituted by the executor in the Jefferson Circuit Court against Joseph Clark and Joseph Coyne, the makers of the notes, substantially alleging the facts as herein set out, Joseph Coyne filed an answer, in which he denied the sale of the notes to L. L. Anderson, and pleaded that he was not indebted to Clark or Anderson; that

he had joined in the making of the note for the accommodation of Clark, and upon the agreement that he was to be bound on the notes merely as surety to the bank at which they were, or might be, discounted, and was to be bound in no other way and to no other person; and charged that Parker, the cashier of the bank, knew of this agreement between him and Clark, and that L. L. Anderson also had notice thereof; that the notes in question were obtained from him by fraud and covin, and that Joseph Clark, the assignor, was justly indebted to him in the sum of \$1,264.57, which was pleaded as an offset. The case coming on to be tried, was submitted to a jury, who returned a verdict in favor of appellee. For some reason, which does not appear, the court set aside this judgment and awarded appellant a new trial.

The case again coming on for trial, the court, after all the evidence was in, awarded appellee a peremptory instruction to the jury to find a judgment in its favor, as prayed for in the petition. Appellant's motion for a new trial having been overruled, he has appealed the case to test the soundness of the judgment awarding appellee a peremptory instruction. We may say, in the outset, that there is no evidence in the record warranting the charge that either the original or the renewal notes were obtained from appellant by fraud or covin, to which the appellee or the decedent was a party, or of which they had notice; nor is there any evidence to sustain appellant's contention, that either Parker or Anderson knew of the alleged arrangement between appellant and Clark, that appellant was only to be surety on the original note, or that there was no consideration, as between appellant and Clark; nor is there any evidence to sustain the claim that the original note was to be discounted in any particular bank. We think it clear that the original note was executed and delivered by appellant for the purpose of enabling Joseph Clark to raise money generally, and the question as to where he raised it was immaterial. It is doubtless true that appellant did not know Clark assigned the original note to Anderson; and as the transaction occurred in the business place of the Louisville City National Bank, with its cashier, he doubtless thought that it was discounted to the bank; but that he was at all interested in this question there is not the slightest evidence in the record.

The case of *Kline v. Templeton*, 78 Ky., 550, will not support appellant's contention, that when Anderson's executor took up and paid off the notes discounted to the bank they became, in its hands, subject to such defense or defenses as existed between the parties prior to their discount to the bank. The consideration of the note in the case cited was illegal, and of that fact the holder who endorsed it to the bank well knew, and when the maker failed to pay at maturity, and the endorser to the bank was required to pay it off and take it up, it became in his hands subject to all the original defenses, because he had notice of its infirmity. The court say: "In this case appellants having received the note sued on with the knowledge that it was without consideration, took it up from the bank with the same right in appellee to make defense as he had prior to the discounting. Appellants, being holders with notice of the infirmity in the bill, it is in their hands subject to all the defenses that exist between the original parties to the paper."

It will thus be seen that the court rested their opinion, that the parties

were relegated to their original rights after it was taken up by the endorser to the bank, alone upon the fact that he had notice of the original infirmity in the bill. Not so in this case. Neither Parker, the agent, nor Anderson, the principal, had any notice, or any reason to suspect, that the original note discounted by Clark was anything but what it purported on its face to be—a merchantable piece of paper based upon a valuable consideration. It may be true that in the negotiation for the renewal of this note Parker, the agent, discovered that Coyne had joined in the making of it for the accommodation of Clark, but this would not alter the status of matters, the rights of Anderson, the principal, having been fixed by the original transaction. No information which he or his agent received subsequent to the original endorsement to him vitiated or weakened his position as an innocent holder for a valuable consideration.

What, then, were the rights of his executor, the holder and owner of the notes in question, after it had taken them up from the bank, to which their decedent had discounted them, assuming, as the facts show, that Anderson was an innocent holder for a valuable consideration of the original note of which these sued on are the renewals?

In the case of *Spencer v. Biggs*, 2 Metcalfe, 123, it is said: "But it is contended by the counsel of appellants that the note, having been taken up from the bank by appellee after it had been negotiated and discounted at the bank, is no longer upon the footing of a foreign bill of exchange. We are satisfied that this position is not tenable. The 7th section of the 'Act to incorporate the bank of Ashland' (Laws of Kentucky, 1855-6, page 26), invests said bank with power and authority to discount promissory notes, and provides that the promissory notes made payable to any other person or persons, and payable and negotiable at the principal office of discount and deposit, or branch of said bank, or at any other bank, and endorsed to and discounted by said bank, are by the act on the same footing as foreign bills of exchange, and the same remedies are given upon such notes as were allowable upon bills of exchange. It is apparent from the record that the note sued on had been endorsed to and discounted by the Bank of Ashland. At the very moment that it was so discounted it was, by the charter of the bank, invested with the nature and properties of a bill of exchange. The act does not provide that these properties shall be changed or lost afterwards, if the bank endorse the paper to some one else, or if it is taken up by the indorser to the bank. Such an act does not deprive the paper of the character and properties which it possessed in the hands of the bank. The impress which was stamped upon it by law at the instant of its discount remains unchanged, although the note may find its way again into the hands of the person who indorsed it to the bank, provided that such person be an innocent holder. Any one who receives it from the bank is substituted to all of the rights and remedies which the bank had whilst the holder of the note."

In the case of *Feland v. Stirman*, 15 Ky. Law Rep., 271, the Superior Court substantially said: "A note in the hands of one who, having received it with notice of the defense against it, discounts it in bank, and afterwards takes it up, is subject to any defense that might have been made to it before it was discounted. But where the payee has indorsed the note to an innocent endorsee, and the latter, after discounting it in bank, upon its maturity takes

it up, he occupies, so far as defenses against it are concerned, as good a position as the bank did."

In the case of *Frank, &c. v. Quast*, 86 Ky., 649, it is said: "The paper had not matured when discounted, and there is no evidence conducing to show bad faith on the part of the appellees in discounting the paper, or that they had any notice of the agreement between the parties to the bill that it should be negotiated at the Breckinridge Bank and nowhere else. The appellees had no reason to suspect the honesty of its debtors, and took the paper as innocent holders for value. \* \* \*

"The paper was made for the accommodation and use of Frank & Sons, and no restriction as to the application to be made by them of the money. Mr. Daniels in his work on Negotiable Instruments says: 'It is immaterial that the paper executed or indorsed for accommodation is not used in precise conformity with agreement, when it does not appear that the accommodation party had any interest in the manner in which the paper was to be applied. No change in the mere mode or plan of raising the money, though not applied to the purpose intended by the accommodation party, will constitute a misappropriation.' (Volume 1, page 742.) Again: 'The accommodation party must have some interest in the application of the money, otherwise he is in no condition to contend that there has been a misappropriation of it, or of the security on which it was to be raised.' This doctrine was applied to a case where the party had applied the proceeds to a pre-existing debt. 'It is now well settled that where a note is endorsed for the accommodation of the maker, to be discounted at a particular bank, it is no fraudulent misappropriation of the note if it is discounted at another bank, or used in payment of a debt or otherwise for the credit of the maker.' (Daniels on Negotiable Instruments, volume 1, page 742.) Here the drawers and indorsers gave to Frank & Sons the use of their names to raise money in any way beneficial to that firm, without restriction or condition, except, as they say, the money was to be obtained from a particular bank. Such a condition, unknown to a bona fide holder, can not affect the validity of the bill in his hands, and from the facts before us we perceive no merit in the defense."

These cases are conclusive of the case at bar, and it follows that none of the defenses set up by appellant could avail him in the action by Anderson's executor, and the court properly instructed the jury peremptorily to find for the appellee.

Wherefore, the case is affirmed.

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DOUTHITT V. CANADAY, GILLIUM & KEY.

(Filed April 16, 1903—Not to be reported.)

Injunction to prevent closing alley—Appellees, on proof that they were the owners of an alley as an appurtenant, same having been laid out by the owner on a plat of the property before the sale, were entitled to an injunction preventing appellant from closing said alley as he had no interest in it.

J. C. Speight for appellant.

D. G. Park for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Hobson.

Appellees filed this action against appellant to enjoin him from closing up an alley ten feet wide between their property in the city of Mayfield, and the court having decreed them the relief sought, he appeals. The alley in contest is in what is known as R. K. Williams' addition to the city of Mayfield. The proof shows that Williams cut up his tract into town lots, subdividing it by streets and alleys, and sold the lots under this division. A plot was made of it, which was recorded in the county clerk's office, and no trouble would, perhaps, have ensued but for the burning of the courthouse and public records some years ago. The alley in question was laid off on the side of Williams' addition and between it and the adjoining property. When the railroad was built through the town it ran through the addition of Williams, crossing this alley. The alley was not as much used as it would have been but for the difficulty in getting across the railroad. It also appears that by an act of the legislature the town boundary was drawn in so as to leave this land outside of the town for some years, but subsequently the boundary was extended so as to take it in. The proof in the case satisfies us that the alley was established in the laying off of the Williams' addition, and was shown on the recorded plot and called for in the deeds to the property abutting on it, under which appellees claim. This gave the owners of this property the right to the use of the alley as an appurtenant to their property independently of the act of the city in accepting the proposed dedication or its excluding the land from its limits when the boundary was drawn in. The proof also satisfies us that the alley in question in no part of appellant's property, and never was. His deeds call for an eighty-foot lot; he has that outside of the ten-foot alley. His title is not deduced from Williams, but from another person who made an addition to the town, and we are satisfied from all the evidence that the ten-foot alley in question is on the ground owned by Williams. The proof fails to show any such adverse possession of the land as would give appellant, or those he claims under, any title to it. The chancellor's conclusion on the facts is supported by the weight of the evidence. These conclusions make it unnecessary for us to consider the rulings of the court on exceptions to the testimony, as none of these matters affected the result.

Judgment affirmed.

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CHESAPEAKE & NASHVILLE RY. CO. V. OGLES.

(Filed April 16, 1903—Not to be reported.)

Railroads—Negligence—Instructions—The appellant's track crosses a turnpike upon a high trestle in an enclosed bridge. Appellant and her husband and brother-in-law were traveling along the turnpike, driving a spirited horse, and when they had arrived at the crossing of the railroad over the turnpike a train of cars rushed suddenly on the trestle, without warning, and greatly frightened the horse, and appellant, when she jumped from the vehicle, dislocated her ankle and she suffered other injuries. She recovered \$600 damages in an action for negligence against appellant, for failure to give due notice of the approach of the train. It is insisted that the court should have given a peremptory instruction for the defendant. Held—That the

court properly instructed the jury that it was the duty of those in charge of the train approaching the crossing to give some warning of its approach for the protection of those who might be riding or driving on the highway, and that the question as to whether or not the failure to give such warning was negligence should be left to the decision of the jury. The court properly refused to give the peremptory instruction as the rule is well settled that it is improper for the court to give a peremptory instruction for defendant if there is any evidence conducing to show a right of recovery in the plaintiff. The act of appellant in jumping from the wagon and suffering the injuries was not such contributory negligence as prevents a recovery. An error of judgment as to the best means of escape from a threatened injury can not prevent a recovery from a person who has failed to perform a duty.

W. C. Goad for appellant.

B. W. Bradburn for appellee.

Appeal from Allen Circuit Court.

Opinion of the court by Chief Justice Burnam.

The track of the Chesapeake & Nashville Ry. Co. crosses the Scottsville and Gallatin turnpike road upon a high trestle near the point where Tramel creek is spanned by a large enclosed bridge. On the 8th day of July, 1901, the appellee, Lula Ogles, and her husband and brother-in-law, were traveling over the turnpike road from Scottsville to their home near the village of Petroleum, in Allen county, and in doing so necessarily passed under the railroad crossing. The testimony shows that neither appellant's track nor trains thereon could be seen from any point south of this crossing, both because it was much higher than the turnpike road and for the reason that the approach to the crossing was at the end of a high bluff, which obstructed the view. When appellee and her husband had arrived at within about sixty yards of the crossing, they stopped their horse, which was a young and inexperienced animal, and listened for a signal or any noise that would indicate the approach of a train. But hearing none, they sent their brother-in-law, who was riding with them, forward to the crossing to see if he could discover any evidence of the approach of a train. He informed them that the way was clear. They then proceeded on their way, and while passing under the crossing appellant's train of cars came suddenly from the south, running rapidly over the crossing, making a loud noise, which so frightened their horse that he began to tremble, jump, and make efforts to escape. Realizing that further along on the turnpike road there was a high and unfenced bluff, and fearing that her husband would not be able to control the horse, and that it would succeed in running away, and in all likelihood throwing her over the bluff, she jumped from the wagon, and in so doing dislocated her ankle, and suffered other serious injuries, which confined her to her bed for many weeks. And this suit was instituted to recover damages for the injuries so received, which she alleges was due to the negligence of the defendant in failing to give notice of the approach of its train to the turnpike crossing by ringing its bell or blowing its whistle. The trial before a jury resulted in a verdict and judgment for appellee for \$600.

The only ground upon which a reversal is asked is that the trial court failed at the conclusion of appellee's testimony to direct the jury to find a verdict for the defendant. It is insisted for the appellant that as the railway

track does not cross the turnpike road upon the same level, that the company were under no obligation to give the signals of its approach required by section 786 of the Kentucky Statutes. But they also insist that, as a matter of fact, these signals were given; and that appellee, who lived in the immediate vicinity of Petroleum, knew at the time she attempted to make the crossing that it was the regular schedule time for the passage of one of their regular trains, and that she was, therefore, guilty of contributory negligence in attempting to drive an unbroken horse under the track.

Five witnesses testify positively that no signal was given by appellant of the approach of their train, and the engineer in charge thereof, while expressing the opinion that a signal was given, testified that previous to the accident he had no instruction from the railway company to blow the whistle for the Big Tramel crossing, but that he received such instruction shortly after the accident. It was decided in *Rupard v. Chesapeake & Ohio R. R. Co.*, 88 Ky., 280, that where a railroad track crossed a public highway on a trestle, that it was the duty of those in charge of the train approaching the crossing to give some warning of its approach for the protection of those who might be riding or driving on the highway, that they might secure themselves against injury by reason of the frightening of their horses, and that the question as to whether or not the failure to give such warning was negligence should be left to the decision of the jury. This is undoubtedly the common-law rule upon the subject, and the instructions in this case are carefully drawn with the view of leaving to the jury to determine whether appellant actually gave the signals of its approach to the crossing, and also whether a failure to do so under the facts of the case was negligence, and the proximate cause of plaintiff's injury. In fact no complaint is made of the instructions on this point. And it is a well-established rule in this State that if there is any evidence conducing to show a right of recovery in the plaintiff, it is improper for the court to give a peremptory instruction for the defendant, even though the court may be of the opinion that the verdict should be for the defendant. This is a question of fact which must be left to the determination of the jury. So far as we are able to discover the conduct of this case by the trial court is in accordance with well-settled rules of law. Nor was appellee guilty of contributory negligence in jumping from the spring wagon at the time and under the circumstances. The right of a person to damages for a personal injury, due to the negligence of another, is not affected by his having contributed thereto, unless he was in fault in so doing, as the rule is well settled that one suddenly and unexpectedly placed in a position of imminent danger, by the failure of duty on the part of others, will not be held guilty of contributory negligence because he did not adopt the best means of escape, or made an error in judgment as to the best course to pursue. (*Middlesborough R. R. Co. v. Stallard's Adm'r*, 24 Ky. Law Rep., 1668, and authorities there cited.)

Judgment affirmed.



## HARL v. HARL.

(Filed April 16, 1903—Not to be reported.)

Divorce—This appeal is prosecuted from a judgment refusing to grant a divorce to the wife from her husband on the ground of cruel and inhuman conduct. Held—That the proof clearly establishes the allegations of the petition as to the cruelty of the husband to the wife, and she is entitled to a divorce from the bonds of matrimony and the custody of the children.

Sweeney, Ellis & Sweeney for appellant.

Montgomery Merritt for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by appellant, Florence M. Harl, against her husband, the appellee, James C. Harl, for the purpose of obtaining a judgment divorcing her from him a vinculo matrimonii. The grounds alleged in her petition were that he had "habitually behaved toward her for more than six months past in such cruel and inhuman manner as to indicate a settled aversion to her, and to permanently destroy her peace and happiness; that appellee had so cruelly mistreated and injured her as to indicate an outrageous temper in him, and that she believed her life was in danger from living longer with him; and that she was in constant danger of great bodily harm."

The answer of appellee put these allegations in issue. Upon the trial the court dismissed appellant's petition, and from this judgment she has appealed. The court will give great weight to the opinion of the chancellor in a case like this, and will not reverse his judgment unless the evidence clearly shows the wife's right to a decree of divorce. As said in the case of *Shrout v. Shrout*, 12 Ky. Law Rep., 470, by the Superior Court: "While an appellate court should give great weight to the judgment of a lower court in refusing a divorce, and should never reverse such a judgment unless the grounds relied upon have been clearly established, the court is of opinion in this case that the evidence clearly established the wife's right to a divorce, upon the ground that her husband had treated her in such a cruel and inhuman manner as to indicate a settled aversion to her, and that his conduct is such as to destroy permanently her peace and happiness. There is no act of a husband toward a wife that so clearly indicates a settled aversion to her, none that will so permanently destroy her peace and happiness, and none so cruelly inhuman, as to charge her falsely with being untrue to her marriage vows."

In the case at bar the evidence shows that the husband periodically gets upon sprees, and that when thus intoxicated he becomes cruel and inhuman in his conduct towards his wife; that, upon one occasion, without any provocation, he caught her by the throat, and threw her to the floor. This was done at a ball, attended by her neighbors and friends, and where her humiliation at being thus publicly assailed was added to the cruelty of the assault itself. The evidence further establishes as a fact that, at least upon one occasion, he publicly applied to her epithets so vile as to be nameless in this opinion, and which, if deserved, would have shown her to be a woman without honor or chastity.

Appellee's conduct towards his wife, when he was under the influence of liquor, which was frequent, was always rough and cruel, and his language, in addressing her, profane. The cross-examination of the learned counsel for appellee seemed generally addressed to the end of showing that appellee's outrageous conduct was dependent upon his inebriety. We know of no reason why drunkenness in the husband should justify his cruel treatment of his wife, nor do we understand that personal injuries from a drunken husband are less painful to the wife, or his insults less humiliating, than they would be if he was sober.

Assuming the evidence for the appellant to be true, it would be cruel, indeed, to require her to remain the wife of a man who could so far forget himself as to wantonly injure without cause the wife whom it was his duty to protect, and so grossly insult her, whose honor he should have been willing to maintain with his life. No self-respecting woman could live with appellee, in the bonds of matrimony, after receiving at his hands the injuries which the evidence shows have been inflicted upon appellant. The court below should have granted appellant a divorce from appellee, and awarded her the custody of her children, making sufficient provision for the father to see them and enjoy their society.

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

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TRUEDELL, &c. v. DARNALL, &c.

(Filed April 16, 1908—Not to be reported.)

Wills—This appeal involves the construction of a will, where the testator devised his lands equally to his wife and A., and in a subsequent clause provided that if his wife and A. should die without children then the estate should go to the testator's brothers and sisters. On the death of the wife without children the brothers and sisters claim the share devised to her. While this claim is resisted, it is insisted that before the brothers and sisters can have any interest in the estate that both the wife and A. should die without children. Held—That on the death of the wife the brothers and sisters of testator are entitled to her share as it was the evident intention of testator that the devise to his wife and A. should be separate, and neither, as survivor, should have any interest in the estate of the other. The law prefers that construction which recognizes a disposition of the entire estate.

A. E. Cole & Son for appellants.

Thos. R. Phister for appellees.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Hobson.

Appellants are the only surviving brothers and sisters of John Gilbert, who died a resident of Lewis county in the year 1848, leaving surviving him his wife, Nancy Gilbert; she died on December 8, 1900, without children. They claim that they are the owners of one-half of the land owned by John Gilbert at his death, as the wife, Nancy, died without children. Their rights depend upon the proper construction of his will, which is in these words:

"I, John Gilbert, of Lewis county and State of Kentucky, do make and

publish this my last will and testament, hereby revoking and making void all former wills by me at any time heretofore made.

"1st. When I die I will my soul to God.

"2d. As I am very little in debt, I wish my estate not to be administered upon.

"3d. I give unto my wife and Nancy Fulton Hoover all my lands, money and perishable property, to be equally divided, share and share.

"4th. And I hereby constitute and appoint my wife, Nancy Gilbert, executor of this my last will and testament, who is to pay all my debts and funeral expenses; who is to let Jane Hoover live on the place; support her while she remains single.

"5th. When my brother Nathaniel Gilbert's son, John Gilbert, settles himself and marries, I wish my wife, Nancy, to give him \$50 when she can spare it.

"6th. If my wife and Nancy Fulton Hoover shall die without children, then in that case I want my brothers and sisters (Margaret Hoover and Elizabeth Sherley excepted) to have the land equally between them, and not to sell it unless to one another. My living brothers and sisters at that time is all that are to have the land.

his  
"JOHN x GILBERT."  
mark

Jane Hoover named in the will is dead. Nancy Fulton Hoover is still living, and is now Nancy Fulton Tolle, one of the appellees. The question to be determined is, what became of the interest devised to the widow, Nancy, upon her death without children? The contention of appellees is that the surviving brothers and sisters take no interest in the land under the will until the wife, Nancy, and Nancy Fulton Hoover shall both die without children, and that as the latter still lives, the circuit court properly dismissed the action.

By the third clause of the will the testator devised to his wife and Nancy Fulton Hoover all his "lands, money and perishable property, to be equally divided, share and share." If the will had stopped here it is clear that the wife and Nancy Fulton Hoover would have taken the estate equally, share and share alike, and neither would have had any interest in the share of the other. The sixth clause is the only modification of this disposition of the estate, and by it, if the wife and Nancy Fulton Hoover shall die without children, his brothers and sisters then living are to have the land equally between them. This takes away what would have been a fee simple in the wife and Nancy Fulton Hoover in the land under the third clause and makes it a defeasible fee. When the wife died without children the estate devised to her was defeated and there is nothing in the will to indicate that in any event Nancy Fulton Hoover was to have any interest in the share of the estate devised to the wife. Taking the will as a whole, we are of opinion that the testator intended to dispose of his whole estate. The purpose seems to have been to provide for his wife and Nancy Fulton Hoover equally, and to make each independent of the other by directing an equal division of the land between them. His purpose also was that his land should go to his surviving brothers and sisters on the death of these devisees without children. As neither the wife nor Nancy Fulton Hoover had any interest in the

land of the other, neither was in anywise affected by the death of the other without children. But when the wife died without children, her share of the land went to somebody, and as there is nothing in the will to show that Nancy Fulton Hoover was in any contingency to have any interest in the wife's share, our conclusion is that it passed on her death without children to the testator's then surviving brothers and sisters. The only other possible construction of the will is that the testator died intestate as to this interest in his estate, and that upon his wife's death without children her share passed to his heirs at law, and will not vest in the residuary devisees unless Nancy Fulton Hoover shall hereafter die without children. But the testator manifestly intended by the third clause to dispose of his entire estate, and the sixth clause must be read in connection with it. There is no reason why the brothers and sisters on the death of the wife without children should not take her share of the land, if they are ever to take it, and the testator's purpose to provide for his surviving brothers and sisters in the event of the death of the first devisees without children is as clearly expressed as his intention to provide for them. It would certainly defeat the intention of the testator if it were held that on Nancy Fulton Hoover's death hereafter, leaving children surviving her, her share would go to her children, but that the share of the wife, Nancy, who has died without children, would not go to the testator's surviving brothers and sisters as directed in the sixth clause. The object of all construction is to arrive at the testator's intention, and cases are not wanting in which to carry out the testator's intention, and word "and" has been read as equivalent to "or," and vice versa. The language of wills is to be construed according to common intentment; technical rules must not defeat intention. (*Moore v. Moore*, 51 Ky., 656; *Darnell v. Crane*, 1 Ky. Law Rep., 354.)

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

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SMITH'S ADM'R v. WELLS.

(Filed April 17, 1903—Not to be reported.)

Fraud—Judicial sale—In this action appellant purchased a tract of land at a judicial sale by his attorney, but did not pay the purchase money. After several years an order was entered in court transferring the bid to appellee, who paid the purchase money, and to whom the commissioner made a conveyance. Subsequently appellant brought this action to recover the land, alleging that the order transferring his bid and ordering a conveyance of the land to appellee was fraudulent and without any authority from him. Held—That owing to the lapse of time and the fact that the attorney and commissioner are dead, and the further fact that the papers are lost, the court properly refused to permit appellant to recover said land as it will be presumed that all steps were properly taken.

Winfield Buckler for appellant.

J. I. Williamson for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Nunn.

On the 6th day of September, 1879, a suit was brought in the Nicholas Cir-

court by Enoch Smith v. Mitchell Grimes, &c., by which action he sought to sell forty-seven acres of land for the satisfaction of a claim due the plaintiff for purchase money. This suit was litigated by the parties until the March term, 1890. During this litigation the plaintiff, Enoch Smith, died testate in the State of Missouri, and appellant, B. W. Boone, was in August, 1889, appointed administrator with the will annexed of the estate of Enoch Smith, deceased, and the action was regularly revived in his name, and prosecuted by him to judgment in the March term, in 1890, the debt, interest and costs, amounting at that time to something like \$1,600, and the court adjudged the same to be a lien upon the land, and on the 14th of April, 1890, T. J. Glenn, the master commissioner of the Nicholas Circuit Court, sold the land and reported to the court that he had sold it to the plaintiff, B. W. Boone, at the price of \$1,335, and that the plaintiff was the purchaser, and that he did not take any bond for the purchase price. The report was confirmed, but no deed was ever made to him for the land, nor did he ever pay anything thereon in the way of costs, or otherwise.

On March 17, 1891, the master commissioner was directed by the court to collect from the plaintiff, the purchaser, a sufficient amount of money to pay all the costs of the proceedings, and in response to that order the commissioner, on the 19th day of March, 1891, filed his report, in substance stating that the land was sold and was purchased by the plaintiff by his attorney, and that the commissioner was informed that the purchaser, the plaintiff, had no funds in hands with which to pay costs, but that the purchaser was endeavoring to make a sale of the land to enable him to settle up the whole matter incident to the proceedings. The commissioner filed like reports November 19, 1891; March 24, 1892; November 24, 1892, he reported that he had been informed that the plaintiff had sold the land to H. C. Wells. On February 14, 1893, the following order was entered in the action of Enoch Smith v. M. Grimes, &c.: "On motion of Ben W. Boone, administrator, purchaser of the tract of land heretofore sold under judgment herein, T. J. Glenn, master commissioner, is directed to convey said land to H. C. Wells, to whom said Boone had sold it, reserving a lien on the land in the deed for price thereof, and by said Wells to be paid to said Boone, to wit, \$600, one-half payable 23th day of April, 1893, and the remainder 26th day of October, 1893. Thereupon the said Glenn produced in open court and acknowledged his deed as commissioner, conveying said land to said Wells, which being examined, is approved and ordered to be certified to proper, — for record."

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It appears from the record that appellee, H. C. Wells, paid his first note of \$300 and interest to Judge W. P. Ross, plaintiff's attorney in that action, and that Ross, out of said fund, paid the costs of that action to the clerk, sheriff, commissioner, etc., reserving to himself a fee of \$75; paid H. L. Stone, attorney for Enoch Smith, a fee of \$100, and paid the balance of about \$38 to Kennedy & Kinsolven, attorneys for Caroline Hayden. Appellee paid the other and last note to the last-named attorneys, as counsel for Caroline Hayden, and took their receipts therefor.

It appears from this record that under the will of Enoch Smith, Caroline Hayden was a devisee, and that she, prior to the year 1893, instituted an action in the Nicholas Circuit Court against Ben W. Boone, administrator,

with the will annexed of Enoch Smith, to recover the amount devised to her, and that Kennedy & Kinsolven were her attorneys in this action. The clerk of the court proves the records of this action to have been lost or misplaced. On the 26th day of April, 1901, the appellant instituted this action against the appellee to recover the forty-seven acres of land and the rents thereon from 1893 to the institution of the action, and afterwards, by an amendment, alleged that the reports by the master commissioner, stating that he was endeavoring to sell the land to pay the costs, were made without his knowledge or consent, or without any authority from him, and the order of court purporting to have been made on his motion, in which it is stated that he had sold the land to appellee for the price of \$800, was made without his knowledge or consent, or by his authority, and was fraudulently made by some one unknown to him.

The appellant in his deposition swears to the same statements that he makes in his petition, and in addition states that he was never in Nicholas county, Kentucky, in his lifetime; that the first he heard of Wells being in possession of the land as a purchaser was in the year 1896, and that he had never received as much as a dollar of the purchase money, and when asked why he had not taken steps to recover the land before April, 1891, answered that he was depending upon Judge Ross, his attorney, to look after his interests. It further appears from the record that both Judge Ross and T. J. Glenn, the master commissioner, had died prior to the institution of appellant's action. Appellant was the only witness who testified to any fact sustaining the allegations of his pleadings. It further appears from the record that the land in controversy, at the time appellee bought it, was in a dilapidated condition, with no building of any kind on it, the fencing on and around it about all destroyed; the land was rolling and had washed into gullies, and its value, by reason thereof, had been greatly decreased. The witnesses, infixing its value, varied from \$400 to \$1,000.

Considering all the facts and circumstances as developed by this record, namely, that appellant never was in Nicholas county, Kentucky, in his life; that Judge W. P. Ross was his attorney and bid the land in at the sale for the appellant, and it is evident that Judge Ross gave the information to the commissioner, from which he reported that the plaintiff was endeavoring to sell the land to get money to pay the costs, and from whom he got the information that he had sold the land, and we are satisfied that it was Ross who prepared the order directing the conveyance of the land to the appellee, and the fact that the appellee paid all the purchase money in the year 1893, the first note to Ross and the second note to the attorneys for Caroline Hayden, who had sued the appellant, the fact that the papers in that suit were lost before the institution of this action, and the further fact that his attorney, Judge Ross, and the master commissioner, Glenn, had both died before the institution of this suit, and the further fact that the appellant admits that he was informed of the purchase and possession by the appellee of the land in controversy for five years before the institution of this action, and not a word from him indicating that he had made any effort to ascertain the facts with reference to appellee's purchase or the situation prior to the death of Ross and Glenn, and not until shortly before the institution of this action; and the further fact that there is not developed in this record any evidence

or any circumstance of any wrongdoing, or any apparent attempt at wrongdoing, or sharp practices on the part of his attorney, Judge Ross, or the appellee, or on the part of any person connected with this transaction, we are convinced that the lower court did right in dismissing the appellant's petition, and that there is not sufficient evidence to authorize this court to adjudge that the order of court directing the deed to be made to appellee was obtained by fraud, and to declare it a nullity.

Wherefore, the judgment of the lower court is affirmed.

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ALLEN v. NEW DOMAIN OIL AND GAS CO.

(Filed April 17, 1903—Not to be reported.)

Injunction—Cancellation of contract for lease of oil and gas lands—Leases of lands for oil and gas privileges were taken in 1891 and transferred to appellee. In 1896 the appellee filed its petition against appellant, alleging that appellant was taking leases of gas and oil privileges on some of the same land on which appellee holds leases, and was giving out in speeches that appellee had forfeited its leases, and an injunction against appellant was prayed for. The petition, as amended, alleged that it had complied with the terms of its lease by drilling the necessary test wells, and not having found oil and gas in paying quantities, was entitled to hold said leases until the expiration thereof, viz., fifteen years, without paying anything to the lessors. A demurrer to the petition, as amended, was overruled and the injunction granted, from which this appeal is prosecuted. It is insisted that the leases are void for want of mutuality. Held—That the general rule of law is that to enable either party to compel a specific execution the contract must be mutually binding on each. There are some exceptions to this rule, as where the party not bound performs his part of the contract. As appellee has fully complied with its part of the contract at great expense to itself and without injury to the lessors, it is now too late for appellant to contend that appellee is not bound to perform its part of the contract. This proceeding does not affect the lessors as they are not parties to it, and this judgment can only affect the appellant in his improper conduct as admitted by his demurrer.

James Goble for appellant.

W. S. Harkins for appellee.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Nunn.

The record, or that part of it necessary to be considered on this appeal, shows that during the year 1891 about 500 land owners in the county of Floyd, in this State, executed and delivered leases of the oil and gas privileges under their respective lands to G. H. Dimick and L. H. Gornley, of Pittsburg, Pa. The terms and conditions of the leases being similar, we copy such parts of one of them as will be necessary to elucidate the issues involved:

"This lease, made this 7th day of September, A. D., 1891, between Joel Allen, of the county of Floyd, and State of Kentucky, first party, to G. H. Dimick and L. H. Gornley, of Pittsburg, Pa., second parties;

"Witnesseth: That the first party grants to the second parties the sole

right to produce petroleum and natural gas from the following named tract of land. \* \* \*

"Specifically granting to the second parties for and during the term of fifteen years, from this date, the exclusive rights to drill and operate oil and gas wells; to lay and operate pipe lines; the necessary right of way over the premises; the use of enough land on which to preserve the products and to erect such buildings as they may desire; the free use of the water, if found on the premises; with the right at any time to annul this lease by failing to comply with its terms; and to remove all machinery and fixtures which they may have placed thereon; and should the second parties find a paying production of oil or gas on said land during said term, then first party agrees to extend this lease from year to year, as long as said production continues.

"First party further agrees within — days after the discovery of oil in paying quantities on said land to make the second parties a good and sufficient deed of the oil and gas right in said land, for which said second parties shall pay first party the sum of — dollars per acre.

"In consideration for which the second parties agree as follows:

"1st. To pay the sum of \$1 in hand, the receipt of which first party hereby acknowledges.

"2d. To use and occupy only so much of said land as may be necessary for the purposes therein granted.

"3d. To commence operations and complete one well on the land herein leased within two years after finding oil in paying quantities in one of the test wells named below, or thereafter pay as rent to first party 10 cents per acre yearly in advance until such well is completed, or until second parties elect to cancel this lease by nonpayment of said rent.

"4th. To deliver to first party in pipe lines, free of charge, one-tenth of all the oil they may produce and save from said land.

"5th. To pay first party for any well from which gas is marketed, semi-annually in advance, the sum of \$100 for each pound of gas pressure per square inch shown by the well at the beginning of each six months while the sale of gas continues.

"6th. To pay any money becoming due to first party at Prestonburg in said county.

"7th. Second parties agree to drill and complete one or more test wells to a depth of eighteen hundred feet, if oil or gas is not found in paying quantities at a less depth, and said well or wells shall be located within fifteen miles of Prestonburg, and shall be completed within eighteen months from the date hereof, or a failure so to do shall work the absolute forfeiture of this lease.

"First party reserves all timber, coal and other minerals, and second parties shall only use enough ground for the privileges above named, and shall have no railroad right or use of salt water.

"All rights under this instrument shall accrue to the heirs, assigns and other legal representatives of each party hereto.

"In witness whereof, etc."

After these leases were taken a corporation was formed under the laws of Kentucky and under the name of the appellee, and Dimick and Gornley, as authorized by the leases, transferred and assigned each and all the leases to this appellee corporation.



On the 80th day of September, 1896, the appellee filed its petition against appellant in the Floyd Circuit Court. After setting forth the corporation and all the leases, in substance charged that the appellant, M. T. Allen, without any right and against the will and consent of appellee, had taken leases upon the gas and oil privileges on a portion of the same lands leased to appellee, and was without right and unlawfully soliciting others of the persons named as lessors of appellee to lease the oil and gas privileges on their lands to him, and is urging and persuading them to believe that appellee's leases are and have become forfeited; that appellee, in order to remove the leases of appellant, which had been taken subsequent to its leases, had been compelled to institute and prosecute suits to remove the cloud from its title, and that the appellant, by his unauthorized acts, had involved appellee in vexatious and expensive litigation, and unless prevented by an order of injunction, would continue to take other leases, covering appellee's property, and further involving it in other expensive and a continued series of suits in order to protect its property in the leases against appellant's unlawful acts, and that it was without adequate remedy at law to protect itself against the unlawful acts of appellant, threatened and complained of; and that appellant was insolvent, and any judgment it might obtain against appellant at law could not be collected for the reason that he had no property subject to execution or choses in action which could be subjected to the judgment, or any judgment against him, and that unless appellant be prevented by injunction from taking and procuring other leases from its lessors that great and irreparable injury would result to it. The other necessary and formal allegations to obtain an injunction were made, and the injunction granted and issued.

The appellant answered, putting in issue all the material allegations of the petition, and attacked the validity of appellee's leases. Other pleadings were filed by the parties until issues were formed. Many depositions were taken by the parties and filed in the action. At the September term, 1900, the action was called for trial. The appellant, by counsel, withdrew his pleadings, and filed a general demurrer to the petition. Pending the demurrer, appellee filed an amended petition, by which it was in substance alleged that appellee had fully kept and performed the covenants and undertakings set out in the several leases enumerated in its petition, and that its assignors, Dimick and Gormley, had so kept and performed the same; that the test wells provided for and mentioned in the leases were begun by them on or about the 15th day of May, 1892, on Right Beaver, in Floyd county, Kentucky, within fifteen miles of the town of Prestonburg, Ky., and that the drilling thereof was prosecuted with all due and proper diligence to a greater depth than eighteen hundred feet, within fifteen months from the date of the leases; that one of the wells was drilled and completed to a depth of 2,248 feet on December 2, 1892, but that oil in paying quantities was not found in this well, nor any or all the wells so drilled; that in an effort to find oil in paying quantities the appellee, up to the time of the commencement of this action, had drilled various wells within fifteen miles of the town of Prestonburg, to wit, about thirty wells in all in that district, most of them within fifteen miles of Prestonburg, but not finding oil in paying quantities in any or all of them; that by reason of not having found oil in paying quantities

in any or all of the wells so drilled, the leases continued in force without appellee being required to drill a well upon each of the tracts of land and without being required to pay rental thereon, and then reiterated the alleged unlawful and wrongful acts of appellant in his attempt to induce the lessors of appellee to attempt to break their lease contract and to place subsequent leases on the same property, thereby creating a cloud on appellee's title and putting him to expense of litigation, etc.

Appellant then filed a demurrer to the petition and amended petition, which the court overruled, and the appellant failing to plead further, the court granted appellee's petition, and made the injunction permanent. The appellant took the proper exceptions, and is here on appeal. The contract in substance and effect required appellee to drill and complete one or more test wells to a depth of 1,800 feet, if oil or gas should not be found in paying quantities at a less depth, and said well or wells should be located within fifteen miles of Prestonburg, and to be completed within eighteen months from the date of the lease. A failure to drill these test wells to work a forfeiture of the lease. If oil or gas should be found in paying quantities in the test well or wells, then in such event appellee bound itself to drill a well on each of the leased premises within two years thereafter or pay each lessee 10 cents per acre yearly in advance.

It will be observed that the drilling of the wells on each of the leased premises or the payment of 10 cents per acre in advance was upon the contingency that oil or gas in paying quantities should be found in the test wells. It is stated in the petition and admitted by the demurrer that the test wells were drilled to the depth and within the time required by the contract, showing a compliance with the contract on the part of the appellee. Appellant contends that the contract is void because there is a want of mutuality in it, because the appellee is not bound to perform its part of the contract. The general rule of law is that to enable either party to compel a specific execution the contract must be mutually binding on each each. There are some exceptions to this rule, as where the party not bound performs his part of the contract.

In the case of *Friend v. Mallory*, 48 S. E., 114, this language is used: "A contract is not void for lack of mutuality where the party who is not bound has performed the conditions of the contract." It appears from the petition and contract that appellee has fully complied with its part of the contract, at great expense to itself, and without injury to the lessors, and it is now too late for appellant to contend that appellee is not bound to perform its part of the contract. It further appears from the petition that appellant was by his conduct and acts casting a cloud upon the title or leases of appellee by his effort to obtain leases and the obtention of same, and was causing appellee a multiplicity of suits, vexatious and oppressive litigation and irreparable injury, and, in such a case, injunction was the proper remedy, as has been repeatedly decided by this court. (*Ellis v. Wren*, 84 Ky., 264; *Walker v. Leslie*, 90 Ky., 642; *Hillman v. Hurley*, 82 Ky., 626.)

Neither the judgment of the lower court nor the affirmance hereof can have any effect on the lessors for the reason that they are not parties to this proceeding, and the judgment of the lower court and this affirmance can only affect the appellant in his improper conduct as admitted by his demurrer.

Wherefore, the judgment of the lower court is affirmed.

Whole court sitting.

## FOX v. WILLIS' EX'OR.

(Filed April 17, 1908—Not to be reported.)

Pirtle &amp; Trabue, Hazelrigg &amp; Chenault and J. T. O'Neal for appellant.

J. L. Clemmons for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Judge Nunn delivered the following response to petition for rehearing:

The appellant asks this court to modify the opinion herein to the extent that he be not charged the \$180, the amount paid to J. P. Morton & Co., and the amount of \$2,222.42, appellant claiming that he has paid and settled these sums.

We have again examined the record, and find that appellant is mistaken. It appears from the record that Mrs. Willis, as executrix, paid the Morton & Co. claim. Appellant is mistaken when he states that this court in the opinion charged him with \$2,222.42; on the contrary, he is credited with it, and properly credited as shown by the record and receipt of J. L. Clemmons. The settlement of October 20, 1893, and the deposition of Mr. Fox, in answer to question 41, show that Fox, at that time, was indebted to Willis in the sum of \$4,707.04, and in the settlement of March 6, 1894, Fox paid on that debt the sum of \$2,222.42, leaving a balance due on that matter \$2,484.62, which sum is charged to him in the opinion. Appellant also moves the court to adjudge him 10 per cent. damages on \$6,924.35, the amount adjudged to appellee in the lower court and alleged to have been withdrawn by her.

We are not aware of any law authorizing this court on the reversal of a case to assess such damages. If appellee, under the judgment of the lower court, withdrew from the court the sum of \$6,924.35 and did not return it, then she received \$1,679.59 more than she was entitled to as shown by the opinion of this court, and on the return of this case the lower court should order her to pay into court the sum of \$1,679.59, with 6 per cent. interest from the time she received it until she pays it.

## HENDRICKSON v. COMMONWEALTH.

(Filed April 17, 1908—Not to be reported.)

Criminal law—Evidence—Dying declaration—Continuance—Appellant prosecutes this action from a conviction under an indictment for murder, and insists that the lower court erred to his prejudice in admitting as evidence the statement of deceased as his dying declaration. Held—That said statement was properly admitted as evidence, although the original memorandum of it was not offered in evidence. The statement written out and approved and signed by deceased was properly admitted. The court erred to the prejudice of appellant in refusing to grant him a continuance on account of the absence of an eyewitness to the killing; also in refusing to admit the affidavit as to the evidence of the absent witness to be read as evidence.

Smith &amp; Ingram and E. N. Ingram for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant prosecutes this appeal from a judgment of conviction sentencing him to twenty-one years' confinement in the penitentiary under the charge of the murder of William Hendrickson. Two grounds are relied upon for reversal. It is claimed for appellant that the court erred in admitting the dying declaration of the deceased; that the wounded man, when he made the statement, was in extremis, and was conscious of the fact, and made his statement under such circumstances as admitted its proof in this case, is not questioned. The person to whom the statement was made first wrote it down as it was dictated by the decedent, using a lead pencil. Subsequently he transcribed the paper as written by typewriting, and some hours afterwards returned and read it over to the deceased, who assented to its correctness, and signed it in the presence of attesting witnesses, and swore to it. Appellant contends that the original paper, the one written with the lead pencil, should have been used. It was not signed, nor was it read over to the party making it. The court is of opinion that the typewritten paper adopted by the wounded man was the one, and the only one, that was competent as the dying declaration.

The witness who took down the statement also testified as to other statements made by the deceased, not included in the writing, but made about or subsequent to the time of the drafting of the paper, and made under the circumstances showing a sense of impending dissolution by the deceased. This was objected to, but we are of opinion that it was likewise competent. A dying declaration need not be in writing. It need not be made at one time, or to the same witness. Any statement of the deceased, made after the mortal injury and when he is rational, and made by him under the sense that death is imminent, is relevant upon the trial of the person whom he accuses of inflicting his injury. The statement or statements made may be proved by a witness, or any number of witnesses, who may have heard them, or any of them. Appellant shot and wounded the deceased December 24, 1901. Death ensued within two days.

He was indicted at the following term. The Commonwealth then announced ready for trial, and a continuance was procured by appellant because of the absence of the particular witness, Bev. Jackson, who appears to have been subpoenaed. A warrant of arrest was directed to be issued against the witness Jackson. At the next May term he was again absent; his recognizance was forfeited, and although the Commonwealth announced ready, appellant again procured a continuance because of the absence of this witness, and an alias warrant of arrest was directed, with bail fixed at \$2,500. The next term of the court was in October, 1902. In July appellant caused a warrant of arrest to be sent to the sheriff of Clay county, which is alleged to have been the county of the residence of the witness, and the sheriff returned it, endorsed as of 28th of September, 1902, that he had arrested the witness, Bev. Jackson, and that he had escaped, and could not thereafter be found.

Appellant immediately, so it is stated in his affidavit for a continuance filed at the October term, had other attachments issued for this witness, which were returned not executed, the witness not being found. Bev. Jackson is alleged in the affidavit to have been an eyewitness to the killing. The

materiality of his evidence is obvious. The affidavit for the continuance says that the absent witness would corroborate the evidence of appellant upon all points. In view of the fact that appellant was successfully impeached at the trial which followed when he had testified in his own behalf makes the testimony of any other eyewitness for him of double importance to him. The court refused the continuance. The affidavit as to what this absent witness would prove was not admitted as the deposition of the absentee. The court is of opinion that forcing the defendant to trial under the circumstances without admitting the statement of the absent witness was error.

The judgment is reversed and the cause is remanded, with directions to award appellant a new trial.

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KIRBY v. SCOTT.

(Filed April 17, 1908—Not to be reported.)

Forcible entry—Evidence—Instructions—A person who enters into possession of a large tract of land with the intention of taking possession of the whole tract may maintain a writ of forcible entry against a person interfering with said possession. In a proceeding of this nature title is not in issue. The only question to be determined is possession. Title papers are never competent except so far as they may show the extent of possession. The court properly instructed the jury in the case.

S. B. Dishman and D. D. Field for appellant.

W. B. Dixon and Jas. H. Hazelrigg for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Settle.

This proceeding of forcible entry was instituted by appellee against appellant before a justice of the peace, then taken by traverse to the circuit court, in each of which courts judgment went against appellant, who brings the case to this court by appeal.

Appellee, by a writing of date February 1, 1900, leased of John S. and Mary D. Wentz, for the year 1901, 1,758 acres of land lying in Letcher county, composed of a number of adjoining patents, but the whole of the leased boundary is embraced in that of a 34,000-acre survey patented to one W. H. Nicholls February 28, 1874, though some of the patents comprising the leased boundary are senior, and some of them junior, in date to the Nicholls patent. Included in the boundary of 1,758 acres and also in the Nicholls patent are two small adjoining surveys, one of 92 acres, patented to the wife of J. J. Lewis, and the other of 75 acres, patented in the name of Wilson Raleigh, but both patents are junior in date to the Nicholls patent. Appellee, at the time of the issue of the writ of forcible entry, was in possession of the 1,758 acres leased by him of Wentz and wife, by actual occupancy of some of the senior and some of the junior patents composing it, and was in fact then living on a patent included in the leased boundary which was older than the Nicholls patent, and in addition he had inclosed and under cultivation a field of 12 or 15 acres in the Lewis 92-acre patent, which adjoins the Raleigh 75-acre patent.

The forcible entry complained of consisted in appellant's building and occupying a house on the Raleigh patent over appellee's objection. Appellee testified upon the trial in the circuit court that he moved upon the boundary contained in his lease, with the intention of taking actual possession of the whole thereof, and that such was in fact the character and extent of his possession. It appears that the lands leased by appellee of Wentz and wife were conveyed the latter by deeds, one from J. J. Lewis and wife and the other from D. M. Collier, both deeds being of record in the office of the clerk of the Letcher County Court. These deeds are referred to in the lease as containing the boundaries of the several surveys included in the 1,758 acres, and both were introduced on the trial in the circuit court by appellee to show the boundary of the leased premises, and the extent of his possession. Only two witnesses were introduced on the trial by appellee, himself and J. J. Lewis, the latter being a surveyor of considerable skill. No evidence was offered by appellant. By the two witnesses named the following facts were established: First, that appellee, in addition to his actual residence upon the 1,758 acres leased by him, had under fence and in cultivation at the time of the forcible entry complained of a strip of 12 or 15 acres, which, though a part of his leased boundary, is outside of the senior patents, but is included in a patent issued to the wife of J. J. Lewis that is junior in date to the Nicholls patent; and, second, that this inclosure is likewise a part of a strip which is connected with, and not cut off from, the Wilson Raleigh patent by any of the senior grants.

So far as the record shows no possession is held by any one under the Nicholls patent, and the act of appellee in inclosing and putting in cultivation the field of twelve or fifteen acres, in the interference of the Lewis 92-acre junior survey, with the Nicholls 84,000-acre senior patent, constituted an entry upon and actual possession of the lap or conflict, and such entry gave notice in fact, and at once, to the owner, or any claimant under the Nicholls patent, that so much of that patent as lay within the leased boundary of appellee was in the actual, adverse possession of the latter. In such a case the possession acquired was not limited to the inclosure, but extended over the entire boundary claimed by him. (*Calk v. Lynn's Heirs*, 1 Marshall, 346, and cases therein cited.)

Tested by the rule stated, appellee's possession must be regarded as actual, and as extending over the whole of the boundary leased by him of Wentz and wife, including the Raleigh 75-acre patent, at the time of the appellant's entry thereon.

But in *Bush v. Coomer*, 24 Ky. Law Rep., 702, yet another rule has been announced by this court which holds that the junior patentee is not required to enter on the lap of the conflicting patents in order to maintain a proceeding of forcible entry against a stranger to the senior title. *Coomer*, as lessee of Thomas Turner and others, was in possession of a large tract of land in Wolfe county. *Bush*, as lessee of the Kentucky Union Co., entered upon a part of this land and began building a house. *Coomer*, by proceeding of forcible entry in a justice's court sought to oust him. Judgment went in *Coomer's* favor in both the justice's and circuit courts, and *Bush* thereupon appealed the case to this court. In passing upon the question of law and fact presented by the appeal the court said: "It was shown that there were

about 18,000 acres in the boundary on which Coomer lived, and that he lived within the John Carnan patent under which his lessors claimed. It was also shown that Bush entered within the Sam Young patent under which it is said that his lessors claimed, and it is insisted that a settlement within the Carnan patent outside the lap did not give Coomer possession of any land within the older patent of Young. On this ground it is earnestly claimed that the verdict is against the evidence. The court refused to allow appellant to read in evidence title papers of his lessors, and of this earnest complaint is also made. These two objections will be disposed of together. In a proceeding of this character title is not in issue. The only question to be determined is possession. Title papers are never competent except so far as they may show the extent of possession. Appellant did not connect himself with the Young patent. He offered a deed from Young, the patentee, to Charles Van Couver; also a deed from Sylvanus Shumway to Thomas Duckham. But Shumway was in no way connected with Charles Van Couver. He also offered to read a copy of a deed from Thomas Duckham, as guardian for his son Samuel, in whom the title had been previously vested, but there is no authority in a guardian to make a conveyance of the land of his infant ward. The court, therefore, properly refused to allow the other deeds to be read, for no connection was shown with the patentee. And while a settlement under a junior patent will not give possession as against an older patent where the settlement is without the lap, this principle has no application to strangers to the title, but is only for the benefit of the holders of the older title. The extent, therefore, of Coomer's possession was not affected by the fact that his settlement was without the Young patent."

In the case at bar nothing appears in the evidence to connect appellant with the Nicholls patent, nor does it appear that he was claiming to hold the survey upon which he entered by virtue of the Nicholls patent. He has not attempted to show any right of possession to the land in controversy either as owner or lessee. It is true that there is in the bill of evidence a statement from appellee that appellant informed him when ordered to betake himself from the land in controversy, that he (appellant) 'was building a house, and had leased it from Altemus & Co.,' but no evidence was introduced to prove that Altemus & Co. are the owners or claimants of the land covered by the Nicholls patent, or any part thereof. Appellant was a mere stranger to the title, and nothing more, so the rule announced in the case of *Bush v. Coomer*, supra, applies to the facts of this case like the fit of a glove. And, according to that rule, the mere fact that appellee lived within his leased boundary was all that was necessary to entitle him to recover as against appellant, in the matter of the forcible entry complained of. It, therefore, follows that the lower court did not err in refusing the peremptory instruction asked for by the appellant.

We are further of opinion that the instruction given by the lower court to the jury was free from error, as it in simple and apt language told them that if they believed from the evidence that appellee was in actual possession of the land described in the warrant of forcible entry at the time that appellant entered on said land, and that said entry was without the consent of the appellee, they should find appellant guilty of the forcible entry com-

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plained of in the warrant; otherwise, that they should find for the appellant. As there was no question under the evidence as to the appellee's actual possession of the boundary of land leased by him of Wentz, including the 75-acre Raleigh patent, there was nothing for the jury to do but to find the appellant guilty of the forcible entry complained of, which they did, as shown by the verdict returned by them.

Finding no error in the judgment appealed from the same is affirmed.

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OWENSBORO, FALLS OF ROUGH & GREEN RIVER R. R. CO. v. COMMONWEALTH.

(Filed April 17, 1903—Not to be reported.)

**Railroads—Taxation—Assessment**—This appeal involves the validity of an assessment of appellant for taxation for the years 1890 and 1891, appellant contending that the report as to the valuation of said property was made to the railroad commission for those years only for statistical and not for taxation purposes. Held—That there was a substantial compliance with the statute as to assessment of railroad property.

Walker & Slack, D. W. Lindsey, J. M. Dickinson and Pirtle & Trabue for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Burnam.

This suit was instituted by the Commonwealth of Kentucky in September, 1892, against the Owensboro, Falls of Rough & Green River R. R. Co. to recover taxes alleged to be due by the company for the years 1889, 1890 and 1891. The trial court adjudged the railroad company exempt from taxation under the act of May 5, 1884, for five years from the date of the beginning of the construction of the road, which was in December, 1888. The judgment was reversed by this court in an opinion filed October 26, 1893 (15 Ky. Law Rep., 449), the court holding that the act of May, 1884, had been repealed by the act of May, 1886, known as the Hewitt Revenue Bill, as to all roads, the construction of which was begun subsequent to the date when that act took effect, and the cause remanded to the lower court for a trial upon its merits. Substantially the only ground relied on to escape liability by the company is that there had been no valid assessment by the railroad commission of Kentucky of the property of the company prior to the institution of this suit. The trial judge held the company liable for the taxes sought to be recovered for the years 1890 and 1891, finding from the evidence as a matter of fact, first, "that during the period for which taxation for 1889 was due and payable the defendant had not completed its railroad, and consequently did not own and operate a railroad within the meaning of the statute;" second, "that during the years 1890 and 1891 Triplott, who was manager of the defendant company from October, 1889, to November, 1891, did make to the railroad commissioners a report, which he intended for statistical purposes, and not for assessment purposes, and that this report was before the railroad commissioner and made the basis of an action by them, which became a



record in the auditor's office;" and from these facts found as a matter of law that the defendant was liable for taxes for the years 1890 and 1891 upon the assessment so made, and rendered judgment therefor, and the company has again appealed.

Plaintiff introduced as a witness the then auditor of the State, who testified that the records of the assessments made by the railroad commissioners for the years 1890 and 1891, which constituted a part of the records of the auditor's office, contained the following written memoranda which was signed by each of the then acting railroad commissioners of the State:

"Owensboro & Falls of Rough R. R. State of Kentucky. Twenty-six miles at \$10,000 per mile, \$260,000. Davis county eighteen miles at \$10,000 per mile, \$180,000. Ohio county eight miles at \$10,000, \$80,000."

And that the following certificate was appended to this valuation:

"Commonwealth of Kentucky,

"Office of the Railroad Commission,

"Frankfort, Ky., November 14, 1890.

"The undersigned board of commissioners, acting under an act, entitled 'An act to prescribe the mode of ascertaining the value of railroads and for taxing same,' approved April 3, 1878; and an act, entitled an Act to amend an act, entitled an act to prescribe the mode of ascertaining the value of property of railroad companies and for taxing same,' approved April 19, 1882, hereby certify that the foregoing pages, from page 178 to the beginning of this certificate, embrace the valuation of property of companies owning railroads subject to taxation in the State of Kentucky, and the figures set opposite the names of counties cities and incorporated towns show the valuation of property within same subject to taxation. Said valuation includes the sidings and rolling stock."

That a similar certificate appears in the record of 1891 assessments, and similarly certified by the railroad commissioners, and Robert S. Triplett, who was the general manager of the appellant corporation during this period, testifies that he made the report required by the statute to the railroad commissioner of Kentucky for each of these years upon printed blanks furnished to him for that purpose by the auditor of public accounts for statistical purposes, as he supposed that company was exempt from taxation during this period under the act of 1884. These reports were laid before the railroad commissioners, and that board made their finding of the length of the defendant's road and its valuation per mile therefrom. As was properly said in the opinion rendered by the trial court, "It can not be assumed that these officers would report a fact as true for statistical purposes which would not be true for purposes of taxation, nor can it be assumed that Triplett, in making his report, would have fixed the valuation of the road lower for taxation than its actual value. If the railroad was worth \$10,000 for statistical purposes, it was worth \$10,000 for purposes of taxation."

Section 1 of article 3 of chapter 92 of the General Statutes provides that: "The chief officer of each railroad company owning a railroad line, in whole or in part, in this State shall, on or before the 1st day of September of each year, report to the auditor of public accounts the length of such road, with its average value per mile and all other property belonging to the company.

"Section 3. The auditor shall lay these reports before the railroad commissioners, whose duty it is to examine such reports, and if either too high or too low, to correct and equalize such valuation.

"Section 4. The same rate of taxation for State purposes which is or may be levied on other real estate shall be levied on the value so found by the railroad commissioners upon the rolling stock and real estate of each railroad company."

There is no pretense that appellant has ever paid any taxes to the State for either of these years, and we have reached the conclusion that the assessments shown upon the books of the railroad commission are a substantial compliance with the requirements of the statute, and the judgment appealed from is affirmed.

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LYNCH v. COMMONWEALTH.

(Filed April 17, 1908.)

Office and officer—Misfeasance of jailer—Instructions—Appellant, jailer of Estill county, prosecutes this appeal from a judgment of conviction for willful neglect of duty, imposing a fine of \$100 and removal from office. The proof showed that a prisoner under sentence of confinement for 100 days was permitted by the jailer under order from the county judge to visit his family on several occasions. Held—That appellant was guilty of a violation of duty imposed by section 2226, Kentucky Statutes, and the court properly gave the jury an instruction authorizing them to convict, under section 3748, Kentucky Statutes, imposing the severe penalty of removal from office in addition to a fine for a willful and intentional violation of duty. The court erred to the prejudice of appellant in failing to give an instruction under section 1839, Kentucky Statutes, authorizing a conviction for mere negligence in the discharge of official duty which imposes a penalty less than removal from office. The offense was evidently not committed willfully, but was due to ignorance and the belief that the county judge had authority to control him in the matter.

Riddell & Riddell for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, J. Sidney Lynch, jailer of Estill county, was indicted for "willful neglect in the discharge of his official duty," and was by the verdict of a jury found guilty, and his fine fixed at \$100, and in the judgment rendered pursuant thereto his office as jailer of Estill county was adjudged vacant, and he has appealed to this court.

The indictment charges that "the appellant, while acting as jailer of Estill county, did unlawfully and willfully and corruptly allow William Bellis, who was at that time confined in jail on a fine from the Estill Circuit Court, to go to his home and such other places as said Bellis desired; and unlawfully, willfully, corruptly refused to keep the said Bellis confined in jail under said judgment, when it was the duty of said defendant Lynch, as jailer aforesaid, to keep the said Bellis confined in jail."

It appears from the testimony that Bellis had been committed to the cus-

tody of the appellant as jailer of Estill county under an order of the Estill Circuit Court, to remain in confinement for 100 days; that during his confinement a member of his family became sick, and that he asked appellant to allow him to go home to see his family, but that appellant refused his request, but agreed that if the county judge would consent that he would permit him to do so; and that upon application to him, the county judge consented for the jailer to permit him to do so; and that he subsequently went home every Saturday afternoon during his term of imprisonment, returning on Sunday afternoon; that he remained in jail the full number of days required by the judgment, the time he was absent therefrom being deducted, and he otherwise performed the sentence of the circuit court. It was the defendant's duty as jailer of Estill county to receive and keep all persons in the jail, lawfully committed thereto, until they were lawfully released. (Section 2226 of the Kentucky Statutes.) And it was a violation of his official duty for him to have permitted a prisoner committed to jail to have left for any purpose at the direction of the county judge, who had no authority in the premises. Section 3748 of the Kentucky Statutes provides: "Judges of the county court, justices of the peace, sheriffs, coroners, surveyors, jailers, assessors, county attorneys, constables, shall be subject to indictment in the county in which they reside for misfeasance and malfeasance in office, willful neglect in the discharge of official duties, and upon conviction shall be fined in any sum not less than \$100 nor more than \$1,000, and upon such conviction the office held by such person shall become vacant, and the judgment of conviction shall so recite."

And section 1339 of the Kentucky Statutes provides that: "If any jailer, officer or guard negligently suffer or permit any person, convicted of or charged with a public offense, to escape, \* \* \* he shall be fined not less than \$100, nor more than \$500, or confined in the county jail not less than one nor more than six months, or both."

Whilst the indictment and instruction in this case were drawn under section 3748 of the Kentucky Statutes, it is evident that the averments of the indictment are sufficiently broad to have authorized an instruction submitting to the jury the question of defendant's guilt under section 1339 as well.

Section 3748 looks to the punishment of a public official for willful neglect in the discharge of his official duties, and to constitute this crime an intention on the part of the officer to do a wrong is one of the fundamental and essential ingredients. The act must be done by the officer "malo animo," and not through mere ignorance, inadvertence or mistake. (Haw P. C., 254; Bishop's New Criminal Law, chapter 35.) Whilst section 1339 provides a punishment for mere negligence in the discharge of official duty in permitting a prisoner convicted of a public offense to escape, either wholly or partially, the penalty denounced by the judgment of conviction, to constitute this offense, it is not necessary that the officer should have designed or intended that the prisoner committed to his care should escape or evade, either in whole or part, the judgment of conviction. The two sections quoted *supra* clearly illustrate the difference in character of these two offenses by a public official, and provide a different punishment. If a public officer willfully or intentionally disregards a duty imposed upon him by law, in addition to the fine imposed by the statute, he forfeits his office. But if the act

is only one of mere negligence, ignorance or inadvertence, a less severe punishment is imposed.

The testimony does not show a willful disregard of official duty by appellant. Undoubtedly he violated the law in permitting Bellis to leave the jail for any purpose, but his conduct seems to have been due to ignorance and the belief that the county judge had authority to control him in the matter. But his ignorance of the law was due to his own negligence, and does not excuse the offense; but it seems to us to be covered by section 1339 of the Kentucky Statutes, instead of section 3748, and the jury should have been instructed under this section as well as under section 3748.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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BUSH v. LOUISVILLE TRUST CO., &c.

(Filed April 22, 1903—Not to be reported.)

Judgment—Pleading—Costs—H. executed seven promissory notes to appellee, and to secure same executed a mortgage on certain real estate. Subsequently he sold and conveyed the property to C., who agreed to pay the mortgage debt, and C. sold and conveyed same to appellant. An action was brought on said notes and the lien sought to be enforced on the property, and a personal judgment was sought against appellant. A judgment enforcing the lien, also a personal judgment against appellant, were rendered by default. This appeal seeks to reverse the personal judgment on the ground that the petition is insufficient to authorize a personal judgment, it being alleged that the deed to appellant had not been recorded and plaintiff was ignorant of its contents, but that by reason of the agreement made in said deed appellant was liable for the debt. Held—That the petition is insufficient to support a personal judgment, but appellant having failed to file a demurrer he is liable for the costs on appeal under section 43, subsection 2, Civil Code of Practice.

Simrall & Doolan for appellant.

W. W. & J. R. Watts for appellee Louisville Trust Co.

W. W. Thum for Joseph Huffaker.

H. L. Stone for appellee City of Louisville.

T. W. Bullitt for appellee Fidelity Trust and Safety Vault Co.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Paynter.

Joseph Huffaker executed seven promissory notes for \$500 each to the appellee, Louisville Trust Co., and to secure which he executed a mortgage on certain real estate. Subsequently he sold and conveyed the property to D. E. Caulton. By the terms of the deed Caulton agreed to pay the debt due the trust company. Afterwards Caulton conveyed the property to the appellant, Bush. This action was instituted by the appellee, Louisville Trust Co., in which it sought a personal judgment against Huffaker, Caulton and Bush, and the sale of the property to satisfy the mortgage debt and other debts against the property. The record shows that the court properly entered a judgment enforcing the lien upon the property to satisfy the debts against it. The judgment was rendered by default.

The appellant seeks to reverse the personal judgment against him upon the

ground that the petition did not aver facts which authorized the court to render it. The averments which were made as a basis for the personal judgment against him are as follows: "Plaintiff says that thereafter, as plaintiff is informed and believes, the defendant, Caulton, made, executed and delivered a deed transferring and conveying said property to the defendant, W. P. D. Bush; that said deed has not been recorded and plaintiff is not advised as to the terms thereof; that by reason of an agreement of said Bush, made in said deed, he is also liable for the debt due plaintiff as set up herein."

It will be observed that it is averred that the deed to Bush has not been recorded; that plaintiff is ignorant of its terms, and that by reason of an agreement of said Bush, made in said deed, he is also liable for the debt due the plaintiff. The plaintiff not only fails to set out the terms of the deed which would show that Bush was personally liable for the debt due him, but says that it is ignorant of the terms of the deed. The averment which follows is simply a conclusion of the pleader, not the statement of the terms of the agreement which would make Bush personally liable for the debt. When all the averments are taken together they show that the plaintiff did not even know what, if any, agreement Bush had made with reference to the payment of plaintiff's debt. The plaintiff was not entitled to a personal judgment against Bush on the averments.

The appellant failed to file a demurrer to the petition, and the cost of this appeal was occasioned by his failure to do so, and under subsection 2, section 93, Civil Code of Practice, the plaintiff is required to pay the cost of this appeal. (*Moore v. Moxey's Adm'r*, 19 Ky. Law Rep., 160; *Davis v. Moxey's Adm'r*, *ibid.* 178.)

The personal judgment is reversed for proceedings consistent with this opinion.

## GRUBBS v. PENCE.

(Filed April 22, 1903—Not to be reported.)

1. Breach of marriage contract—Pleading—Instructions—In this action by appellee to recover damages for breach of contract by appellant to marry her, it is insisted that the petition is insufficient as it charges that appellant promised to marry appellee on the — day of July, 1901, at Middlesborough, and that plaintiff went to Middlesborough and remained there during that month, and was willing and ready to comply with her part of the contract and marry defendant, but does not allege an offer on her part to perform her contract. Held—That the petition is sufficiently definite, and that the facts alleged constituted a cause of action. It alleged that the contract was to be performed some day in July, at a designated place, and that she was there during that month, ready and willing to carry out her part of the agreement, and he had failed to carry out his agreement. He was guilty of a breach of it when he failed to appear at Middlesborough in that month and marry appellee. The court properly instructed the jury that plaintiff was entitled to recover, if at all, a sum sufficient to compensate her for the breach of contract, and for any mortification of feelings suffered by her on account of such failure, not to exceed the amount claimed.

2. Evidence—The court did not err in refusing to admit a witness to testify that an order on defendant in favor of plaintiff had been paid at his store during July, 1901, as this was not competent to prove that she was not at Middlesborough during that month.

C. C. Bagby, R. V. Hume and R. G. McKee for appellant.

E. V. Puryear, John C. Voris and W. R. Embry for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Paynter.

This action is upon an alleged breach of a marriage contract by the appellant. It is averred in the petition that in June, 1901, the appellant and appellee mutually agreed to marry each other on the — day of July, 1901, at Middlesborough, Ky.: that pursuant to that agreement the appellee went to Middlesborough and remained there during that month, and was willing and ready to comply with her part of the contract and marry the appellant, but that appellant failed and refused to keep his contract to marry her.

Counsel for the appellant contend that the petition was demurrable because it did not state the day in July that the marriage was to take place. Where time and place are not fixed by the agreement of the parties there can be no breach of the contract, and no action can be maintained by either unless the party complaining has offered to marry the other, and the averment to that effect must be made. If no time and place has been fixed for the performance of the contract, then, in the contemplation of law, it is to be carried out within a reasonable time. If the time and place have been appointed for the performance of the agreement, there is no necessity for the averment of an offer to perform. In such a case, if it be averred that the party was there and was willing and ready to perform her part of the engagement, and the defendant was absent, or refused to do what the agreement required of him, such allegations would be sufficient. (*Burks v. Shain*, 2 Bidd., 341; *Fible v. Caplinger*, 13 B. M., 464; *Burnham v. Cornwall*, 16 B. M., 284.) In this case the marriage contract was to be performed some day in July at a designated place. It is averred that she was there during that month, and was ready and willing to carry out her part of the agreement, and he had failed to carry out his agreement. We are of the opinion that the petition was sufficiently definite as to the time, and that the facts alleged constituted a cause of action. It was not necessary for her subsequent to July to offer to marry defendant, and he refuse, in order to constitute a breach of the contract. He was guilty of a breach of it when he failed to appear at Middlesborough in that month and marry appellee.

On the trial of the case the evidence tended to support the averments of the petition. The court properly instructed the jury upon the facts of the case as averred and proven. It is urged that the court erred in telling the jury that if it found for the plaintiff it should find such a sum as it believed from the evidence would fairly compensate her for defendant's failure to marry her and for any mortification of feelings suffered by her on account thereof. The plaintiff was entitled to recover, if at all, a sum sufficient to compensate her for the breach of the contract and for any mortification of feelings suffered by her on account of such failure, not to exceed the amount claimed. It is suggested that the court erred in refusing to allow a witness to testify that an order on him in favor of the plaintiff had been paid at his store during July, 1901. The purpose in offering this testimony, we presume, was to show that she was not at Middlesborough during that month. It would not at all tend to show that she was not in Middlesborough during that month to prove the payment of the order, it not being claimed that she was present and received payment of the order.

The judgment is affirmed.

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

## KENTUCKY COURT OF APPEALS.

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WELLER v. HULL'S ASS'EE.

HULL, &c., EX'ORS v. EVANS, &c.

PARTIN, &c. v. AYRES, &c.

WELLER v. HULL'S ASS'EE, &c.

HULL'S ASS'EE v. STEELE.

EVANS, &c. v. UNTHANK'S ADM'R.

(Filed April 17, 1903—Not to be reported.)

1. Assignment for benefit of creditors—Rights of State and foreign creditors—H. made two deeds of assignment for the benefit of his creditors, one in Kentucky and one in Connecticut. A claim for \$36,509.80, properly proven, was presented to the assignee in Kentucky, and it is urged as objections to said claim that the father of the assignor, whose executors have presented this claim, made a will, devising \$40,000 to the assignor, but charging him with this indebtedness, and that said executors held collaterals sufficient to pay said indebtedness. Held—That the claimants of this debt should be required to exhaust their lien on the devise; also to subject the collaterals to their debt before prorating with the creditors in the estate in Kentucky. The pleadings should set up these matters. The creditors in the State of Connecticut should not be permitted to participate in the estate in Kentucky until the Kentucky creditors are made equal with them.

2. Allowance to assignee—Allowance of an additional sum of \$200 to the administrator of Unthank, the assignee, for services, was proper.

3. Attorney's fees—Weller, who was an attorney representing a claim of his own, also a claim for Evans, rendered services in defeating improper claims against the estate; also in endeavoring to have the assets bring the highest prices at the sales, and asked an allowance of a fee of \$2,000 out of the estate.

Held—That Weller is not entitled to a fee to be charged to the estate, as the assignee was ably represented by Ayres, who should be allowed \$2,000 in full of his services. An allowance to Cook, as attorney for Unthank, of \$300 had previously been allowed.

4. Allowance to commissioner—The lower court allowed to the commissioner \$1,500 for selling 880 separate tracts of land, situate in different counties, and this allowance is objected to on this appeal. Held—That said claim is approved as the commissioner, under section 1740, Kentucky Statutes, is entitled to \$5 for selling each tract.

N. J. Weller for appellant, N. J. Weller.

Wm. Ayres, Wm. Low and A. G. Patterson for appellees, F. A. Hull's Assignee, &c.

N. J. Weller for appellant, N. J. Weller.

Wm. Ayres and Wm. Low for appellees, F. A. Hull's Assignee, &c.

Wm. Ayres, N. B. Hays and A. G. Patterson for appellants, F. A. Hull's Assignee.

A. G. Patterson and Cook & Jones for appellants, Hannah E. Hull, &c., Ex'ors.

N. B. Hays, N. J. Weller and E. N. Ingram for appellees, Shelton Evans, &c.

N. J. Weller for appellants, Anderson Partin, &c.

Wm. Ayres for appellee, Wm. Ayres, &c.

N. B. Hays and Wm. Lowe for appellants, Shelton Evans, &c.

D. B. Logan for appellee, J. M. Unthank's Adm'r.

Appeal from Bell Circuit Court.

Opinion of the court by Judge O'Rear.

The above styled appeals all grow out of the settlement of the assigned estate of F. A. Hull. They come up out of the same record, and are consolidated and heard together.

The assignor, F. A. Hull, owned a considerable estate in Kentucky and Connecticut and elsewhere. He made two deeds of assignment for the benefit of his creditors generally. The deeds were executed simultaneously. One was executed to Henry W. Hoyt, conveying to him in trust for the assignor's creditors all of the estate of the assignor except that situated in Kentucky and North Carolina. The other was to J. M. Unthank, conveying to him, for the benefit of the assignor's creditors, all of the assignor's estate in Kentucky and North Carolina. The latter estate comprised between 300 and 400 tracts of land, situated in the counties of Clay, Leslie, Perry, Knott and Bell, this State, and some town lots in the town of Pineville. The deeds of assignment were made in 1893.

Subsequent to the qualification of Unthank, as assignee, certain creditors of Hull, particularly appellants, N. J. Weller, Shelton Evans and others, who were Kentucky creditors, brought their several suits in the Bell Circuit Court against Hull and his assignee, Unthank, attacking the deed of assignment as being fraudulent, and made with the design to hinder and delay the assignor's creditors, and when he was not insolvent. A trial of those suits



resulted in a judgment by the circuit court sustaining the claims of the respective plaintiffs, and sustaining their attachments. Upon appeal by Hull and his assignee those judgments were reversed. (Hull, &c. v. Evans, &c., 22 Ky. Law Rep., 1118.) The court directed that on the return of the cases the court below should order a reference to the commissioner to audit the debts against the estate, and assets, etc. Upon the return the case was referred to the commissioner, who reported debts to the amount of about \$100,000 against the assigned estate.

Among the claims reported by the commissioner and allowed by him was one in favor of the estate of Charles Hull, deceased, amounting to \$36,509.80. This claim was properly authenticated as required by the statute. It was rejected, however, upon exception, because the exceptors alleged that Charles Hull, the decedent, was the father of F. A. Hull, and that by his will he had devised to F. A. Hull one-fifth of his estate, which one-fifth, it was asserted, would amount to more than \$40,000, and that it was provided in the will of the said Charles Hull that the interest devised to F. A. Hull was subject to his indebtedness to the testator's estate. It was further alleged by the exceptors that the estate of Charles Hull held certain collateral belonging to the assignor as a security upon the claim; and further, that Hoyt, the assignee in Connecticut, had not settled and distributed the assigned estate there, nor had the estate of Charles Hull been settled, but that the two estates would be sufficient to pay the claim here asserted, and above named in full, without resorting to any assets in Kentucky; that the Kentucky creditors, the exceptors, had not filed their claims before the assignee, or before the probate court in Connecticut, and that they were advised that their claims were now barred from being presented against the estate in Connecticut by the statutes of that State.

The court rejected the claim of Charles Hull's executors for the \$36,509.80 upon these exceptions without proof. We are of opinion that under the circumstances shown the circuit court should have required Charles Hull's executors to have set up their claims against the estate in Kentucky by appropriate pleadings in this action, and that they should have been required to specifically state what collateral, if any, was pledged to secure it, and the value of the collateral, and the disposition of it, if it had been disposed of. To this pleading the assignee and creditors should have been permitted to present such defenses as would make an issue if they desired; and then the court should have afforded the parties an opportunity to introduce proof in support of their respective contentions. If upon the trial it should develop that there was collateral pledged to secure this debt, and that it had been legally disposed of; or if not disposed of by claimants, they should have been compelled to first enforce their lien upon it. Furthermore, the lien of Charles Hull's estate upon the devise to F. A. Hull should be exhausted. If then there was a balance remaining on the claim, it should be allowed to share pro rata in the assigned assets in the same manner as creditors whose claims are not secured by liens. (Section 74, Kentucky Statutes.) But we are of opinion that neither the claim of Charles Hull's executors, nor any other claim against the assignor, F. A. Hull, which had been presented against the estate in Connecticut, should be allowed to participate in the distribution of the Kentucky assets until the Kentucky creditors, who had not pre-

sented their claims in Connecticut, had received an equal per cent. upon their claims to that which the other creditors had received from the Connecticut assignee.

J. M. Unthank died before administering the assigned estate in Kentucky. He had, however, served for several years, preserving the estate, paying taxes, etc. In addition to some small sums which had been received by Unthank in his lifetime the court allowed his administrator an additional sum of \$200 in full compensation for his services. In view of the state of record and the proof we are of opinion that this allowance was proper. Appellant, N. J. Weller, was a creditor of F. A. Hull upon a claim of \$3,000. He is an attorney at law, and in addition to his own suit represented appellant, Shelton Evans. Weller's suit was the first brought attacking the deed of assignment in the proceedings first herein mentioned. After the return of the case from this court, Weller representing himself and Evans, was vigilant and industrious in contesting claims presented against the estate which he thought were not proper demands, and in endeavoring to have the assets in Kentucky bring the highest prices at the sales. He presented a claim for \$2,000 for his services as such attorney, and asked that it be allowed as a part of the costs of the assigned estate. The circuit court allowed \$500 for his service, and Weller has appealed because the remaining \$1,500 was not allowed. The assignee and other creditors have prayed a cross appeal from the judgment allowing the \$500. The assignee was represented by counsel, William Ayres, who was competent, and is shown to have been attentive to the interest and affairs of the assigned estate, and who throughout the proceedings had represented it alone. All the other creditors were represented by counsel employed by them respectively.

We are of opinion that the allowance to Weller of any sum to be paid out of the assigned estate as costs for his services was unauthorized. (Section 489, Kentucky Statutes; *Calloway v. Calloway*, 21 Ky. Law Rep., 870; *Thirlwell v. Campbell*, 11 Bush, 168.)

William Ayres represented the assignee and the assigned estate on the former appeal above alluded to, and since the return of the case has represented the assignee throughout the conduct of this case. His services were valuable to the estate. The circuit court upon showing allowed him \$500 as a fee for all of his services. In view of the fact that prior to the death of Judge Unthank he was represented by other counsel, A. K. Cook, and that Cook was allowed and paid \$300 for his services out of the estate, we are of opinion that the court should not have allowed Ayres more than \$2,000, which should be in full of all his services to the estate.

Henry Steele, the master commissioner of the court, who audited the claims and executed the various judgments of sale, filed a statement and claim for his services for about \$1,700. Among the items in his claim was one for selling 330 separate tracts of land at \$5 each. The circuit court allowed him \$1,500 in full of his services. The lands of the assignor in the counties of Perry and Knott were ordered to be sold, and were sold in one lot; those in Leslie in another; those in Clay in another, while the few tracts in Bell were sold separately. In addition the equity of redemption was sold in all of the lands in Leslie, Clay, Knott and Perry. The sales realized about \$30,000. Section 1740, Kentucky Statutes, regulating the fees

of commissioners making sales of land under decrees, restricts the amount that may be allowed to \$25 where the sale does not exceed \$10,000, and to \$10 where it does not exceed \$2,000. But it is added: "Where more than one tract of land is sold under the same decree the court shall have power to allow not exceeding \$5 for each additional tract sold." The tracts in the counties of Knott, Perry, Leslie and Clay are not shown to have constituted one body, or even three bodies, of land. They appear to have been comprised in something over 330 separate patents. Nor does it appear that these tracts were contiguous. The judgment decreed that all of the land ordered to be

sold, lying in the counties of Knott and Perry, should be sold "in one lot," etc. We are of opinion, that under the section of the statute the commissioner was entitled to receive within the discretion of the court not exceeding \$5 for each of the tracts named and sold under the same decree. In view of the state of the record, the character of the land, the prices realized, the services necessarily rendered and to be rendered by the commissioner in fully executing the judgment, we are not inclined to disturb the circuit court's judgment fixing his compensation. It was within the terms of the statute.

From the foregoing it follows that the judgment dismissing the claim of Hannah E. Hull, &c., executors of Charles Hull, must be reversed.

The judgment in favor of N. J. Weller against the assigned estate for \$500 is reversed on the cross appeal of the assignee and creditors.

The judgment disallowing the \$1,500 claim of Weller against the assigned estate is affirmed.

The judgment in favor of William Ayres against the assigned estate for \$2,500 is reversed.

The judgment in favor of Henry Steele, commissioner, allowing his claim of \$1,500 is affirmed, and the judgment in favor of J. M. Unthank's administrator against the estate, allowing him \$200 additional, is likewise affirmed.

In so far as the judgments are reversed this case is remanded for proper proceedings not inconsistent herewith.

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WIGGINS, &c. v. JACKSON, &c.

(Filed April 21, 1903—Not to be reported.)

Injunction—Trespass—Under section 2361, Kentucky Statutes, the owner of land may maintain an action to recover damages for any trespass or injury committed thereon, or restrain any trespass or other injury, without having the actual possession of the land at the time of the commission of the trespass.

James Sparks for appellants.

H. C. Hazelwood for appellees.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge O'Rear.

Jarvis and Mamie Jackson, infants, by their guardian, A. R. Dyche, by parol contract sold the standing timber on a certain tract of land in Laurel

county to S. F. Jackson. The timber was not branded or otherwise identified than by specification of the character and size of the trees to be taken. The vendee was to have two years from the date of the contract to remove the timber. He paid \$112 on the purchase price, but died shortly thereafter and before any of the timber was cut. Subsequently his administrator disclaimed liability for the remainder of the purchase money, relying upon the invalidity of the contract, because it had not been reduced to writing and signed by the parties to be bound thereby. Dyche, guardian, settled with him the purchase money that had been paid. Thereafter the timber was sold to others by the guardian, acting, so it is said, under a decree of the Laurel Circuit Court, authorizing the sale for the purpose of maintenance and education of the wards.

Appellants, claiming to be the vendees of S. F. Jackson, started to enter upon the land and cut and remove the timber, when Dyche, as guardian, and his wards, brought this action and obtained an injunction against the threatened trespass. The circuit court on final hearing perpetuated the injunction. Standing timber is a part of the realty. It was not sold in contemplation of immediate separation from the soil, and, therefore, the case is not within the rule announced by this court in *Cain v. McGuire*, 13 Ben Mon., 841; *Bayssee v. Reese*, 4 Met., 372.) The contract not having been reduced to writing and signed by the parties to be bound, was void. (Kentucky Statutes, section 470, subsections 6 and 7.)

Appellant complains that the judgment should not have been rendered in favor of appellees because of alleged defects in the petition. The petition avers that the infant plaintiffs "are the joint owners in fee simple and in the possession of the land in controversy." Appellant's complaint is that, under *Hillman v. Hurley*, 82 Ky., 626, the allegation should have been that the plaintiffs were in the actual possession of the land. Such was the statute at the time the opinion in *Hillman v. Hurley* was rendered, but the present statute is section 2361, Kentucky Statutes): "The owner of land may maintain the appropriate action to recover damages for any trespass or injury committed thereon, or to prevent or restrain any trespass or other injury thereto or thereon, notwithstanding such owner may not have the actual possession of the land at the time of the commission of the trespass."

The judgment of the circuit court is affirmed.

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SCHNEIDER v. SCHNEIDER, &c.

(Filed April 21, 1903—Not to be reported.)

Newton G. Rogers for appellant.

Kohn, Baird & Spindle for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Settle.

It appears that the questions raised by this appeal were all passed upon and finally adjudicated by this court on both original and cross appeals during the September term, 1902 (see opinion of Judge Paynter delivered November 18, 1902), *Schneider v. Kohn, Baird & Spindle, &c.*, upon the record

**CENTRAL C. AND I. CO. V. WALKER'S EX'TX, &C. 219T**

brought up by the appellees, Kohn, Baird & Spindle, and filed in the office of the clerk of this court March 24, 1902, whereas this record was not filed by appellant, August Schneider, until August 23, 1902.

As the judgment and opinion on the first record are conclusive of the same matters involved in this one, this appeal is stricken from the docket at the cost of the appellant, August Schneider.

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**CENTRAL COAL AND IRON CO. v. WALKER'S EX'TX, &c.**

(Filed April 21, 1903—Not to be reported.)

Corporation—Stockholders—Statute of limitation—Estoppel—W. and others organized a corporation and purchased the interest of a number of heirs in a tract of land and took possession of same. Subsequently W. purchased the interest of other heirs in the same land, and he, as president, afterwards conveyed the entire tract of land to another corporation. After the death of W. his executrix brought suit to recover this interest purchased by W. The statute of limitation was pleaded as a defense. An estoppel was also pleaded. Held—That the statute of limitation was a sufficient defense. W. and his heirs are estopped from claiming any interest in this land after he had, as president, conveyed the entire tract without any reservation.

H. P. Taylor for appellant.

J. E. Fogle for appellees.

Appeal from Ohio Circuit Court.

Opinion of the court by Chief Justice Burnam.

Prior to the 24th day of June, 1870, John Maddox died the owner of a tract of 117 acres of land lying in Ohio county on the waters of Lewis creek, a branch of Green river, which descended to his eight living children and the three children of his daughter, Sarah Southard, who died before her father. About that time E. Dudley Walker and others organized a corporation, called the Render Coal, Iron, Mining and Manufacturing Co., which company bought the interest of the eight living children in the 117 acres, and also the interest of two of the three children of Sarah Southard. The third, Amelia Southard, had married Thomas Ashby, and died, leaving surviving her two children as her only heirs at law, W. P. Ashby and Sarah Elizabeth Ashby, who subsequently married Thomas Jones, both of them being infants at the time the Render Co. bought out the interest of the other heirs at law. This purchase was made under the advice and through the agency of E. Dudley Walker, who was the acting attorney for the corporation. After the purchase the company took possession of the entire tract of 117 acres of land, laid out and incorporated thereon the town of Hamilton, and subsequently sold and conveyed through Walker, its then president, lots therein to Archibald Pollock and others. On the 27th of March, 1880, the Render Co., through E. D. Walker, its president, pursuant to a resolution of the stockholders of the company, conveyed in fee simple divers tracts of land owned by it, including the 117 acres purchased of the heirs of John Maddox, to L. C. Murray as trustee to secure the payment of thirty negotiable bonds for \$500 each, bearing interest at the rate of 6 per cent. per annum, which were issued and sold

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by the company. On the 21st day of September, 1881, the Render Co. sold and conveyed by general warranty deed to the Central Coal and Iron Co., a corporation organized under the laws of this State, all the property owned by it, including the 117 acres of land purchased of the heirs of Maddox, in consideration of six hundred shares of \$100 each in the new company, and the assumption by the new company of the indebtedness of the Render Co., including the thirty bonds of \$500 each. A short time previous to this transfer E. D. Walker, not desiring to go into the new corporation, sold his stock in the Render Co. On the 19th day of August, 1880, whilst E. Dudley Walker was acting as president of the Render Co., he purchased from W. P. Ashby and Sarah E. Jones, children of Amelia Southard Jones, their one twenty-seventh interest in this tract of land for \$200, and had the title thereto conveyed to himself as an individual. No reservation, however, of this interest was made either in the mortgage made to Murray or the deed to the Central Coal Co. A few months after the sale to the Central Coal and Iron Co. Walker notified them that he claimed to be the owner of this interest in the 117-acre tract, and proposed to sell it to them, but the company declined to buy, upon the ground that he had no valid title thereto. Some twelve years afterwards, on the 7th day of March, 1893, he instituted this suit, claiming to be the owner of this one twenty-seventh interest in the 117-acre tract of land by virtue of this purchase from W. P. Ashby and his sister, and asked that it should be allotted to him contiguous to another tract of land owned by him. The company in their answer, after denying Walker's right to recover, plead the statute of limitation, and set out in substance the facts recited supra as to the plaintiff's connection with the company, and plead that he was estopped thereby. It appears from the deposition of James A. Thomas, the only surviving incorporator of the Render Co., that the company immediately took possession of the entire tract of 117 acres of land, claimed and used it as their own, and paid the taxes thereon, although he admits that he understood that there was some small interest in this tract of land which the company did not acquire by their original purchase, but that he understood that it was subsequently acquired; that during all this time Walker was a director of the company and its principal attorney, and for a greater part of the time, the president; and that after the purchase by the Central Co. they held the property in the same way.

An officer of the corporation can not acquire an interest in land in the possession of the corporation so as to divest the possession of the corporation, and it seems to us that the plea of the statute of limitation should have been sustained. But even if we are wrong on this proposition, it is perfectly clear that Walker and his heirs at law are estopped from asserting claim to any part of this tract of land in the hands of the Central Coal Co., after he had himself, as president, conveyed the entire tract of land to Murray in trust to secure the payment of bonds issued by the company, and which the Central Co. thereafter assumed to pay. It is true that in the reply filed in this case it is claimed that Walker bought this interest in the land with the knowledge and consent of the company, but this plea is not supported by any proof, and is in direct conflict with his own conduct as attorney, director and president through a long series of years. If he had any valid claim growing out of this transaction, it was against the old Render Co., and should have been asserted prior to its final dissolution.

## HARRODSBURG W. CO. V. CITY OF HARRODSBURG. 2193

For the reasons indicated the judgment is reversed and cause remanded, with instructions to dismiss the petition of appellee.

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### HARRODSBURG WATER CO. V. CITY OF HARRODSBURG.

### CITY OF HARRODSBURG V. HARRODSBURG WATER CO.

(Filed April 21, 1908—Not to be reported.)

**Contracts—Municipal government—**In this action by the water company to recover of the city water rent alleged to be due under contract for supplying the citizens and city with water the lower court gave judgment for the rent, and cancelled the contract on the ground that its terms had not been complied with. Both parties have appealed. The city urges three grounds for reversal: First, that the contract was executed by the trustees of Harrodsburg instead of the city council; second, that the contract was not binding on the city as the proposition to tax the city for this purpose had not been properly voted upon by the people; and, third, that the water company had failed to comply with its part of the contract by failing to furnish water in sufficient quantities and of proper quality of purity. Held—That the first two questions were settled adversely to the city on the first appeal, and the evidence shows that the water company has not complied in substance and effect with its contract, and that it would be inequitable and unjust to compel the city to pay the full contract price for the water furnished it by the water company. On the other hand, the water furnished by the water company has been of considerable benefit to the city, and that the water company has not intentionally failed to comply with its contract, but it has been slow in using its means to obtain the character of water it contracted to furnish, and until it does substantially comply with its contract in these respects it should only be allowed to recover a reasonable price for such water as it has and does furnish, not, in any event, to exceed the contract price.

Gaither & Vanarsdall and Breckinridge & Shelby for Harrodsburg Water Co.

Robt. Harding, E. M. Hardin and W. C. Bell for City of Harrodsburg.

Appeals from Mercer Circuit Court.

Opinion of the court by Judge Nunn.

The water company filed its action in the Mercer Circuit Court on the 26th day of January, 1900, against the city of Harrodsburg to recover the sum of \$1,055, claimed to be due the company on contract for water rent for the quarter ending November 30, 1899. The city answered in three paragraphs. The water company demurred to each and all of the paragraphs. The lower court sustained the demurrer to the first and second paragraphs and overruled it as to the third. On the trial of the case the court rendered a judgment against the city for the amount claimed, and the city appealed to this court and the case was reversed. (23 Ky. Law Rep., 456.)

On the return of the case the pleadings were amended, as indicated by the opinion of this court. Afterwards another petition was filed by the same plaintiff against the same defendant, claiming a like sum for the next quarter's rent, and afterwards another petition was filed by the same party against the city for the balance of the rent, for \$6,330, up to August 30, 1901, the pleadings in the last two cases being similar to the first. These sums

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were claimed by the water company under an alleged contract dated the 31st day of July, 1891, and upon allegations that the water company had fully performed and complied with the terms and requirements of the contract on its part. The city answered, denying the allegations of the several pleadings of the water company, and averred that the contract was void for three reasons, viz.:

1st. The contract purported to have been executed by the trustees of Harrodsburg instead of the city council.

2d. Before the contract could be made binding upon the city the proposition to tax it for such purposes must have first been ratified by the voters of the city at an election held for that purpose as required by law, and it was denied that such an election had been held.

3d. That if it was a legal contract, by it the water company bound itself to furnish engines and pumps and an elevated tank of the best modern character. The elevated tank to hold not less than 80,000 gallons, to be erected on brick, stone or iron foundation, to be constructed of iron, to be of such thickness as to withstand all pressure required of it, and to be elevated sufficiently to give, when full, four streams of water seventy-five feet in height at the courthouse through fifty feet of two and one-half inch hose, with ring nozzle one inch in diameter, that its waterworks should, in case of necessity, furnish at any time ten to fifteen sufficient streams of water for the purpose of extinguishing fire; the water to be supplied to be pure and wholesome and protected from all sources of impurity and contamination, and constantly maintained during the life of this contract to that standard of purity usually required for supplies of water for municipal and domestic purposes. It should be sufficient in quantity to supply ten thousand people with fifty gallons each per day, the same to be increased, if necessary, to meet the future requirements of the city; and also agreed to furnish, free of cost, water for the public schools of the city, the city alleged that the company failed in each and all of these particulars; that the water furnished, instead of being pure and wholesome, was foul, stagnant, impure, filthy, unfit for drinking purposes, bathing purposes and unfit even for sprinkling the streets or yards, and when so used in sprinkling gave forth foul and offensive odors. The water company denied each and all of these allegations and alleged that the water supply was from Salt river, and that it was known at the time the contract was entered into that the supply was to come from that source; that the city had accepted the contract with that knowledge, and was, therefore, estopped from complaining of the quality of the water so furnished. The issues were completed by additional pleadings filed.

As to the first contention of the city, it appears to us that the former opinion referred to settles it by the use of this language: "We do not think that it is material whether the contract was made with the trustees of Harrodsburg or the city council if in fact the name of the city authorities had been changed by law. In such a case the officers of the city exercising the power theretofore vested in the trustees did in fact enter into the contract after the same had been ratified by the voters."

As to the next proposition, as to whether or not the contract had been ratified by the voters, we are of the opinion, from all the evidence introduced,



that the election was in substantial compliance with the law with reference to the elections upon such questions. In the same opinion the court said: "Nor do we think that the mere fact that the vote was taken at the hotel and courthouse invalidates the election, provided there was in effect any law authorizing an election to be held at those places at that time, and provided the election was in fact held there upon due notice and the voters of the city generally participated therein."

The next and last question is more serious. There is copied into this record the depositions of about one hundred witnesses, all stating, without material contradiction, that from three to six months in each year that the water furnished by the water company, under its contract with the city, was foul, stagnant, impure, unfit for drinking and bathing purposes, and when the streets or yards were sprinkled with it they gave forth foul and offensive odors; that none of the citizens drank it during these times nor used it for cooking purposes; few bathed in it; some washed their dishes and cooking utensils with it, but used cistern or well water for rinsing and some sprinkled their yards and the streets with it. Many stated that it was unhealthy, and all agreed that it was very offensive and noxious to the smell. The proof also showed that the standpipe was not sufficiently elevated, or that it was not kept full of water so as to create the pressure as required by the contract to extinguish fire, and that probably twenty or more houses in the city, by reason of their elevation, are not furnished any, or complete, fire protection. The witnesses also stated that the cause for the water being unwholesome was because the water did not run in Salt river during the dry season of the year and stood in pools, and the water company erected a dam across the river to accumulate water sufficient for its purpose, which caused the pool to extend several miles up the stream, in which stock of all kinds entered and stood and the carcasses of dead animals accumulated, and the filth from the farms and buildings above was washed into it and the mud and slime accumulated in it.

On the other hand, the water company showed that it had furnished the city a good and substantial waterworks plant at a cost of seventy-five or a hundred thousand dollars; that the only trouble is the impurity of the water for a part of the year, the lack of filtration when the water is muddy and the defect in the pressure from the standpipe, the pressure being insufficient to protect a few of the buildings from fire. The proof showed that the system had been very effective for the purpose of putting out fires from the erection of it until the trial of the case, and had been of great benefit to the city for that purpose.

We do not understand that the contract between the city and the water company meant that the city was to pay the water company the sum of \$1,055 quarterly for the sole purpose of affording it fire protection, but it was to be paid for all the benefits which might or could be derived from such a plant, and the citizens when they voted the tax upon themselves for that purpose, they contemplated getting pure and wholesome water for domestic purposes, even though they had to pay individually for water for such use, and all these benefits and conveniences were contemplated in the making of the contract by the city council for the benefit of the citizens.

From all the facts and circumstances shown by the record we are of the opinion that the water company has not complied in substance and effect

with its contract, and that it would be inequitable and unjust to compel the city to pay the full contract price for the water furnished it by the water company. But, on the other hand, we are of the opinion that the water furnished by the water company had been of considerable benefit to the city, and that the water company has not intentionally failed to comply with its contract, but it has been slow in using its means to obtain the character of water it contracted to furnish, and until it does substantially comply with its contract in these respects it should only be allowed to recover a reasonable price for such water as it has and does furnish, not in any event to exceed the contract price.

Under all the circumstances it would be unjust and inequitable to declare this contract null; by doing so it would cause almost the entire sacrifice of its investment. The city should pay the water company a reasonable price for the water furnished to enable it to furnish water as it contracted to do, then if within a reasonable time the company fails to furnish water in accordance with its contract, the city should be absolved from the contract. It is our opinion that the ordinance passed by the city council declaring the contract void and at an end, and the written notice given by the water company to the council to the same effect, did not have the effect to annul the contract.

The principles upon which we have held that the controversy between these parties should be settled are in line with the cases of *Escott & Son v. White, &c.*, 10 Bush, 170; *Morford v. Ambrose & Mastin*, 3 J. J. M., 688, and *Morford v. Ambrose & Mastin*, 6 Mon., 609. The parties upon the return of this cause should be allowed to amend their pleading as herein indicated, and upon their failing to do so the actions should be dismissed.

Wherefore, the judgments of the water company against the city for \$8,440 is reversed, and also the judgment in favor of the city annulling the contract is reversed, and the actions are remanded to the lower court for further proceedings consistent herewith.

#### BAKER, &c. v. FIDELITY AND DEPOSIT CO. OF MARYLAND.

(Filed April 21, 1903—Not to be reported.)

**Sheriffs—Sureties—Subrogation—Homestead**—The sheriff of Hancock county collected and failed to pay over to the creditors of the county about \$1,500 of the county levy, and appellant, as one of his sureties, was compelled to pay his proportion thereof, and then instituted this action to be subrogated to the lien of the county, and prayed that land belonging to the sheriff be subjected to the lien to satisfy said indebtedness. Held—That under section 4130, Kentucky Statutes, the same lien given to the Commonwealth is given to the counties and taxing districts on all the property of the sheriff, including his homestead, and appellant is entitled to be subrogated to the lien of the county.

2. Levy—The order of the fiscal court making a general levy for county purposes was sufficient to charge the sheriff and his sureties.

Sweeney, Ellis & Sweeney for appellants.

Geo. W. Jolly and G. D. Chambers for appellees, Miller and others.

Powers & Atchison for Fidelity and Deposit Co., appellee.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Nunn.

In the month of December, 1892, the appellees, J. H. Miller and about six others, became the surety of G. C. P. Baker, the sheriff of Hancock county, on his revenue bond for the collection of taxes for the year 1893. On the 28th day of December, 1893, the Fidelity and Deposit Co. of Maryland became his surety on his revenue bond for the collection of taxes for the year 1894. It appears that the sheriff defaulted to the extent of about \$1,500 in the payment of county claims, although he collected the taxes with which to pay same. The Hancock Deposit Bank being the owner of the unpaid claims, by purchase and assignment from the creditors of the county, instituted suit against the sheriff and the sureties on both bonds. The case was litigated, and the bank recovered judgment against both sets of sureties for \$1,546.30. The sureties on each bond paid one-half. This was right under section 4184 of the Kentucky Statutes. By this section the sureties on all the bonds executed by the sheriff shall be jointly and severally liable for any default of the sheriff during the term in which the bond may be executed, whether the liability accrued before or after the execution of such bond or bonds. Then the appellee, Fidelity and Deposit Co. of Maryland, brought this action against the appellant, by which it sought to subject some real estate belonging to him, claiming that it, with the other set of sureties who were made parties, were entitled to be substituted to the lien of the county on the real estate of appellant. Under section 4130 of the Kentucky Statutes this language is used: "The Commonwealth, the county and any taxing district, shall have a lien from the date the sheriff begins to act upon the real estate of the sheriff therein, secured or afterwards acquired by him, which shall not be discharged until the whole amount of money collected by the sheriff, or for which he may be liable to them respectively, shall have been paid."

In the case of *Dawson v. Lee and Lee v. Hill*, 83 Ky., 51, the court recognized the fact that when sureties of a sheriff pay for him money collected as revenue, then the sureties should be substituted to the rights of the Commonwealth to its lien upon the real estate of the sheriff. When this decision was rendered the statute only allowed a lien in favor of the Commonwealth, but under the present statute, section 4130, the lien is given to the Commonwealth, county and taxing district, and we can see no reason why the sureties are not entitled to be substituted to the county's lien. The appellant filed his answer, to which appellee demurred, and the court sustained the demurrer and rendered judgment against the appellant and subjected his real estate to the payment thereof. The appellant complains at the action of the court, and insists that the court erred to his prejudice for two reasons. The first is, he claims that the petition is defective in not alleging that the county court made a levy on the property of the county authorizing his collection of the taxes for which he defaulted. The petition alleges that the fiscal court at the October term, 1893, a majority of the members thereof being present and concurring, duly made and entered an order levying for county purposes, to pay off the existing current indebtedness (by a previous order they had shown this to be \$3,691.75) of said county to defray the current and necessary expenses thereof, and to pay the claims out of the levy as aforesaid, a poll tax on each male person of the age of twenty-one

years residing in the county, and an ad valorem tax of 20 cents (afterwards changed to 23 cents) on each \$100 worth of taxable property in said county subject to taxation for county purposes, and ordered and directed the appellant, G. C. P. Baker, sheriff, to collect same. We are of the opinion that this was a proper levy, and especially is it sufficient when appellant admits having collected the tax thereunder. The next cause of complaint by appellant of the action of the lower court is that the court refused to allow his plea, claiming his real estate as a homestead. His plea was sufficient, if allowed to retain it as against the claim sued on. The appellant claims that the sections of the General Statutes and Kentucky Statutes, on the subject of liens on behalf of the Commonwealth, etc., for taxes collected, are different. He claims that in the Kentucky Statutes, section 4190, the words "subject to execution" have been interpolated, and that these words do not appear in the General Statutes. This is right as to the General Statutes of 1873, but in 1886 this statute was changed. (Section 4, title 9, chapter 92 of the General Statutes of 1899.) The words "subject to execution" do appear. These words have no reference to the lien on the sheriff's real estate for taxes collected. There has never been any change of the statutes for taxes collected by him, except that it put his real estate in lien for taxes for counties and taxing districts in addition to the lien on behalf of the Commonwealth.

He also contends that by leaving the words "then owned" out of the Kentucky Statutes in section 4190, and inserting the words "therein secured," appellant's homestead was exempt from liability on this claim. We do not so understand it. There has been no change in the meaning. "Therein secured" has reference to the lien, and means that the lien exists or is therein secured on the real estate of the sheriff at the moment of the execution of the bond and the commencement of his duties as such officer under the bond. We deem it unnecessary to refer to a number of cases which decide that a sheriff can not claim a homestead as against the Commonwealth for liabilities created by the collection of taxes due it; and by the statute which existed at the time of the execution of these bonds, and as it now exists, the same lien given to the Commonwealth is given to the counties and taxing districts.

Wherefore, the judgment of the lower court is affirmed.

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ESTEP, &c. v. ESTEP, &c.

(Filed April 21, 1903—Not to be reported.)

**Conveyances—Fraud**—In this action a deed from appellants to appellees should have been cancelled because it was executed through fraud or mistake so as to include a different tract of land from the one intended, but the other deed from a father to his son was properly upheld as it was executed for a valuable consideration. It was not rendered void by the son attempting to reconvey it while an infant to his father as the proof shows that upon arriving at age he renounced the deed made to his father and conveyed it to another. The father acquiesced in these acts of the son.

J. M. Roberson and Roscoe Vanover for appellants.

J. F. Butler and N. J. Auxler for appellees.

## Appeal from Pike Circuit Court.

Opinion of the court by Judge Nunn.

On the 27th day of July, 1900, the plaintiffs, as the heirs at law and real representatives of one John Estep, deceased, instituted this action in the Pike Circuit Court against the appellees, asking that they be adjudged the owners and entitled to the possession of the land described in their petition, and that the deed from the appellee, Godfrey J. Estep, to his co-appellee, William F. Estep, be cancelled, and that the appellants be adjudged the owners thereof, and that the deed from John Estep, deceased, to the appellee, William F. Estep, be corrected so as to convey the boundary of land actually sold to appellee, William F. Estep, by the decedent, John Estep, in the year 1892, claiming that by either fraud or mistake there was included in the boundary given in the deed much more land than was intended to be conveyed therein. The piece intended to be conveyed was and is bounded as follows: "Beginning at the point at the lower side of a hollow and running up the point on the lower side of the hollow with Lizzie McCoy's line to the back line onto Martha Dodson's line; thence with Martha Dodson's line to the bed of Peter creek, and with the bed of Peter creek to the beginning."

That the parcel of land included in the deed by fraud or mistake is on the other side of Lizzie McCoy's land. The piece intended to be conveyed and the piece not intended to be conveyed are separated by the land of Lizzie McCoy. According to the deposition of George W. Dodson, Jr., and other evidence which is uncontradicted, except in a manner by the appellee, William F. Estep, the parcel of land above that of Lizzie Dodson, included in the deed above referred to, was so included without the knowledge or consent of John Estep, now deceased, and by the fraud of appellee; and the lower court erred in not so adjudging.

The deed from John Estep to his son, Godfrey J. Estep, was executed in 1888 for the recited consideration that his son, Godfrey, should care for and support his father, mother and his idiotic sister during their natural lives.

This, from the evidence, was an unconscionable consideration, as the land was of a very little value. He, Godfrey, owned another piece of land, conveyed to him by one Blankenship, from which his father sold ninety-six poplar trees and received the price of \$1 per tree, and also sold a few walnut trees. In 1889, when Godfrey was sixteen years of age, he attempted to re-convey this piece of land to his father. In 1894, after he arrived at the age of twenty-one years, he renounced the deed which he had made to his father, and conveyed the same piece of land to the appellee, William F. Estep. In 1895, and just before the death of John Estep, it is proven by several witnesses, and not contradicted, that he stated that he knew the deed Godfrey had made to him in infancy was invalid, and stated that he wanted Godfrey to have that piece of land which he had conveyed to him, and made arrangements for his widow to remove to and live upon another tract of land and to surrender that piece of land to Godfrey after his death. In view of these facts, and the fact that John Estep received the price of the timber sold off of Godfrey's other piece of land, and that Godfrey was his child, we are disposed to believe that the lower court was right in not setting aside this deed.

For these reasons the case is reversed and the cause remanded for further proceedings consistent with this opinion.

HALLAM, &amp;c. v. COULTER, AUDITOR, &amp;c.

(Filed April 21, 1908.)

Attorneys—Unauthorized Collections—A. and C. were rival candidates for a seat in the lower house of the general assembly. C. received the certificate of election and A. contested his seat before the legislature. Appellants were attorneys for A. The legislature appropriated \$250 each to A. and C. to pay their attorneys' fees and expenses incident to the contest. Appellants applied to and received from the auditor a warrant on the treasurer for the amount due A. as attorneys for A., and said amount was paid them by the treasurer. A. instituted this action for a mandamus to compel the auditor to issue his warrant for the amount of the appropriation. The auditor and treasurer answered, setting up the facts above stated, and alleging that appellants had full authority to receive said sum, and that same was paid them in good faith. Appellants were made defendants, and judgment against them for said sum was prayed for in the event that the auditor and treasurer should be compelled to pay same to A. The court granted a writ of mandamus, compelling the auditor and treasurer to pay said sum to A.; also rendered a judgment against appellant for the amounts unlawfully received by them, from which they prosecute this appeal. Held—That appellants had no lien on said money and no implied authority to receive same. The contest set on foot by A. was to recover or secure an office, not an appropriation at the hands of the legislature. The sum allowed was a mere incident or result of the contest, given by the legislature not as a matter of right, but as a gratuity to indemnify him against loss or expense incurred by reason of the contest. Appellants do not claim that they had any express authority from A. to collect this claim from the State, and as their right to represent him appears to have ended with the contest, authority to collect or receive the sum thereafter allowed him by the legislature to defray the expenses of the contest will not be presumed or implied.

T. L. Edelen for appellants.

C. J. Pratt and M. R. Todd for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Settle.

D. R. Allen and W. H. Collopy were rival candidates at the November election, 1899, for a seat in the lower house of the general assembly of Kentucky in and for the eighty-first legislative district. Collopy received the certificate of election to the office in question, but his right thereto was denied by Allen, who claimed to have been elected, and he thereupon instituted a contest for the office before the general assembly upon the meeting of that body, in which contest he was unsuccessful.

Upon the termination of the contest the general assembly, by an act entitled "An act appropriating money," which became a law on June 13, 1900, duly appropriated to the use of Allen and Collopy the sum of \$250 each, wherewith to pay attorneys' fees and other expenses incurred by them respectively in the contest.

For the \$250 thus appropriated for the benefit of Allen a voucher was issued by the auditor of the State of Kentucky, payable to the appellant, T. F. Hallam, as attorney for Allen, who caused the same to be presented to the treasurer of the State for payment, and the latter thereupon issued his check, payable too Hallam, as attorney for the amount named in the voucher; and

upon this check the appellant, Hallam, and associate counsel, Durrett and Green, received out of the State treasury the entire sum of \$250 appropriated to Allen. The voucher of the auditor was issued upon the following written order: .

"Cincinnati, O., April 23, 1900.

"Hon. Gus G. Coulter, Auditor of Kentucky, Frankfort, Ky. :

"Dear Sir—In the contested election case of R. R. Allen, contestant, against W. H. Collopy, contestee, for the seat as representative in the general assembly from the second district of Kenton county, please make out check and warrant (when due) for allowance by assembly for contestant's expenses, so that the same shall be payable to the order of T. F. Hallam, attorney for D. R. Allen, and deliver same to Pat McDonald.

"MARTIN M. DURRETT,

"E. J. GREEN, JR.,

"T. F. HALLAM,

"Attorneys for D. R. Allen."

After the payment of the above sum to the appellant, Hallam, Allen demanded of the auditor a voucher for the amount appropriated to his use by the general assembly, which was refused; he thereupon instituted suit in the Franklin Circuit Court against the auditor and treasurer, respectively, in his petition setting forth, in substance, the contest, the appropriation of \$250 made him by the legislature, and the refusal of the auditor to issue him a voucher or warrant therefor upon the treasurer, the petition closing with a prayer for the writ of mandamus to compel the auditor to issue a warrant upon the State treasurer for the sum of \$250. payable to him, and directing the treasurer to pay him that amount upon presentation of the warrant. Joint answer was filed by the auditor and treasurer, in which they set up the order from appellant Hallam, the issual of the warrant by the auditor to him, and its payment by the treasurer, and further averred that he and his associate counsel and co-appellants, Durrett and Green, had a lien on the sum appropriated by the legislature to the payment of the expenses incurred by Allen in his contest, and that the appellants had the right to collect and apply the same to the payment of their fees for legal services rendered him in his contest with Collopy.

Thereafter an amended answer was filed by the auditor and treasurer, in which it is, in substance, averred that the payment to appellants of the sum allowed Allen by the legislature was made by them in good faith, and with the belief that the appellants had the authority to receive same as attorneys for Allen; they, therefore, asked that their answer be made a cross petition against appellants, and that they be made parties defendant, and required to answer and show what authority they had to collect the sum paid them; and if they had received the same without right, that they be made to pay it into court, that it might be delivered to whomsoever the court might direct.

The appellants filed demurrer to the answer and cross petition of the auditor and treasurer, and with same an answer, in which it was admitted that they received the \$250 in controversy, and in substance averred that they, by employment of Allen, represented him in his contest before the

legislature, and that he promised to pay them for their services whatever sum might be appropriated by that body in payment of the expense incurred by him in the prosecution of the contest; that they did perform for him all the services contemplated by their employment, and in addition that they engaged the services of officers to execute notices and subpoenas, and to take depositions in the contested election case, whose fees were paid by them at Allen's request; and further, that the appellant, Hallam, came to the city of Frankfort, and there, before the general assembly and its committees, represented him in his contest, and paid his (Hallam's) own hotel bills, and other necessary expenses, while there. The answer also sets out in detail the fees paid and expenses incurred by appellants in the prosecution of the contest, and avers that the value of their services, together with the fees paid and expenses incurred by them, exceeds by \$174 the amount of the appropriation collected by them out of the State treasury, and they deny the right of the auditor or treasurer to recover of them the \$250, or any part thereof.

A general demurrer was filed by Allen to the answer as amended of the auditor and treasurer, which was sustained by the lower court, and they failing to plead further, judgment was duly rendered, directing the auditor to issue to Allen a warrant upon the treasurer for the \$250 in controversy, and the treasurer to pay the same upon presentation out of the State treasury, and further adjudging to Allen his costs in the action expended.

The general demurrer filed by the auditor and treasurer to the answer of appellants to their cross petition was also sustained, and the latter failing to plead further, it was adjudged by the lower court that appellees, G. G. Coulter and S. W. Hager, recover of appellants, Hallam, Green and Durrett, \$250 with interest thereon from the 1st day of May, 1900, until paid, and their costs expended, to which judgment appellants excepted and prayed an appeal, and the case is now before this court upon that appeal. We are not disposed to question the reasonableness of the fee attempted to be asserted by appellants, nor are we inclined to approve of the conduct of Allen in seeking to withhold from his attorneys the sum appropriated by the legislature to reimburse him for his costs incurred in prosecuting the contest for a seat in that body, for the appropriation was made in the main to enable him to pay his attorneys for legal services rendered him in that contest, but we are called upon to determine the legal rights of the parties as presented by the record, in doing which our only guide must be the law.

Appellants claim to have a lien upon the sum allowed appellee by the general assembly. If they can have and assert such a lien, it must be under and by virtue of section 107, Kentucky Statutes, which provides that "attorneys at law shall have a lien upon all claims or demands, including all claims for unliquidated damages, put into their hands for suit, or collection, or upon which suit has been instituted, for the amount of any fee which may have been agreed upon by the parties, or, in the absence of such agreement, for a reasonable fee for the services of such attorney, and if the action is prosecuted to a recovery, shall have a lien upon the judgment for money or property which may be recovered, legal costs excepted, for such fee."

\* \* \*

The liens allowed by this section relate to claims, or demands, put into the hands of an attorney for collection, or suit, or to judgments for money



or property which may be recovered. It is clear that a lien in favor of an attorney can not arise under the statute out of a contest for office before a legislative body, for in such a proceeding neither money nor property is involved, and if the office be recovered through the efforts or skill of the attorney, no lien can be asserted by him upon the office, its fees or emoluments, for, under our Constitution and laws, the incumbent of an office may not farm it out, or assign the fees or salary thereof.

The contest set on foot by Allen was to recover or secure an office, not an appropriation at the hands of the legislature. The sum allowed was a mere incident, or result of the contest, given by the legislature, not as a matter of right, but as a gratuity to indemnify him against loss or expense incurred by reason of the contest, and according to parliamentary custom such allowances are made to the unsuccessful, as well as to the successful, party. It is not contended by appellants that they were employed to secure for Allen an appropriation at the hands of the legislature; such an employment would have been against public policy, and no compensation could have been recovered by them by reason thereof. The sum appropriated by the legislature to Allen could not have been attached by appellants before its payment by the treasurer of the State, and we are of opinion that no attorney's lien was created thereon while it remained in the State treasury.

It is not claimed by appellants that they had any express authority from Allen to collect this claim from the State. And as their right to represent him appears to have ended with the contest, authority to collect or receive the sum thereafter allowed him by the legislature to defray the expenses of the contest will not be presumed or implied.

The judgment in favor of Allen against the auditor and treasurer has not been appealed from, but for the reasons herein given the judgment in favor of appellees, Coulter and Hager, on their cross petition against appellants is hereby affirmed.

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HALE v. HALE.

(Filed April 21, 1903—Not to be reported.)

Divorce—Fraud—Coercion—Appellant brought this action for divorce against his wife, alleging that she falsely charged that he was the father of her bastard child, and that he had seduced her under promise of marriage, and that he was induced to marry her under threat of prosecution for a penitentiary offense, she being under twenty-one years of age. In an amended petition he alleged that she abandoned him without fault on his part. On the trial the lower court dismissed the petition. On appeal, Held—That the proof seems to sustain the chancellor, and his finding will not be disturbed.

Garnett & Garnett for appellant.

Lilburn Phelps for appellee.

Appeal from Russell Circuit Court.

Opinion of the court by Judge Hobson.

Appellant brought this suit to obtain a divorce from his wife, Laura Hale. In his original petition he alleged that in November, 1900, she falsely charged that she had been seduced by him, and that she was then with child and

that he was the father of the child, and threatened to prosecute him on the charge of seducing her, a female under twenty-one years of age, under promise of marriage, threatening that she would swear enough to convict him and he would have to serve a term in the penitentiary; that other members of her family made like threats; that by reason of these things, though he was not guilty of the charge, to avoid being arrested and put in jail he suffered himself to be married to her; that soon after they were married she confessed that he was not the father of the child and had not seduced her, but that she had been seduced by another, who was the father of the child, and since that time he had had nothing to do with her, except he offered to support her provided she would live at a house he furnished her, but she refused to live there. He alleged that the marriage was obtained by force, fraud and duress, and that the defendant's conduct had been so lewd and lascivious as to prove her unchaste, and that since she married him she had been keeping the company of other men. It was alleged that the wife was an infant. She denied the allegations of the petition. On February 22, 1902, the plaintiff filed an amended petition, in which he charged that the wife had abandoned him and voluntarily lived apart from him without fault or wrong on his part. The case was, after this, submitted and the court entered a judgment to the effect that the plaintiff's petition and amended petition were not sustained by the proof, and, therefore, dismissed the action at his cost.

The judgment of the chancellor on the facts in cases of this character is given considerable weight, and is not disturbed where, on the whole, case the court is in doubt as to the truth. The proof showed that the husband is twenty-four years of age, the wife under twenty-one; that they resided not far apart in Russell county and were married on November 27, 1900. Some seven or eight weeks before this she had given birth to a bastard child. After their marriage they came to the house of the plaintiff's father and lived there one week, when, on a rainy day in December, the wife took her baby in her arms and walked to her father's house some distance away. Soon after this the original petition in this case was filed, attacking the wife's character for chastity and charging her with lewdness. No proof is offered of these charges, and no greater cruelty can be shown a wife than unfounded charges of this sort. No cause is assigned for the wife's taking up her baby and walking home in the rain, except so far as it may be inferred from the circumstances surrounding the parties. But in view of the allegation of the petition as to how this marriage was obtained, filed so soon after the separation, we are not prepared to say that the chancellor erred in holding that the evidence failed to satisfy the court that her leaving was without the fault of the defendant.

Judgment affirmed.

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FUQUA v. COMMONWEALTH.

(Filed April 22, 1903—Not to be reported.)

1. Criminal law—New trial—Appellant was indicted with P., as having aided and abetted him in the commission of murder, and his trial resulted in a conviction for murder and sentence to life imprisonment, from which

this appeal is prosecuted. Among the errors alleged in the ground for a new trial it charged that the sheriff gave to the jury in their rooms the minutes of evidence given in the examining trial of P. and appellant, and also the grounds for a new trial filed by P., which influenced the jury in rendering their verdict. It was also charged that the verdict was decided by lot. Held—That as these errors complained of appear for the first time in the motion for a new trial, they can not be considered on this appeal, as under section 281, Criminal Code of Practice, they are not subject to exception.

2. Instructions—Instruction No. 3 is not objectionable as assuming that P. killed the deceased as that had been stated in another part of the instruction and was unnecessary to be repeated.

3. Evidence—Dying declarations—The Commonwealth's attorney was permitted to state that P. had made statements to him contradictory of his evidence given on the trial, but the court erred in not instructing the jury that this evidence was only admissible for the purpose of impeaching the witness, and not as substantive testimony against appellant. The dying declaration of deceased was given under the belief that he would soon die. This fact is amply proven by his own statements and his condition at the time. It is no objection to the admissibility of the dying declaration that there is other evidence to prove the facts attending the killing. Before a written dying declaration is admissible in evidence it is necessary that same should be either read over to the party and assented to by him, and either signed by or for him. While the paper which was not signed may not be read in evidence the witnesses who heard the declaration may testify orally as to what was said by the deceased, and the witness who wrote down the words may refresh his memory by reference to the memorandum made by him.

Moss & Moss for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Barker.

Spot Polk was indicted by the grand jury of the county of McCracken, Kentucky, charged with the willful murder of George Gray, and, with him, the appellant, Lon Fuqua, was jointly indicted, charged with aiding and abetting him in the murder. Spot Polk seems to have pleaded guilty, and upon appellant's trial for the offense for which he was charged he was found guilty by the jury, and his sentence fixed at confinement in the penitentiary for life. His motion for a new trial having been overruled the case is here on appeal.

There are several grounds for a new trial filed, and these we shall discuss, not in the order in which they were made, but in the order of their importance, as we regard them.

The seventh, eighth, ninth, tenth, eleventh and twelfth grounds may be considered together. These set forth that "the sheriff, H. F. Lyon, handed to the jury, in their room, the minutes of the grand jury in considering the charge against Spot Polk and appellant; also the motion for a new trial in the case against Spot Polk, and many other papers in the case; and because the verdict in this case was caused and found and induced as much by reason of the aforesaid minutes or memorandum of the evidence heard by the grand jury and the motion for a new trial in the Spot Polk case as by anything else; and because the defendant did not have a fair trial in this case; because

the jury had and read the memorandum of the evidence before the grand jury, and also the typewritten motion and grounds for a new trial in the Spot Polk case; because the verdict was decided by lot, and also not by a fair expression of opinion by the jurors; because the verdict was not the verdict of one, two or three of the twelve jurors, and those whose verdict was and is contrary to the verdict returned agreed to it, but did not, and do not, believe the defendant was proven guilty beyond a reasonable doubt."

Section 280 of the Criminal Code is as follows: "Upon the trial of criminal or penal prosecutions either party may except to any decision of the court by which the substantial rights of such party are prejudiced, subject to the restrictions in the next section."

Section 281 provides that "the decision of the court upon challenges to the panel, and for cause, upon motion to set aside an indictment, and upon motion for a new trial, shall not be subject to exception."

These sections have often been construed by this court as forbidding the reversal of a case for an error or wrong done to the rights of the defendant during the progress of the trial, which appears for the first time in the motion for a new trial. (*Kennedy v. Commonwealth*, 14 Bush, 340; *Brown v. Commonwealth*, 14 Bush, 338; *Farris v. Commonwealth*, 14 Bush, 362; *Morgan v. Commonwealth*, 14 Bush, 106; *Redmond v. Commonwealth*, 82 Ky., 383; *Vinegar v. Commonwealth*, 20 Ky. Law Rep., 412; *Leslie v. Commonwealth*, 18 Ky. Law Rep., 1201; *Sawyer v. Commonwealth*, 18 Ky. Law Rep., 657; *Commonwealth v. Simon*, 100 Ky., 164.)

As the errors complained of in the grounds *supra* appear for the first time in the motion for a new trial, they can not be considered on this appeal under the rule laid down in the cases above cited.

Appellant further complains that the court erred in refusing to give instruction "Y" asked by him. Instruction "Y" is substantially the ordinary instruction as to the presumption of innocence and reasonable doubt, and we think, while it was unobjectionable in form, that it was unnecessary, as instruction No. 4, given by the court, amply covered this ground. It is also urged that instruction No. 3, given by the court, is erroneous in this: That it assumes Spot Polk did kill George Gray; whereas it is claimed that this question should have been left for the decision of the jury. In this the learned counsel for appellant are in error. The instruction clearly required the jury to believe "from all the evidence, to the exclusion of a reasonable doubt, that Spot Polk did feloniously, willfully, and with malice aforethought, kill and murder George Gray," and having so required the jury to believe, it was not necessary, in that part of the instruction which relates to the charge against appellant, of aiding and abetting Spot Polk in the killing of George Gray, to add the words "if he did kill him." The instruction, as a whole, required the jury to believe, to the exclusion of a reasonable doubt, every substantive fact necessary to be shown in order to establish the guilt of appellant, and we think the instruction contains a correct exposition of the law as applicable to the case at bar.

The sixth ground for a new trial is that the court erred to the prejudice of defendant in permitting the Commonwealth to contradict Spot Polk by showing that he had made statements to W. F. Bradshaw, the Commonwealth's attorney, which differed from the evidence he gave upon the trial. We

think the Commonwealth had a right to contradict the witness as to his testimony in question, but the court erred in not instructing the jury that the evidence of the witness introduced was only admissible for the purpose of contradiction, and was not to be considered as substantive evidence against appellant.

In the case of *Mullins v. Commonwealth*, 23 Ky. Law Rep., 2483, this court, in speaking of a similar question, said: "But this evidence was only admissible for the purpose of impeaching the witness, and not as substantive testimony against the appellant. The court should have so instructed the jury. The failure to do this was a prejudicial error. (*Jones v. Commonwealth*, 22 Ky. Law Rep., 355; *Collins v. Commonwealth*, 15 Ky. Law Rep., 691; *Feuston v. Commonwealth*, 91 Ky., 230.)

We are of opinion that a proper foundation was laid by the Commonwealth for the introduction of the paper containing the dying declaration of George Gray on the subject of who killed him, and the circumstances of the killing. It is true, as contended by counsel for appellant, in order that such declarations be admissible, it is necessary to show to the court that the deceased made such declaration under the influence of impending dissolution. Robertson, in his work on Kentucky Criminal Law and Procedure, section 226, says: "To render a statement admissible as a dying declaration it must first be shown by the party offering it in evidence that it was made in extremis, under a solemn sense of impending death, and when the party has given up all hope of this life; but whether this be so or not may be determined not only by what he may say, but by his conduct: the character of the wounds; the opinion of physicians or others attending him, and also the surrounding circumstances; and he need not, in express words, declare that he knows he is about to die, or make use of equivalent language. The true test of the admissibility of the evidence of such declarations is a belief in the mind of the party making them that he will soon die."

Greenleaf, in his work on Evidence, section 158, says: "It is essential to the admissibility of these declarations, and as a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made; it is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved by the express language of the declarations or by inference from his evident danger, or the opinion of the medical or other attendants, stated to him, or from his conduct or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind."

We think that the evidence shows Gray's condition at the time he made the declaration in question to have been such as to warrant the court in admitting it in evidence; he was suffering from a wound necessarily mortal, and was so weak as to be hardly able to move in bed, and to render audible speech exceedingly difficult. He stated that he believed he was going to die, and that the doctor had told him so. Taking all these facts together, they show his condition of mind, as to his immediate dissolution, to have been such as to fully meet the requirements of the rule laid down by Robertson and Greenleaf above quoted. Nor can we agree with the learned counsel, that the declaration in question was inadmissible because there were other

witnesses in the case, who testified as to the killing, and its circumstances, and that, therefore, there was no necessity for the introduction of the dying declaration of Gray. It is true that the reason for the admissibility of dying declarations rests on the general necessity that oftentimes it would be impossible to show who did the killing but for the dying declaration of the party killed; but this is a general necessity, and has no reference to the exigencies of the particular case. The principle being once established as a rule of evidence, such declarations are admissible in every case where they are otherwise competent, without reference to the number of witnesses who may depose as to the facts of the killing. It is true that in the case of *Collins v. Commonwealth*, 12 Bush, 271, the court, in the opinion, uses some general language, which seems to give support to the contention that the admissibility of dying declarations depends on the necessities of the particular case; the exclusion of the dying declaration in the case cited, however, was not based upon this ground, but another, the soundness of which can not be questioned. If such declarations were admissible only upon the necessity of the particular case, it would follow that the court would be forced to require the Commonwealth's attorney to produce all of the State's evidence before the dying declaration could be heard, for, until that was done, it could never know whether or not the Commonwealth possessed sufficient evidence to establish the killing without the dying declaration; and it would throw upon the court the burden of deciding in each case whether or not the Commonwealth had sufficient evidence to establish the killing without the declaration, thus making the judge decide the weight to be given the Commonwealth's testimony.

In the case of *Lukers v. Commonwealth*, 9 Ky. Law Rep., 385, in discussing this question, the court said: "We do not understand the rule to have been heretofore so interpreted and applied by this court as to make dying declarations competent evidence of the act of killing and identity of the guilty party only when there is no other testimony relating thereto, nor do we perceive the reason for such restriction, for it often occurs that the testimony of living witnesses is contradicted and discredited, as was attempted in this case.

But the trouble we see in permitting the paper containing the dying declaration in this case to be read to the jury is that it had not been signed by the decedent, or read over to him, or in any way recognized by him after it was written. In the case of *Saylor v. Commonwealth*, 17 Ky. Law Rep., 100, in speaking of written dying declarations, this court said: "It is not necessary that the writing should be sworn to by the deceased; if it is signed by him it is sufficient."

In the Am. & Eng. Ency. of Law, 2d edition, volume 10, page 391, the rule is thus laid down: "Even though the declarations have been reduced to writing, the writing is a mere memorandum, and is not competent evidence of the declarations if it was neither signed by the deceased nor read over to him." (Citing *Anderson v. State*, 79 Ala., 5; *State v. Fraunburg*, 40 Ia., 555; *State v. Sullivan*, 51 Ia., 142, and *Allison v. Commonwealth*, 99 Pa. State, 17.)

It seems to us that where a dying declaration is made, as in this case, by one so weak as to speak with great difficulty, and it is reduced to writing, it should have been read over to him as a whole, and assented to by him, and

either signed by or for him before it becomes admissible as his dying declaration. An emanuensis, under such circumstances, is more than ordinarily liable to error, and it seems only fair to the defendant that before such a paper is read to the jury as the dying declaration of the deceased, he should have given some recognition or assent to it as a whole.

But while the paper in question may not, for the reasons given, be read to the jury as a deposition, the witnesses who heard the declaration may testify orally as to what was said by the deceased, and the witness who wrote down the words may refresh his memory by a reference to the memorandum made by him.

Wherefore, the case is reversed for proceedings consistent with this opinion.

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PARK & CO. v. ORTH, &c.

(Filed April 22, 1903—Not to be reported.)

Street improvements—The city of Louisville entered into a contract with appellants to improve the carriage way of Frankfort avenue from the former city boundary line to Cavewood avenue extended, pursuant to an ordinance, and appellants having completed the work and received apportionment warrants therefor, brought this action against the abutting property owners and the city. The court held that no part of the property lying south of New Main street or north of Clifton avenue was liable for any part of the improvement on it. The property relieved of this charge did not front on Frankfort avenue, but lay within the boundary of 195 feet on either side of Frankfort avenue and fronted on two other streets, viz., New Main street and Clifton avenue, but appellants contend that said property is not relieved of this charge because New Main street and Clifton avenue are not principal streets of the city, and were never dedicated as such for public use. Said original property was outside the city of Louisville and owned by one person who laid it off into streets and lots and recorded the plat in the office of the county court clerk and sold lots fronting on said streets, many of which were improved, by houses being erected thereon, more than twenty years before the territory was annexed to the city. Held—That the act of the city in taking this territory into the city was wholly voluntary on its part. In thus extending its limits it took the territory as it then was laid off into streets, with lots used as residences fronting on these streets. The property covered by the street had been dedicated by the owner to this purpose in the most solemn way, by recording the plat and conveying the lots calling for the streets. The city could not take this territory in with the streets in actual use without accepting the benefits with the burden. Its annexation by the city was an acceptance by it of the street. The dedication was made in anticipation of the annexation of the property to the city, and when the property was annexed no further act on the part of the city in accepting the streets was necessary. The court, therefore, properly relieved the property fronting on New Main street and Clifton avenue from the burden of the improvement of Frankfort avenue.

Barnett & Barnett, H. H. Herr and Chas F. Taylor for appellants.

Lane & Harrison for appellees.

H. L. Stone for appellee City of Louisville.

Helm, Bruce & Helm for appellee L. & N. R. R. Co.

Appeal from Jefferson Circuit Court, Chancery division.

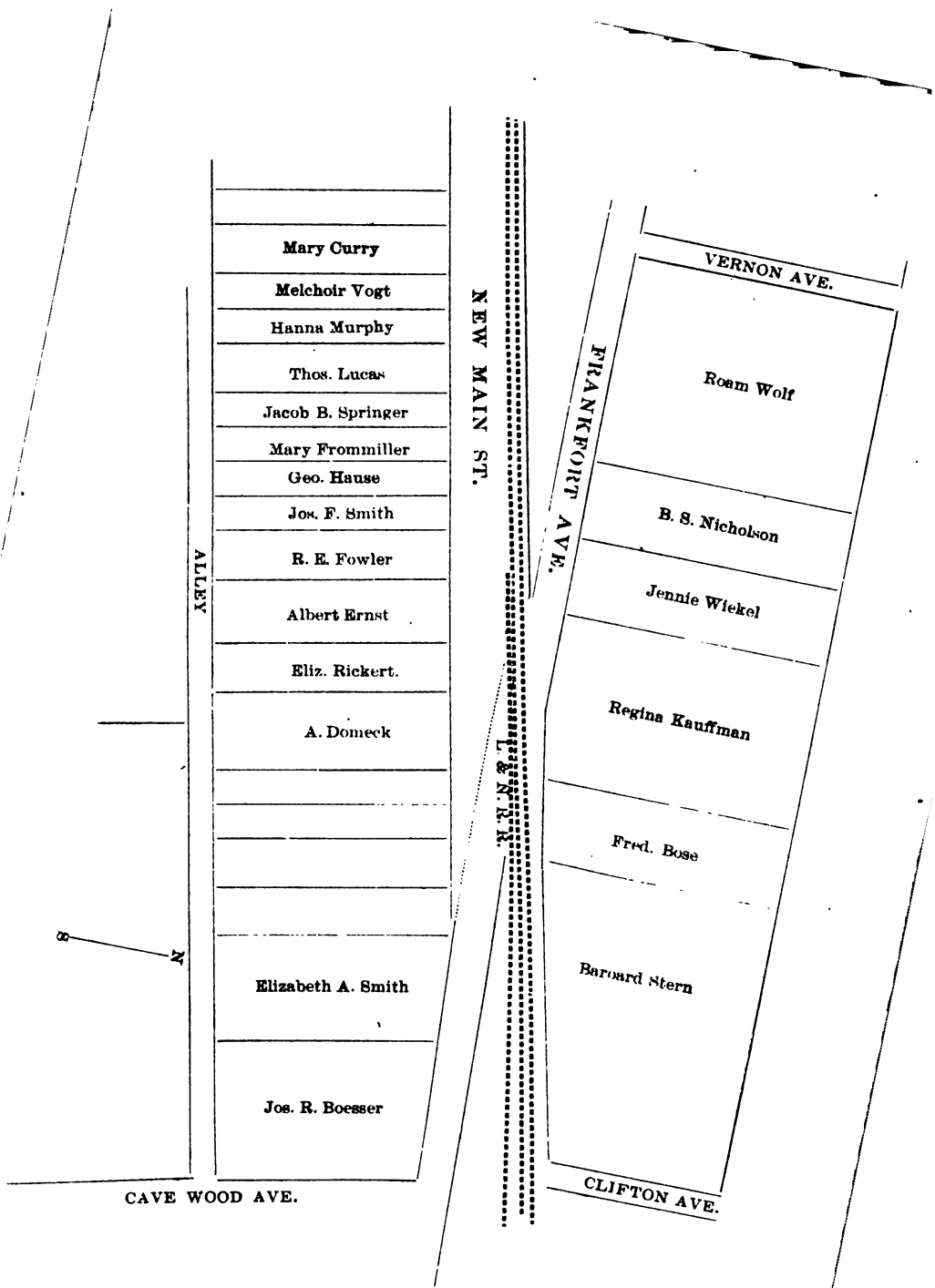
Opinion of the court by Judge Hobson.

Appellants, R. B. Park & Co., on July 3, 1900, entered into a contract with the city of Louisville to improve the carriage way of Frankfort avenue from the former city boundary line to Cavewood avenue extended, pursuant to an ordinance of the council theretofore passed, and having completed the work and received apportionment warrants therefor, brought this action against the property owners abutting thereon and the city to recover the cost of the improvement. The court held that the apportionment had been made on the wrong basis, and directed a new apportionment to be made. He also held that no part of the property lying south of New Main street or north of Clifton avenue was liable for any part of the cost of the improvement. The petition was accordingly dismissed as to the defendants, A. Dominick, Elizabeth Rickert, Albert Ernst, R. F. Fowler, Joseph F. Smith, Mary Frommiller, Jacob Springer, Thomas Lucas, Hanna Murphy, Barbara Stern and Fred Bose. The situation of this property is shown on the following map: (See accompanying page.)

The ordinance directed the cost of the improvement to be assessed against the property fronting on Frankfort avenue, and extending back to a depth of 195 feet. The property of the defendants, as to whom the petition was dismissed, fronts on New Main street or Clifton avenue, but is taken in by a line running parallel with Frankfort avenue and 195 feet from it. Other ground intervenes between this land and Frankfort avenue. In holding it not subject to the lien the court followed *Fidelity Trust and Safety Vault Co. v. Voris' Ex'ors*, 22 Ky. Law Rep., 1873, where it was held that the council in fixing the territory to be assessed for the cost of the street improvement exceeded its authority in crossing a principal street, which intersected the street improved at an acute angle. The soundness of that opinion is not assailed by the counsel for appellant, but it is insisted that the facts of this case do not bring it within the rule there laid down because, as is urged, neither New Main street nor Clifton avenue is a principal street of the city.

Some twenty-five or thirty years ago J. W. Bowles, who then owned this land, laid it out as an addition to the city of Louisville, subdividing it by New Main street, Clifton avenue, Vernon avenue, etc. A plat was made, which he had recorded in the county clerk's office. All the lots fronting on New Main street, Clifton avenue, Young avenue, Vernon avenue and the like were sold and conveyed by deeds calling for such streets, which have been continuously used by the public as public ways under a claim of right for more than twenty years. Though it is not shown that the county authorities accepted these highways or ever took control of them, or that the city has done so since the annexation of the territory to the city, it is shown that when the annexation was made the streets were in existence and used by the public; the lots bordering on them had been sold under the deeds calling for the street, the purchasers had settled on their lots and were in use of their property, together with the street appurtenant thereto. To illustrate the condition to which New Main street was settled it is only necessary to look at the map and see how closely it was cut up into lots, all of which but one





ALLEY

NEW MAIN ST.

L. & N. R. R.

VERNON AVE.

FRANKFORT AVE.

CLIFTON AVE.

CAVE WOOD AVE.

Mary Curry

Melchoir Vogt

Hanna Murphy

Thos. Lucas

Jacob B. Springer

Mary Frommiller

Geo. Hause

Jos. F. Smith

R. E. Fowler

Albert Ernst

Eliz. Rickert.

A. Domeck

Elizabeth A. Smith

Jos. R. Boesser

Roam Wolf

B. S. Nicholson

Jennie Wickel

Regina Kauffman

Fred. Bose

Baroard Stern



or two were built upon. When the property came into the city in this condition these streets were recognized by the assessing officer in describing the property for assessment, but it is not shown that the city has in any other way accepted the dedication of the streets. The question to be decided is whether New Main street and Clifton avenue are, on these facts, principal streets of the city of Louisville within the meaning of the statute. In Elliott on Roads and Streets, section 117, it is said: "Dedication may be established against the owner of the soil by showing that he has platted the ground, representing the streets and alleys on the plat, and has sold lots with reference to it, or by showing that he has adopted a map or plat made by public officers, or other persons, or by showing that he has sold lots describing them as bounded by a street or road. Merely laying out grounds, or merely platting and surveying them, without actually throwing them open to use or actually selling lots with reference to the plat, will not, as a general rule, constitute a dedication, and even when lots were sold with reference to an unrecorded plat showing a street, it was held that a finding that there was no dedication was justified when it appeared that the owner maintained obstructions across the same and told the purchaser that it was a private way. But ordinarily the sale of a single lot with reference to the plat will complete the dedication."

Again, in section 153, it is said: "Where an amended charter is accepted which adds to the municipal corporation territory previously laid off and platted there is an implied acceptance of the streets and alleys designated on the plat."

So in 2 Smith on Municipal Corporations, section 1280, the rule is thus stated: "The user for a considerable period of property as a public highway creates a presumption of its being a public street. While there is a distinction between a public road and a public street, yet when property over which a road is located is annexed to a municipality the road becomes a street, and while the purposes and uses are the same the regulation and control will be different." (2 Dillon on Municipal Corporations, 3d edition, section 682; *Eastern Cemetery v. Louisville*, 13 Ky. Law Rep., 279; *Louisville v. Brewer's Adm'r*, 24 Ky. Law Rep., 1671; *South Covington, &c., R. R. Co. v. Turnpike Co.*, 23 Ky. Law Rep., 68, and cases cited.)

The act of the city in taking this territory into the city was wholly voluntary on its part. In thus extending its limits it took the territory as it then was, laid off into streets, with lots used as residences fronting on these streets.

The property covered by the street had been dedicated by the owner to this purpose in the most solemn way, by recording the plat and conveying the lots calling for the streets. The persons who bought the lots were entitled to the free use of these streets, and the public was using them and had used them as highways for a number of years. Some of the residences on New Main street have been built as much as twenty years. The city could not take this territory in with the streets in actual use without accepting the benefits with the burden. Its annexation by the city was an acceptance by it of the street. The dedication was made in anticipation of the annexation of the property to the city, and when the property was annexed no further act on the part of the city in accepting the streets was necessary.

We are, therefore, of opinion that the circuit court properly held New Main

street and Clifton avenue to be principal streets of the city, and, therefore properly adjudged that the land of the defendants above named fronting on these streets, and not on Frankfort avenue, could not be subjected for the improvement of Frankfort avenue.

A number of other questions are discussed by counsel, but none of these can be considered as the court has rendered no final judgment as to any of these matters. The court has not determined as to the liability of the city of Louisville or of the Louisville & Nashville R. R. Co., or as to whether a deviation was made from the contract. At least no final judgment has been rendered on any of these matters and none of them are, therefore, before us on the appeal. The only thing finally determined by the circuit court is that the property of the defendants above named is not subject to the lien, and seeing no error in the judgment, to this extent we must affirm it, without any intimation as to the other matters not yet finally determined in the circuit court.

Judgment affirmed.

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KELLER v. FERGUSON.

(Filed April 22, 1903—Not to be reported.)

Appeals—Bonds—It is a substantial compliance with the provision of the law requiring the execution of a bond as a condition precedent to an appeal in a contested election case if the bond is filed in time, signed by the surety, although the principals may not sign same.

J. R. Morton, J. B. Finnell and L. F. Sinclair for appellant.

John R. Allen and W. S. Kelly for appellee.

Appeal from Scott Circuit Court.

Judge Barker delivered the following response to petition for rehearing:

In the consideration of the petition for a rehearing we have carefully examined the record, and can find no reason for departing from the conclusions reached in the opinion.

It is urged that the motion to dismiss the appeal of certain of the appellants, because of a failure on their part to execute the bond required by the statute, should have been sustained. The provision is as follows: "Either party may appeal from the judgment of the circuit court to the Court of Appeals by giving bond to the clerk of the circuit court, with good surety, conditioned for the payment of all costs and damages the other party may sustain by reason of the appeal, and by filing the record in the clerk's office of the Court of Appeals within thirty days after the final judgment in the circuit court."

In the case of *Patterson v. Davis*, 24 Ky. Law Rep., 842, it was held that "the execution of the bond to the clerk within the time is made a condition precedent to a right of appeal, and unless complied with an appellant has no standing in court."

An examination of the bond, which was executed in this case by the appellants alluded to in the petition for a rehearing, discloses the fact that, while all the appellants are not mentioned in the body of the bond as principals and all did not sign it, yet it is made payable to the clerk, and is conditioned

to pay all costs and damages accruing to the appellees by reason of the appeal. It was not necessary for the appellants to sign the bond; all that was necessary was that a bond with good surety should have been executed to the clerk, conditioned as by law required for the benefit of all the appellees. This, as we understand the bond, appears to have been done, and is a substantial compliance with the statute.

The petition is overruled.

Whole court sitting.

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CANFIELD v. CITY OF NEWPORT.

(Filed April 22, 1903—Not to be reported.)

Municipal government—Negligence—In this action against a city for damages for alleged negligence in permitting a manhole to remain uncovered, by reason of which plaintiff fell into it and suffered injuries, the court properly instructed the jury to find for defendant as the evidence shows that the manhole was opened by an unauthorized person and remained open for such a short length of time that the city or its officers, in the exercise of proper care and diligence, could not have obtained knowledge of its dangerous condition.

Phil J. Ryan for appellant.

Aubrey Barbour for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Patrick J. Canfield, brought this suit against the appellee, the city of Newport, to recover damages for injuries which resulted from falling into a manhole in the gutter at the southeast corner of Saratoga and Fifth streets in the city of Newport, which he alleges the defendant negligently and knowingly permitted to remain open and unguarded. The testimony shows that on a Sunday morning in October, 1899, between 11 and 12 o'clock, some boys took the iron covering from this manhole to release a cat, which had fallen into the sewer, and that when they attempted to replace the lid it fell into the hole, which was some nine feet deep; that a citizen who lived in the vicinity immediately placed a barrel over the hole and weighted it down with rocks, thus furnishing an effectual barricade against accidents; that it remained in this position during the day, but was removed by some unauthorized person during the following night; that the appellant, Patrick J. Canfield, fell into this hole on Monday morning before daylight, while on his way from his home to the butcher shop. The testimony fails to show at what hour, or by whom the barrel was taken from over the hole, or that the city authorities had notice that the covering had been removed.

A city is not responsible for accidents which happen in its streets as the result of defects caused by the acts of persons not connected with its government, unless such defect has existed for such a length of time and under such circumstances that the city or its officers, in the exercise of proper care and diligence, ought to have obtained knowledge of it. (Elliott on Roads and Streets, section 628; *City of Covington v. Asman*, 24 Ky. Law Rep., 415.) There was no defect in the covering of this manhole before it was interfered

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with by unauthorized persons, and the placing of a barrel over it appears to have been a reasonable precaution against accidents, although not taken by the city, and no injury would have resulted except for the unauthorized removal of it from the hole some time during Sunday night. The facts in the case do not, therefore, warrant a presumption of negligence on the part of the city of Newport, and we think the trial court properly directed the jury to find a verdict for appellee.

Judgment affirmed.

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WILLIAMS' ADM'R v. SOUTHERN RAILWAY IN KENTUCKY.

(Filed April 22, 1903.)

Railroads—Negligence—Instructions—This action was instituted to recover damages from appellee for injuries resulting in the death of a boy caused by a brakeman throwing him from the top of a box car. A trial resulted in a verdict for defendant, from which this appeal is prosecuted. It is insisted that the court erred in its instructions, which authorized a verdict for defendant if the act of the servant was malicious and not in the interest and business of the defendant. Held—That according to the great weight of authority the master is liable for the malicious action of his servant when acting in the line of his duty within the scope of his authority. Appellee's trainman was acting within the scope of his authority and in the line of his duty in requiring decedent, to get off the train, and if his conduct in the discharge of his duty was brutal and reckless this fact does not relieve the company from liability for his acts committed in the course of his employment. The instruction was misleading, and the jury should have been told that they should find for defendant if the act was not done in the line of the servant's employment and while acting within the scope of his authority.

Matt O'Doherty and A. Y. Bizot for appellant.

Humphrey, Burnett & Humphrey for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Chief Justice Burnam.

This suit was instituted by the appellant, John H. Weller, as administrator of Robert Williams against the appellee, the Southern Railway in Kentucky, for damages for having caused the death of his decedent. The petition alleges in substance that plaintiff's intestate, a boy of about fifteen years of age, was on top of one of defendant's freight cars, which was being hauled through the city of Louisville; and that one of the defendant's agents in charge of the train wrongfully pushed or threw him from it to the ground below; and that the fall so bruised and injured him that he shortly thereafter died. The defendants in their answer, which is in two paragraphs, first traverse all of the affirmative averments of the petition, and denies that the boy was thrown from the car at all. The second is a plea of contributory negligence.

Upon the trial three witnesses were introduced, who claimed to have seen plaintiff's intestate on the car and to have witnessed his fall therefrom. Two of these, Mrs. Löffler and Kurtzinger, were introduced by the plaintiff. They testified in substance that on Saturday, the 17th of March, 1900, between 3 and 4 o'clock in the afternoon, they were walking on the railway track near Greenwood avenue in the city of Louisville; that a freight train,

composed exclusively of box cars, passed the place where they were, going north towards Broadway; that as the train approached them they stepped off the track, and that whilst the train was passing they saw three boys running along the top of one of the cars which composed the train, and one of the defendant's employes in pursuit of them; that the trainman overtook the last boy and knocked him off the train, saying "you damned son of a bitch, I have been telling you I would kill you if you did not keep off this train;" that when he fell to the ground he laid perfectly still for a few moments, and finally got up, crying, and said he was hurt in the side; and that he staggered down the track in the direction of his home, being joined in a short time by the other two boys; that they recognized this boy as Robert Williams, and that he died on the 23d day of March thereafter.

The defendant introduced as a witness James Robertson, who testified in substance that the deceased, Robert Williams, and himself boarded one of the defendant's freight trains near Weber's Bend, and rode over to Broadway on Sunday after St. Patrick's day, which was the 18th of March; that he got on top of the car, but that Williams was standing on the side ladder near the front end of the car holding on with one hand, and that in some way he lost his hold and fell to the ground near Broadway, and that he immediately jumped down from the top of the car and picked him up and assisted him down to a distillery, from which point Williams went straight home; that none of the train employes knocked or threw him from the train, or were anywhere near him at the time of the fall, nor did any one threaten or curse him. He also testified that he and Robert Williams had been in the habit of boarding defendant's freight trains and stealing rides in this manner. The physician who attended deceased testified that he died from "spinal meningitis," but that this disease could be produced by a blow or shock, such as is alleged the deceased received in being thrown from the car. Numerous other witnesses were introduced with a view of impeaching the testimony of this witness and the other two for plaintiff, but their testimony is not important in the determination of the questions of law raised by this appeal.

The trial resulted in a verdict for the defendant and the plaintiff has appealed, relying for reversion upon errors in instructions Nos. 1 and 2 which were given to the jury, and which are as follows:

"If the jury believe from the evidence that Robert Williams was riding upon one of the cars of the defendant, the Southern Railway Co. in Kentucky, at the time complained of herein, and that while so riding he was thrown or pushed from said car by one of the servants or employes of the defendant in charge of said cars, and by reason thereof was injured to such an extent that death resulted therefrom, they should find for the plaintiff, unless they believe from the evidence that the act of such employe or servant was malicious and not done in the interest and business of the defendant.

"2d. If the jury believed from the evidence that Robert Williams was not riding upon one of the cars of the defendant at the time complained of herein, or that while so riding he was not thrown or pushed from said car by one of the employes or servants of the defendant in charge of said cars, or that the act of such employe or servant in throwing or pushing said Williams from said car was malicious and not done in the interest and business of the defendant, or that the death of Robert Williams was not caused by the injuries,

if any, received by him by being thrown or pushed from said car, they should find for the defendant.

In both of these instructions the jury were told that if the act of the servant was malicious, and not in the interest and business of the defendant, no recovery could be had. And we are referred to *Smith v. L. & N. R. R. Co.*, 95 Ky., 16, and *Illinois Central R. R. Co. v. West*, 22 Ky. Law Rep., 1387, as authority for this qualification of defendant's liability for the malicious act of a servant committed in the course of his regular employment. The opinions in the cases referred to do not support this contention. In the case of *Smith v. L. & N. R. R. Co.*, 95 Ky., 16, the plaintiff, a minor, charged that one of defendant's agents or servants kicked or threw him off of its train, thereby breaking his arm and causing other serious injuries. The defense in that case was that the brakemen charged with throwing plaintiff off the train had no authority in the premises, and the court instructed the jury that "if the brakeman was not charged or required as part of his duty, under his employment as brakeman, to put persons off the train who had failed to pay their fare, they should find for the defendant."

The jury found for the defendant, and upon appeal to this court the judgment was reversed, the court saying: "We are of the opinion that the only question under the pleadings and proof which should have been submitted to the jury was whether the brakeman kicked the plaintiff from the train."

And quoted with express approval from the opinion in *Hoffman v. New York Central and Hudson River R. R. Co.*, 87 N. Y., 25, as follows: "But assuming authority in the conductor or brakeman to remove a trespasser in a lawful manner, the question remains whether, when a conductor or brakeman, without warning or notice of any kind, kicks a boy of eight years from the platform of the car while the train is running at a speed of ten miles an hour, he can be said to be acting within the scope of his employment so as to make the company liable for the act. Assuming the case made by the plaintiff, the act was flagrant, reckless and illegal, but the point is, was the act within the scope of the employment and authority? In this case the authority to remove plaintiff from the car was vested in defendant's servants, the wrong consisted in the time and mode of exercising it. \* \* \* In all cases where unnecessary force is used it may be said that the servant acted without authority, express or implied. It can be truthfully claimed in all cases and by all companies that the authority of their servants is limited to the exercise only of force sufficient to eject the passenger in a lawful manner. Nevertheless the company is liable if the servant, in the exercise of his authority within the general scope of his employment and in the line of his duty, use unnecessary force, or use it under circumstances or at a time when the consequences ordinarily would seriously injure the person ejected. \* \* \*

"We are of opinion that the only issues to be submitted to the jury in this case are whether or not the brakeman kicked the plaintiff off, and whether he did so without malice or evil design as above indicated. Upon the determination of these issues depend the question of the company's responsibility for plaintiff's injury."

And the judgment in favor of the defendant in that case was reversed. In *Ill. Cen. R. R. Co. v. West* appellee had recovered a judgment against the *Ill. Cent. R. R. Co.*, for personal injuries, in being thrown or kicked from a



moving train of appellant by one of the brakemen employed on it. The company appealed, and sought to escape liability on the ground that the brakeman's act was malicious and not done in the master's interest and business, and for this reason the company was not liable. Their contention was denied and the judgment of the lower court affirmed, the court holding that the act of the servant was within the general scope of his employment and authority, and in the line of his duty. In *Thurman v. L. & N. R. R. Co.*, 17 Ky. Law Rep., 1842, a negro boy thirteen years of age, with two companions, crawled under a freight car of appellee and got on a truss rod, and while thus riding they were discovered by one of the defendant's brakemen, who pushed him off while the car was in motion, and he lost an arm and a leg as a result thereof. A trial before a jury resulted in a verdict for the defendant. Upon appeal this court said: "The boy was a trespasser, nevertheless the trainman might not eject him from the train when to do so would probably endanger his life or even cause him to be injured. If the trainman pushed the boy off the train, or caused his fall therefrom as charged, the law permits a recovery, and if they did not the law is for the defendant.

There was nothing else to go to the jury, as it is well settled in numerous cases that in spite of his wrongful conduct the trespasser does not forfeit his life or subject himself to loss of limbs without redress."

In the case of the *Lexington Railway Co. v. Cozine*, 23 Ky. Law Rep., 1187, the question was whether the railway company was liable in exemplary damages for the willful, malicious, oppressive or insulting act of one of its conductors, although it had not previously authorized or subsequently ratified it. After a careful review of the authorities the court reached the conclusion that while the question was not free from difficulty the great weight of authority held the master liable for malicious action of his servant, when acting in the line of his duty within the scope of his authority.

Appellee's trainman was acting within the scope of his authority and in the line of his duty in requiring decedent to get off the train, and if his conduct in the discharge of this duty was brutal and reckless, this fact does not relieve the company from liability for his acts committed in the course of his employment. We are, therefore, of the opinion that the instructions were erroneous and misleading in the use of the words "not done in the interest and business of the defendant," instead of words "not done in the line of his employment and while acting within the scope of his authority."

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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LEAK'S HEIRS v. LEAK'S EX'ORS.

(Filed April 22, 1903—Not to be reported.)

*Wills—Probate—L.*, by her will, devised her estate, worth about \$4,000, in trust for several religious organizations. On the offer of the will for probate the heirs objected on the ground that the charitable and religious devises were too indefinite and uncertain as to be void. The court overruled the motion to probate the will, and on appeal to the circuit court that court re-

fused to consider the grounds concerning the indefiniteness of the devises and ordered the will to probate. On appeal the question involved is whether on a motion to probate a will the court can inquire into the question as to whether or not the devises are void on the ground of uncertainty. Held—That under sections 4849, 4850 and section 4859, Kentucky Statutes, relating to probate of wills, there is no authority given to construe the instrument purporting to be the will. If the paper is shown to have been executed according to the provisions of the statute, then it must be admitted to probate. As to whether or not certain devises are void for uncertainty, or for any other reason, that can be determined in a proceeding to put the instrument in execution.

O. H. Waddle for appellant.

V. P. Smith for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Barker.

Mrs. Victoria Ann Leak died testate, in the county of Pulaski, Kentucky, which was her residence. By her will, after the payment of her debts and funeral expenses, she devised her entire estate, consisting of some \$4,000 worth of real estate in Texas, to the Rev H. G. Scudday, in trust for the benefit of several religious and charitable purposes therein named. The trustee was appointed sole executor of the testament.

On the 16th day of June, 1902, the executor, H. G. Scudday, offered to probate the will in question in the Pulaski County Court. This being resisted by the heirs at law of Mrs. Leak, the judge of the county court overruled the motion to probate, because the charitable and religious devises therein made were so indefinite and uncertain as to be void.

From this judgment of the county court an appeal was taken to the Pulaski Circuit Court, where, for the purpose of the trial, the following written agreement was entered into by counsel for the contestants and contestee, respectively: "It is agreed for the purpose of the trial of the contest of the paper purporting to be the last will and testament of Victoria Ann Leak, that said Leak died in Pulaski county, Kentucky, and that her estate consists of real estate in the State of Texas of about the value of \$4,000; that at her death she was a citizen and resident of Pulaski County, Kentucky, and that Joseph A., Emory P. and Jessie O. Boring all are her nephews and niece and her next of kin and heirs at law."

On the 8th day of July, 1902, the appeal came on for trial in the Pulaski Circuit Court, and no jury having been demanded, the law and facts were tried by the court, and the case having been heard and submitted, the following judgment was entered: "This case came on and was heard and the court being advised, is of the opinion that the grounds of contest filed by Joseph A. Boring, &c., can not properly be heard on the motion to probate the will, and the said protest and grounds are overruled and dismissed, and it is adjudged that H. G. Scudday, executor, nominated in the said will, recover of the said contestants all of his costs occasioned by this contest.

"It is now adjudged that the paper filed and offered as the last will and testament of Victoria Ann Leak is the last will and testament of Victoria Ann Leak, and it is now ordered that said paper be delivered to the clerk of the Pulaski County Court by the clerk of this court, and the judge of the

Pulaski County Court is hereby directed and ordered to receive the same as the last will and testament of said Leak, and order that same be put to record in said court as such. To all of which the contestees except and pray an appeal to the Court of Appeals, which is granted."

The first question presented on this appeal is whether or not the circuit court erred in holding that the only question before it on the appeal was whether the instrument purporting to be the last will and testament of Mrs. Victoria Ann Leak was, or not, her last will and testament, and refusing to go into the question of whether or not the charitable and religious bequests therein made were void for uncertainty. We have been cited to no adjudicated case bearing upon this question, and are, therefore, relegated for its solution to the language of the statute relating to the subject-matter.

Section 4849 of the Kentucky Statutes provides that "wills shall be proved before, and admitted to record by, the county court of the county of the testator's residence; if he had no known place of residence in this Commonwealth, and land is devised, then in the county where the land or part thereof lies; if no land is devised, then in the county where he died, or that wherein his estate, or part thereof, shall be, or where there may be any debt or demand owing to him.

"Section 4850. An appeal may be taken from the county court to the circuit court of the same county, and thence to the Court of Appeals, from every judgment admitting a will to record or rejecting it. The circuit court shall try both law and facts unless a jury be required. The Court of Appeals shall not hear any matter of fact pertaining thereto other than such as may be certified from the circuit court; and the same effect shall be given to the verdict of a jury in a will case as is given to the verdict of a jury in other civil cases. \* \* \*

"Section 4859. When the proceeding is taken to the circuit court, all necessary parties shall be brought before the court by the appellant; and upon the demand of any of the parties a jury shall be impaneled to try whether or how much of any testamentary paper produced is, or is not, the last will of the testator. If no jury is demanded, the court shall determine that question, and the final decision given shall be a bar to any other proceeding to call the probate or rejection of the will in question, subject to the right of appeal to the Court of Appeals as hereinbefore named: but nothing in this section shall preclude a court of equity from its jurisdiction to impeach such final decision for such reason as would give it jurisdiction over any other judgment at law."

It will be observed that these sections of the statute only authorized the court to try the question of whether the instrument offered for probate is, or is not, the last will and testament of the decedent.

There is no authority given by the statute to construe the instrument purporting to be the will. If the paper is shown by the evidence to have been executed according to the provisions of the statute; that the testator was of sound mind and disposing memory, and unconstrained by fraud, or undue influence, then the instrument must be admitted to probate.

As to whether or not certain devises are void for uncertainty, or for any other reason, that can be determined in a proceeding to put the instrument in execution; but upon an appeal from an order of the county court pro-

bating, or refusing to probate, a writing purporting to be a will, the only question is whether or not it was the will of the decedent.

As the learned judge of the circuit court so held in this case, it is affirmed.

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HEDGES, &c. v. HEDGES.

(Filed April 21, 1903—Not to be reported.)

1. Guardian and ward—Surcharging settlements—Interest—In surcharging the settlement of a guardian, where the guardian fails to show the amount of interest collected, the doubts should be resolved against him.

2. Board—The general rule is that the father must support his infant children. The obligation is both a natural one and a legal one. If he is able to support them he is required by law to do so, although they may have an estate of their own. It is not equitable to permit a father who is able to maintain his infant children to avail himself of their personal services and then to compel them to pay him for board as if they were strangers. It is the duty of a guardian to restrain his wards in their expenditures. Whenever he is unable to provide his wards that character of maintenance to which their position in society and their fortune and social expectations entitle them, he should be permitted to exceed their income. If there is a reason for encroaching upon the principal of the ward's estate it devolves on the guardian to show it.

3. Advancements—The will charges to the heirs of the wife of the guardian the rent of the house in which he lived at \$100 per year. Held—That the rule of construction of wills would permit the property to be occupied at that rate only during the lifetime of the testator. If he occupied the house of his ward after the testator's death he should be charged a reasonable price.

4. Advancements—In this action the guardian should be charged with \$2,257.02, the amount of his note executed to the testator, as it was intended as an advancement, which should not be collected.

J. T. Simon for appellants.

Berry & Webster for appellee.

Appeal from Harrison Circuit Court

Opinion of the court by Judge O'Rear.

Appellee qualified January, 1887, as the guardian of his infant daughters, appellants, Gertrude and Arabella Hedges. By the will of their grandfather, W. W. Trimble, they and three other children of appellee and their mother had been devised a dwelling house and lot in Cynthiana, worth about \$7,500, and personal estate, the exact amount of which is not shown. The guardian had occupied the devised dwelling for many years by leave of his father-in-law, the testator, and continued to occupy it with his family, including appellants, till about the time of the majority of appellant Gertrude and the final settlement of his accounts before the county court in February, 1892. He reported in his first settlement that he had received for each of his wards personal estate of the value of \$2,184.21, and certain items of interest. Subsequently he received from L. Trimble's estate for each of them \$495. He invested part of their personal estate in bank stock for them, which seems to have been judicious. Before the final settlement he sold the bank stock of

appellant Gertrude at a premium. On the final settlement his accounts showed that he had on hand for appellant Gertrude \$554.49, which he paid to her, and for Arabella \$931.37.

Two suits were brought to surcharge these settlements, one by appellant Gertrude Hedges, and the other by the then guardian of Arabella Hedges. The suits were prepared and heard together. The circuit court found and adjudged that the settlements as made by appellee should stand, except that there was adjudged to Arabella \$183.25 in addition to the balance above stated. The wards have appealed.

The guardian received for his wards certain notes payable to their testator's estate. The notes were taken as cash. They were solvent, and bore interest at the rate of 8 per cent. per annum. The guardian, though interrogated on this point, failed to disclose what amount of interest he collected on the notes, or at what rate. If he received 8 per cent., then the estate of the wards was entitled to it, and he should have accounted for that rate for the length of time it was collected by him. As he failed to keep books of account of his transactions with his wards' estate, or at least failed to exhibit any, and in view of his indefinite and unsatisfactory responses in his settlement, the doubts should have been resolved against him, instead of for him, as was done.

Another complaint made by the wards in the court below, and here, is that their father charged them with board. His first settlement with the county court was made within two years of his appointment. In those settlements was this entry: "Guardian makes no charge for board or allowance (for services), which he allows as an offset for house rent."

In the last settlement before the county court he charged each ward \$125 a year for three years (since his first settlement) as board, and credited each of them with \$20 (one-fifth of \$100 which he charges himself with for the use of their house) per year. The evidence is conclusive that a reasonable rent for the house is more than \$100 per year. Appellee must have so regarded it, for he offset its rental by his services to the wards and their board for the first two years. There is nothing in the record to show that their board was worth materially more, or that the rent of the house was materially less, for the last three years than for the first two. The record shows that appellee for a portion of the time he was acting as guardian was a merchant, perhaps not in a large way, and bought and sold tobacco. Laterly he was manager for an electric light company upon a salary of \$50 per month. He now claims that his children were more able to board themselves than he was to board them. But that is not the test. The general rule is that the father must support his infant children. The obligation is both a natural one and a legal one. If he is able to support them he is required by law to do so, although they may have an estate of their own. It is only where he is unable to support them, in view of his obligation to other dependent members of his family and where their own estate is capable for the purpose, that the courts allow, as an exception, that the father may charge the guardian of his infant child with its support. The father is by law entitled to the labor and the wages of his infant children. This is partly because he is charged with their support. This record discloses that appellants did render such services about appellee's household as are ordinarily rendered by girls

of their age in their father's home. It would not be equitable, nor is there warrant, in our opinion, for permitting a father who is able to maintain his infant children to avail himself of their personal services, and then to compel them to pay him for board as if they were strangers. (*Clement v. Hughes*, 13 Ky. Law Rep., 353; *Reynolds v. Reynolds*, 93 Ky., 556; *Chapline v. Moore*, 7 Mon., 173; *Bush v. White*, 8 Mon., 101.)

The infants had each an estate of at least some \$2,500 in personalty, all of which was productively invested. Within about five years, and before the daughter, Arabella, had become twenty-one years old, the guardian had spent upon them (or permitted them to spend as he says), all but \$554.49, in the elder's case, and \$931.33 in the other. These expenditures seem to have been nearly altogether for clothing and personal ornament, and many items not of apparent necessity. Notwithstanding the girls, from lack of experience and judgment, may have insisted on being supplied with the articles purchased, and may have then assented to their being charged with them, we can not but regard it as a profligate waste of their estate. Their importunities and consent can not be an excuse to appellee. It was because of their incapacity in law to chose and bind their estate in such matters that the law provides the maturer and safer judgment and control of the guardian. It was his duty to restrain them in such expenditures. We can not say, though, that appellee was shown to have been able, in view of his obligations to other dependent members of his family, to have alone afforded appellants that character of maintenance to which their position in society and their fortune and social expectations entitled them. It would, therefore, be proper for the circuit court to allow appellee for their support, including clothing and other necessary expenses, such sums as he may reasonably have expended therefor, but not to exceed the income of their estates, for the guardian had not the right to use more than the income of the wards' estates for their support in any view of the case. Section 2034, Kentucky Statutes, is clear and explicit to this effect. It is: "No disbursements shall be allowed the guardian for the maintenance and education of the ward beyond the income of the estate, except in the following cases, unless authorized by the deed or will under which the estate is derived.

"1st. When the ward is of such tender years or infirm health that he can not be bound out as an apprentice, or no suitable person will take him as such.

"2d. When it is best for the ward that the principal of his personal estate shall be applied for his board and tuition, and the court, upon settlement of the accounts, shall deem such application to have been judicious and properly made. But neither the ward nor his real estate shall be liable for any such disbursement."

In this case the wards were not shown to have been of infirm health; they were nearly full grown; the income of their estates was more than sufficient to pay for such items of education as are shown in the record. If there was a reason for encroaching upon the principal of their estates to maintain them, under the statute it must be affirmatively shown by the guardian seeking the credit, or it will be disallowed. (*Bybee v. Tharp*, 4 B. Mon., 813; *Felder v. Harbison*, 93 Ky., 482.) No such reason was shown.

Among the items bought for the wards and charged to them are some

carpets and other articles of household furnishings. After the maturity of appellant Gertrude she appears to have taken these articles which had been bought in her name by her guardian. As to such we are of opinion that her action was a ratification, and the guardian should be credited accordingly with their cost, even if it should come out of the principal of her estate.

The guardian should be charged with the house rent for the time he occupied it after his qualification till his resignation. The price of \$100 per annum fixed by the testator in his will was not intended to extend beyond the testator's lifetime. The will charged as an advancement against the interest of the children of Mrs. Hedges the rent of the house at \$100 per annum from November, 1874, and "as long as (J. T. Hedges) may continue to occupy it as a residence," meaning, in our opinion, during testator's lifetime. Leave was not given to Hedges to occupy it at all after testator's death. On the contrary, by the will it was disposed of absolutely to the children. Any other construction would necessarily have resulted in indefinitely postponing the grandchildren's rightful enjoyment of their property, while at the same time they would be paying out of their share of the estate for the use of their dwelling by their father and such of his family as he might choose to live with him. The value of the rental should be fixed under the proof.

For his services the guardian should be allowed not exceeding 5 per cent. on the sums received and disbursed by him. The income of the estate would then be rents of real estate, dividends on bank stock, interest on money loaned, or not otherwise invested. Against this the guardian should be allowed the wards' reasonable board, reasonable expenditures for clothing, school tuition, medical bills, taxes, insurance, and repairs of real estate, and an allowance for his services indicated, but all these credits should not be more in the aggregate than the income above named.

Appellants complain that the guardian did not charge himself with a certain note which he had received from their testator's estate, payable by appellee. The note is for \$2,257.02, dated July 24, 1882, payable by J. T. Hedges to W. W. Trimble. J. T. Hedges had married Eliza, a daughter of W. W. Trimble, and the mother of appellants. In treating of advancements made to his children, and which were to be charged in the distribution of his estate, the testator provided in his will as affecting the Hedges children as follows: "To my daughter, Eliza Hedges, now deceased, I gave \$2,000, and hold the note of J. T. Hedges, her surviving husband, therefor, payable to me as trustee. \* \* \* The children of Eliza Hedges to be charged with the \$2,000 above named."

We understand it to be the contention of appellee that this \$2,000 is represented by the note above named; or, at least, that it was an advancement to the testator's daughter, not to be collected of appellee in any event. To sustain this theory appellee offered certain entries made by the testator, and which are said to be in his book of advancements, viz.:

"March 1, 1874. I gave to J. T. Hedges \$2,000 for the sole and separate use of his wife, Mrs. Eliza W. Hedges, 1st March, 1874, and took his receipt therefor, and this sum is to be charged as an advancement to him from me. I also loaned him \$1,000 the 23d of March, 1875, \$1,000 to bear interest at 10 per cent. until paid; this I intend also as an advancement and not to be collected from him. In December, 1874, he moved into my dwelling house in Cynthi-

ana, Ky., and I intend him to be only charged \$100 per year rent, as an advancement out of my property as long as he occupies it. July 19, 1876.

"On the 23th of November, 1876, I let J. T. Hedges have \$500 at 8 per cent., which I do not wish to be collected from him, but to be charged to him as an advancement."

The will was dated July 8, 1882, and besides the \$2,000 item quoted herein, no reference was made to any of the other matters set out in the above entries except the one of \$100 per year for house rent. The \$2,000 mentioned in the will and the \$2,257.02 note can not be the same sum. The difference in dates, amounts and name of payee all indicate that they are distinct transactions. But appellee contends that the \$2,257.02 is a merging of the \$1,000 loan and the \$500 loan referred to in the foregoing entries in the book of advancements. While those loans, calculated at the rates of interest indicated in the memorandum, would have been more on the date of the note than it calls for, yet we may assent, for that matter, that they are the same debt. It would then appear that testator had at the date of those entries determined to constitute as advancements those two debts for loaned money owing him by his son-in-law. But the testator evidently changed his mind with respect to them. His will, made about six years after the entries, and made about one year after the two notes had been consolidated, according to appellee's statement, into the \$2,257.02 note, disposes of all his estate. Therefore, there was no intestacy, and being none, no account of advancements as such can be had other than is provided for in the will. (Section 1407, Kentucky Statutes.) The unexecuted intention of a parent to acquit to his child as an advancement a debt owing to the former by the latter is necessarily subject to any change of purpose by the ancestor. In addition to this change of purpose being manifested by the will in this case, the endorsements of payments on the note show that the testator had collected the interest on it to June 1, 1884, and on November 3, 1885, had collected \$500 of the principal.

From all these facts we have no hesitancy in concluding that, whatever may have been the testator's purpose at one time with reference to making this indebtedness an advancement to his daughter, Mrs. Hedges, he had concluded finally not to do so, and in fact, by the terms of his will disposing of all of his estate, had treated this debt as part of it, for no reference is made to it when he was writing his several advancements to his beneficiaries.

We are also convinced that the executrix of W. W. Trimble's will treated this note as part of his estate, and that when she came to make distribution it was charged to the children of Mrs. Hedges as that much money. On the back of the note is the following endorsement:

"For value received I assign the within note to J. T. Hedges, Guard., without recourse. June 9, 1888.

"MARY B. TRIMBLE, EX'TX."

This indicates that the note was assigned to the guardian of the Hedges children as part payment of the sum to which they were entitled under the will. No different explanation of the endorsement is offered. It would, therefore, be immaterial, so far as appellants are concerned, whether the note and its interest was justly owing to testator's estate or not, because if the guardian took it as a valid, interest-bearing debt, in lieu of other assets to which his wards would have been entitled, he must account for it with



legal interest in his settlement. He will not now be heard to say that it was not a valid collectible debt.

The judgment is reversed and cause remanded, with directions to recast the guardian's accounts upon the principles herein indicated, and for such further necessary proceedings as may not be inconsistent with this opinion.

CRAIG v. WELCH-HACKLEY COAL AND OIL CO.

(Filed April 22, 1903—Not to be reported.)

Pleading—Appellant brought this action, praying that she be adjudged an heir of W. and entitled to share in the benefits of a compromise of other alleged heirs of W. made in and concerning mineral rights in certain lands. A demurrer was sustained to the petition and the action dismissed, from which this appeal is prosecuted. Held—That the court properly sustained a demurrer to the petition and amended petition as it failed to show that W. had any rights in the land, and the allegation that plaintiff was an heir at law of W. was a mere conclusion of law.

Jno. H. Wilson for appellant.

J. Smith Hays, Nicholas P. Bond and E. B. Slater for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Sarah F. Craig, by a petition filed in the Knox Circuit Court, states that she is a resident of Charleston, in the State of West Virginia; that Eliza S. Goodwin, Levi Welch, Cornelia H. Welch, Miriam W. Donley, Lalla V. Welch, Charles Hedrick, Catherine C. Hedrick, Mary V. Hedrick, James Fry, Henry Fry and John Fry, each and all claiming to be heirs at law of one James Welch, deceased, late of Greenbrier, formerly in the State of Virginia, but now West Virginia, filed a suit in equity in the United States Court for the district of Kentucky, at Frankfort, Ky., on the 26th day of September, 1896, against certain persons then residing in Knox county, Kentucky, for the purpose of quieting the title to certain lands in that county which were claimed by Eliza S. Goodwin and her co-plaintiffs as heirs at law of James Welch.

This action, which was styled "Eliza S. Goodwin and others, plaintiffs, against William Gilbert and others, defendants," in the United States Court for the district of Kentucky, did not come to trial, but was compromised by the plaintiffs, as the heirs at law of James Welch, with the defendants, who were the occupying claimants of the lands involved in the action. By this compromise the occupying claimants granted and relinquished to the plaintiffs all of their right, title and interest in the coal and mineral rights in the land in question, and the plaintiffs relinquished to the occupying claimants all of their interest in the surface thereof, and the action in the United States District Court was dismissed. Proper deeds of conveyance between the parties to the action were made, and duly put to record in the Knox County Court. Afterwards the plaintiffs in the action before mentioned, as heirs at law of James Welch, conveyed all of their right and title in and to the mineral rights in the land so acquired to the Welch-Hackley Coal and

Oil Co., a corporation created under the laws of the State of New Jersey, with power to contract and be contracted with, to sue and be sued, and among other powers granted to it, it was empowered to mine coal and bore for oil; that none of these before-mentioned plaintiffs in the action in the United States Court for the district of Kentucky were heirs at law of James Welch, nor did they have any right, title or interest in, or to, the lands in question; that appellant is an heir at law of James Welch, but was not a party in the suit in question in the United States Court for the district of Kentucky, and was not a party to the compromise made therein, nor was she a party to any deed or deeds of conveyance made in pursuance of the compromise before mentioned.

Appellant further states that Alexander Montgomery, Guy Montgomery and L. L. Bright are the only heirs at law of James Welch, except herself, of whom she has any knowledge, and that she will take such steps as are necessary to bring them before the court; that Eliza S. Goodwin and her co-plaintiffs effected the compromise in question, and obtained the conveyance of the mineral rights before mentioned, by reason of the fact that they pretended to be heirs at law of James Welch; that the mineral rights, obtained by reason of the compromise in question, have great value, and that appellee, who purchased the same, has given out the statement that it paid \$500,000 for them; that appellant does not desire to attack or assail the agreements of compromise and deeds of conveyance made thereunder to Eliza S. Goodwin and others, but, on the contrary, she ratifies the agreements of compromise, and accepts the deeds of conveyance, and prays that she be adjudged to be an heir at law of James Welch, and that appellee be adjudged to hold the conveyances made to them in trust for her and the other heirs at law of James Welch; and she prays for her costs and all other proper relief.

A general demurrer having been filed by the appellee to the foregoing petition, it was sustained by the court; whereupon appellant filed an amended petition, in which she sets forth the names of the various occupying claimants who were defendants in the action of Eliza S. Goodwin against William Gilbert and others, and gave in detail the various agreements of compromise with reference to the land in question, and sale of the mineral rights to appellee. By a second amendment she states that the compromise between the occupying claimants and Eliza S. Goodwin and her co-plaintiffs was made under the belief that Eliza S. Goodwin and her co-plaintiffs were the true heirs at law of James Welch, and that the compromise in question was made for the sole use, benefit and profit of the real heirs at law of James Welch, and was so intended; that the agreements of compromise in question were all made without the knowledge or consent of appellant, but that she adopts and ratifies them.

A general demurrer having been filed to the petition as amended, it was sustained by the court, and appellant declining to plead further, her petition was dismissed, from which judgment she has appealed. The petition as amended does not raise the question which appellant evidently desired to have this court adjudicate. Without reference to the merits of the question involved the petition is clearly bad on demurrer, because it is not alleged that James Welch ever owned the land mentioned in the pleadings, or that

he had any interest therein; nor is it alleged that he died intestate or shown how appellant is his heir. The allegation that she is his heir at law is a mere legal conclusion, as was decided by this court in the case of *Larue v. Hays*, 7 Bush 50. On this subject the court says: "But we are of the opinion not only that the plaintiffs have failed to manifest their right to any recovery by any sufficient evidence of title, but that the petition is fatally defective, so far at least as it purports to allege the derivation of title by Phoebe Larue by inheritance from Isaac Larue, the averment that she was one of his heirs being but a conclusion of law, as this court has repeatedly decided in effect in passing upon the competency of evidence adduced to prove heirship. (*Banks v. Johnson*, 4 J. J. Mar., 649; *Currie, &c. v. Fowler*, 5 J. J. Mar., 145.)"

Appellant's petition was fatally defective for these reasons, and the circuit court did not err in dismissing it on demurrer.

Wherefore, the judgment is affirmed.

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BARBER ASPHALT CO. v. GAAR.

CITY OF LOUISVILLE v. BARBER ASPHALT CO.

WALSH, &c. v. SAME.

RAFFO, &c. v. BARBER ASPHALT PAVING CO.

(Filed April 22, 1908.)

1. **Municipal government—Streets**—These actions were instituted on apportionment warrants to recover for the improvement of the carriage way of Chestnut street from Thirty-first to Thirty-fourth street and from Thirty-fourth street, to Shawnee avenue. The lower court rendered judgment against the property owners between Thirty-first street and Gaar's lane, or Fortieth street and as to the property from Fortieth street to Shawnee avenue decided that the city had no authority to improve said street at the cost of the adjacent land owners, and, therefore, gave judgment in favor of the contractor against the city. Appeals have been prosecuted from said judgments. The two ordinances under which the improvements were made provided that the work should be done in accordance with plans and specifications on file in the office of the board of public works. At the time the ordinances were passed there were general specifications which had been printed on file in the office of the board of public works, but the contract was not made according to these specifications, but after the ordinances were passed the board prepared plans and specifications for the work, differing in some respects from those on file in the office of the board of public works. It is urged that the contract was invalid because it was not made in accordance with the general specifications in existence when the ordinances were passed, but made material alterations in same. Held—That the ordinance without the words "in accordance with plans and specifications on file in the office of the board of public works" might be rejected, and that the ordinance without these is sufficient. It was proper to permit the board of public works, under sections 2836, 2839 and 2830, Kentucky Statutes, to arrange all matters of detail concerning the work. Under this authority, although the board may have received bids for No. 1 and No. 2 asphalt pavement, they had the right to accept the bid for No. 1 at the higher price; they also had authority to change the contract from flag stone guttering to asphalt guttering, and this change was

more beneficial to property owners as the asphalt pavement was cheaper, and the presumption will be indulged that the board contracted only for a fair price. There was nothing in the specifications prepared by the board of public works after the ordinances were passed which stifled competition in bidding. The requirement that the contractor should guarantee the pavement for five years was beneficial to the city.

2. Constitutional law—License fees—An ordinance requiring the payment of a license fee by contractors is unconstitutional, and any fees paid thereunder may be recovered.

3. Fairness of apportionment—The council exercised a fair discretion in fixing the depth of the taxing district at 171 feet on both sides of Chestnut street. There is no evidence showing that a fairer apportionment could have been made. The rule is that unless it appear that under a different method of apportionment the party complaining would be required to pay less than under the method adopted, the apportionment as made by the city authorities will not be disturbed. If the apportionment was wrong the court, under section 2834, Kentucky Statutes, is authorized to correct it so as to do justice to all parties concerned.

4. Agricultural lands—Lands within the limits of a city, although used for agricultural purposes, is subject to local assessment for street improvements where the proof shows that the construction of the street was a necessity at the time it was ordered, and that many buildings were being erected along the line of said improvement and property generally enhanced in value. The question as to whether agricultural lands should be subjected to said improvement depends on the special circumstances of each case.

5. Estoppel—A property owner who stands by without objection and permits a contractor to expend his money in making improvements upon the faith that the cost was to be a charge upon the abutting property is estopped to resist payment for said improvement.

Wm. Furlong and B. F. Washer for Barber Asphalt Co.

H. L. Stone for City of Louisville.

Lane & Harrison, O'Neal & O'Neal, Strother, Hardin & Strother, I. T. Woodson and J. A. McHenry for Cornelius Walsh, &c., Mary Raffo, &c., and Mary Gaar, &c.

L. N. Dembitz for Mary J. Gaar and Mary Raffo, &c.

Appeals from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hobson.

By an ordinance approved August 22, 1898, the general council of the city of Louisville provided for the improvement of the carriage way of Chestnut street from Thirty-first to Thirty-fourth street; and by another ordinance, approved on the same day, it provided for the improvement of the carriage way of Chestnut street from Thirty-fourth street to Shawnee avenue. Contracts were made with the Barber Asphalt Paving Co. for the construction of the street under the ordinances. The company complied with its contract; the work was examined and accepted by the city; the cost was apportioned among the owners of property fronting on the street, and apportionment warrants were issued therefor. A number of these warrants remaining unpaid, the company instituted two actions in the Jefferson Circuit Court to enforce them. Answers were filed by the property owners controverting their liability for the improvement, and on final hearing the circuit court held that

the property between Thirty-first street and Gaar's lane, or Fortieth street, was liable to assessment for the improvement, and the lien of the plaintiff was ordered to be enforced; but as to the property between Gaar's lane, or Fortieth street, to Shawnee avenue, it held that the city had no authority to improve the street at the cost of the adjacent land owners; and it accordingly rendered judgment in favor of the defendants and against the contractor as to this property, but entered a judgment in favor of the contractor against the city for the amount of these warrants. From this judgment the four appeals before us are prosecuted.

In Barber Asphalt Paving Co. v. Gaar, &c. the contractor complains of that portion of the judgment denying it relief against the property lying between Fortieth street and Shawnee avenue.

In City of Louisville v. Barber Asphalt Paving Co. the city complains of so much of the judgment as makes it liable for this part of the improvement.

In Cornelius Walsh, &c. v. Barber Asphalt Co. the owners of property from Thirty-fourth street to Fortieth street complain of so much of the judgment as holds their land liable for the cost of constructing the street in front of it.

In Raffo, &c. v. Barber Asphalt Paving Co. the owners of property from Thirty-first to Thirty-fourth street complain of the judgment holding their property liable.

The last two appeals are prosecuted separately as two separate actions were brought in the circuit court, and the questions made are not identical in some respects. For convenience all the appeals will be considered together. The City of Louisville purchased Shawnee Park something over ten years ago. At that time it lay without the city limits, but in the year 1884 the city limits were extended so as to take in the park. This was done by taking into the city a narrow tongue of land 460 feet in width and something over a mile long, extending from a line 200 feet west of Thirty-fourth street to Shawnee avenue. Sixty feet of this strip throughout its entire length was taken up by Chestnut street, leaving a strip 200 feet wide on each side of it. This extension of the city limits appears to have been made without protest on the part of the property owners. After the territory was taken into the city the county authorities ceased to keep the roadway in order, and there being considerable travel on it, it got in very bad repair in the four years elapsing after it was taken into the city before the improvement was ordered. Some of the property owners were active in procuring the council to order the improvement. Others were silent, and some held a meeting and protested, but they took no active steps to prevent the improvement being made as directed in the ordinances. The first of the ordinances under which the work was done is in these words:

"Be it ordained by the General Council of the City of Louisville: That the carriage way of Chestnut street from the center line of Twenty-first street to the center line of Thirty-fourth street extended from the north, shall be thirty-six feet in width, and shall be improved by grading, curbing and paving with the asphalt pavement, with corner stones at the intersections of streets and alleys. Said work shall be done in accordance with the plans and specifications on file in the office of the board of public works and at the cost of owners of ground on the south side of Chestnut street from Thirty-first street to the center line of Thirty-fourth street extended from the north,

and extending back to a line 171 feet distant from and parallel to Chestnut street, and on the north side of Chestnut street from Thirty-first street to Thirty-fourth street as provided by law.

"The cost to be equally apportioned among the owners of property according to the number of square feet of ground owned by the parties respectively within the limits above set out, and that all ordinances in conflict herewith be, and are hereby, repealed."

The other ordinance is similar, except that, after providing for the improvement, it is as follows: "Said work shall be done in accordance with the plans and specifications on file in the office of the board of public works and at the cost of owners of ground on the north side of Chestnut street, from the center line of Thirty-fourth street to a line at right angles to Chestnut street, passing through a point where the center line of Shawnee avenue extended from the south intersects the center line of Chestnut street and extending back to a line 171 feet distant from and parallel to Chestnut street, and on the south side of Chestnut street from the center line of Thirty-fourth street extended from the north to a line at right angles to Chestnut street, passing through a point where the center line of Shawnee avenue extended from the south intersects the center line of Chestnut street, and extending back to a line 171 feet distant from and parallel to Chestnut street.

"The cost to be equally apportioned among the owners of property according to the number of square feet of ground owned by the parties respectively within the limits above set out, and that all ordinances in conflict herewith be, and are hereby, repealed."

At the time the ordinances were passed there were general specifications which had been printed on file in the office of the board of public works, but the contract was not made according to these specifications. The board, according to its custom, prepared after the ordinances were passed plans and specifications for the work, and the contract was made thereunder. By section 4 of the specifications the guttering was to be made of flag stones. After the contract was let the board of public works, by a written contract with the contractor, changed this and allowed the guttering to be made of asphalt. By section 22 of the specifications the contractor was required to erect a permanent plant in the city limits which should remain there during the time of the guarantee period, five years. The specifications were in the alternative, for either asphalt pavement No. 1 or asphalt pavement No. 2. The advertisements were so made. Bids were received on both classes of pavement, and the board accepted the bid for pavement No. 1. The difference between No. 1 and No. 2 consists in the thickness of the pavement. No. 1 being thicker and costing something over \$2 more per square of 100 feet than No. 2. The specifications also called for a binder course underneath the asphalt or surface pavement. Madison street runs parallel with Chestnut and 340 feet from it on the north. Magazine street runs parallel with Chestnut and is 420 feet from it on the south. The tax limits for the improvement are fixed at 171 feet on the south side of Chestnut, as well as on the north side, while one-half the distance to Magazine street is 210 feet. The apportionment was made as to each fourth of a square from Thirty-first street to Thirty-fourth street, and from Thirty-fourth street to Shawnee Park the apportionment was made from one cross street to the next, this territory not being defined into squares by principal streets.

It is insisted for the property owners that the proceedings are void, and created no lien upon the property for the following reasons:

1st. Because the contract was not made in accordance with the general specifications in existence when the ordinances were passed, and a discretion as to the amount and the cost of the work to be done was left by the law-making body to an executive board.

2d. Because the material for part of the work was unlawfully changed from that required by the ordinance and contract, and something else was received in place of it.

3d. Because both the ordinance and the specifications tended toward stifling competition, and imposed on the lot owners burdens which they ought not to bear.

4th. The burden was thrown on the property extending back from the street 171 feet, and not 210 feet or half way to Magazine street on the south from Thirty-first to Thirty-fourth street, and west of Thirty-fourth street to Shawnee avenue the burden was thrown on the property running back 171 feet from the street on both sides; while the city boundary along here extended out 200 feet from the street, and thus twenty-nine feet of land within the city boundary was exempted from the burden.

5th. The territory contiguous to Chestnut street from Thirty-fourth street to Shawnee avenue was not defined into squares by principal streets, and there existed no authority in the general council to prescribe by ordinance for the construction of an improvement for more than a mile in length at the cost of the owners of lots contiguous thereto to a depth of only 171 feet, to be apportioned equally as set out in the ordinance.

6th. This territory was in part suburban and in part agricultural, and to enforce the lien on the land is to appropriate the property of the citizen to public use without compensation therefor to the owner.

These objections will be considered separately.

1st. It was held in *Richardson v. Mehler*, 23 Ky. Law Rep., 917, where the ordinance directed the street to be improved with vitrified or block pavement, "in accordance with the plans and specifications on file in the office of the board of public works," that the words, "in accordance with the plans and specifications on file in the office of the board of public works," might be rejected, and that the ordinance without these was sufficient. We see no reason why the same rule should not apply to an ordinance requiring the improvement of the street with asphalt pavement. It is clear from the proof that it has been the uniform custom of the board of public works in each case where an improvement is ordered to prepare after the passage of the ordinance plans and specifications as the exigencies of the particular work demanded, and we must presume that the board of public works in recommending the ordinances in question, and the general council in passing them, acted in view of this well-known custom of transacting the business, and did not refer to the general specifications theretofore printed and on file in the engineer's office, which were in fact never considered in making the contract. By section 2826, Kentucky Statutes, no public way shall be constructed except by ordinance recommended by the board of public works. By section 2829, whenever the board shall order any work to be done, which, according to law, is to be performed by independent contract, the board shall

thereto throughout its entire length, it is not shown that appellants were in anywise prejudiced by the apportionment which was in fact made, and if the apportionment was wrong it would be incumbent on the court under section 2834, Kentucky Statutes, to correct it so as to do justice to all parties concerned. No cause is, therefore, shown for disturbing the judgment on this ground.

6th. In *Oswald v. Gosnell*, 21 Ky. Law Rep., 1660, where an ordinance for the erection of fire hydrants in this territory was before the court, we held that all the steps in the annexation of the territory to the city had been legally taken, and that the territory was properly a part of the city. Fire hydrants have been located along the street from Thirty-first street to Shawnee avenue. Water and gas mains have been laid; the street is illuminated by electric lights; city police control the district; the city firemen furnish it fire protection; a bus line is maintained from Twenty-eighth street to Shawnee avenue; property along the street as improved is numbered according to the scheme prevailing throughout the city; as far west as Fortieth street the land is cut up into building lots, with a few small exceptions, and between Fortieth street and Shawnee avenue several fine houses have been built. Sewer connection has been furnished; a number of parallel projected streets north and south of Chestnut street have been dedicated in the several additions made to the city, and as shown by the photographs of Chestnut street from Thirty-fourth street to Shawnee avenue it presents throughout the appearance of a city street. Before the construction of the street the property fronting on it sold for prices ranging from \$10 to \$12 a front foot. Since its construction the price has ranged from \$15 to \$22 a foot. The street cost something over \$4 a foot, and under all the evidence we are satisfied the benefit to the property from the construction of the street as a whole, from one end to the other, exceeds the cost of the work. This is so evident from the proof that in the elaborate argument of the case no objection was made by any of the counsel to the assessment on the ground of want of benefits. While some of the land is used for truck farming, it is all suitable for residence purposes, and is very desirable therefor. The value of the land by the front foot and character of houses that are erected along the street show that it is only a question of a short time when it will all be cut up into building lots. The annexation had been contemplated for a number of years before it was made, and the construction of the street was a necessity at the time it was ordered, and without it the building up of this territory would necessarily have been much retarded. Land within the limits of a city, although used for agricultural purposes, is subject to local assessment for street improvements, under such circumstances as are shown here. In *Smith on Municipal Corporations*, section 1236, the rule is thus stated: "Property within the limits of a city which is unplatted is liable to special assessment for local improvements, as if laid off into blocks and lots; and so farming lands within the limits of a town are subject to taxation by the town authorities, and it is not essential that they receive benefits and protection. Urban property may be assessed for a local improvement though not divided into lots, and though used for farm purposes, if the surrounding property is urban property. It is sometimes difficult to determine whether the property is city property and liable for local improvements, or whether it



is rural and not subject to assessment. No hard and fast rule on the subject can be laid down. It necessarily depends on the special circumstances of each case."

In determining the liability of the property for the cost of the improvement after it has been made the court has a very different question before it than would be presented if the objection was now made to the annexation of the property between Fortieth street and Shawnee avenue, and the propriety of the annexation was the question to be determined, or even if the property owners had enjoined the construction of the street at their cost when ordered by the council. But they stood by and allowed the improvement to be made and without notice to him allowed the contractor to expend his money in making it upon the faith that the cost was to be a charge upon the abutting property. This distinction has often been pointed out by this court. (*Preston v. Roberts*, 75 Ky., 570; *Feeler v. Gosnell*, 99 Ky., 380; *Richardson v. Mehler*, 23 Ky. Law Rep., 917.) In *Elliott on Roads and Streets*, section 590, it is well said: "The fact that a street is being improved by order of public officers ought to put the property owner upon inquiry, and to him should be applied the familiar rule that one put upon inquiry is chargeable with notice of all the facts which a reasonably diligent investigation will disclose. Public works are undertaken, as every one knows, under authority delegated by law to public officers, and there is little or no reason why a property owner, who has full notice of what is being done, should be allowed to stand by in silence until the work is completed and then escape paying for the benefit his property has received. If he would avoid this result he should act promptly, and if he fails he should not demand that the persons who have done the work should go unpaid."

We have been referred to no provision of the Constitution or statutes under which property within a city may be exempted from assessment for municipal improvements by the bare fact that the land is used for agricultural purposes. There is nothing in the case to warrant the application of the rule forbidding the taking of private property for public uses without just compensation. Considering the benefit which this property receives from the improvement, the size of the city of Louisville, its growth in the direction of Shawnee Park, the value of the property by the front foot, its situation and surroundings, we are satisfied that under the rule established by the current of authority none of the land after the improvement has been made should be exempted from paying for it. (*Leitch v. LaGrange*, 136 Ill., 291; *Tabor v. Grafmiller*, 109 Ind., 206; *Medland v. Linton*, 60 Neb., 249, and cases cited.)

The case of *Congor v. Graham*, 85 Ky., 583, involved the constitutionality of a legislative act taxing the abutting property for the improvement of a county road. This was not city property or a city highway. The case rests on the idea that the burden of keeping the road up was by general law placed on the entire county, and that the charge on the abutting property was so great as to amount to spoliation. The cases of *Washington avenue*, 69 Pa., 352, and *Craig v. Philadelphia*, 89 Pa., 265, are equally inapplicable.

On the appeal of *Barber Asphalt Co. v. Gaar, &c.*, and of the *City of Louisville v. Barber Asphalt Co.*, the judgment is reversed and cause remanded, with directions to enter a judgment as above indicated. On the appeal of *Cornelius Walsh, &c. v. Barber Asphalt Co.*, and *Mary H. Raffo, &c. v. Barber Asphalt Co.*, the judgment is affirmed.

KENTUCKY DISTILLERIES AND WAREHOUSE CO., & C. V.  
SCHREIBER.

(Filed April 23, 1908—Not to be reported.)

Master and servant—Negligence—Instructions—Appellee, an employe in appellant's distillery, in the meal room, and occasionally in the mash room, which was in charge of Monz, was required to obey Monz as his superior. Appellee was ordered by Monz to remove a cap from an opening in the top of a mash tub and let in some cold water. While engaged in this duty another employe, under orders of Monz in another room, turned on hot water without removing a cap to let it into the mash tub where appellee was engaged, by reason of which the hot water scalded appellee severely, without any fault on the part of appellee, for which he recovered \$600 damages. On appeal the principal error relied on for a reversal is that the court refused to give a peremptory instruction to find for defendant on the ground that appellee being a fellow servant with the servant who turned on the hot water, no recovery can be had against the master. Held—That as the two servants were employed in different rooms and acting under the immediate orders of a superior, who was guilty of gross negligence in permitting the acts of one servant to injure another without giving any warning of the danger, the master is liable for damages. It was error to instruct the jury that they might give exemplary damages, as the rule is that an employer is liable to an employe only for compensatory damages, and in that case the negligence must be gross, but only compensatory damages were given in this case.

Joyes, Jarvis & Swope for appellants.

Forcht & Field and O'Neal & O'Neal for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Settle.

Appellee, John Schreiber, while employed by appellants, the Nelson Distillery Co. and the Kentucky Distilleries and Warehouse Co., in one of their distilleries, was scalded and injured, and for the injuries thus received he sued and recovered of appellants in the lower court a verdict and judgment of \$600 in damages. Appellants complain of that judgment and of the refusal of the lower court to grant them a new trial, hence this appeal.

At the time of receiving the injuries complained of appellee was at work in the mash room of the distillery, which is on the first floor. The proof shows, however, that his regular place of work was in the meal room, on the second floor above the mash room, but he occasionally worked in the mash room, when ordered to do so by his superiors in appellants' service.

The distillery, according to the evidence, was under the control of a superintendent, one Murphy, and the mash room in charge of a subordinate of Murphy's called Monz. The evidence further shows that both Murphy and Monz were the superiors of appellee, and that he was required to obey their orders.

The mash room was as to size about forty feet square, and in one corner of this room stood a mash tub about twenty-two feet in diameter, and five and one-half feet in height. The tub was covered with a conical shaped top; the material for the tub was admitted through chutes from bins in the meal room. Water, hot and cold, was run into the tub by means of pipes from

above, that ended about three inches above the covering of the tub, the water pipes being about three feet apart. Just beneath each pipe was an opening in the cover of the tub of a size to properly admit the stream of water from the pipes, and these openings, when water was not being introduced into the tub, were always covered with movable plates, which served to preserve the temperature of the tub and prevent leakage from the pipes into the tub. The cold water was let into the tub by means of a valve, or stop cock, two feet above the tub, and the hot water was regulated by pulling a rope in an adjoining room which was attached to a lever near the hot water tank.

Appellants' agent, Monz, who had control in the mash room, was intrusted with the duty of seeing that the proper materials were placed in the tub, and that the mash was properly scalded, his post of duty in watering the tub being at the thermometer and guage in the mash room.

Just before receiving his injuries appellee was standing in the mash room waiting to be relieved by the night helper, whose duty it was to take his place, when he was ordered by Monz, the mash boss, to turn the cold water into the mash tub, which he at once did, after removing the plate from the opening under the cold water pipe. While appellee was thus engaged in turning on the cold water Ed. Saur, another servant of appellants, by order of Monz, turned on the hot water from an adjoining room, without first removing the plate which covered the opening in the tub under the hot water pipe; the hot water was thus thrown and splashed upon appellee, whereby he was badly scalded upon the head, neck, body and arms.

It is averred in the petition that "pursuant to and in obedience to the orders of said foreman he (appellee) went to the stop cock, or faucet, for the purpose of turning on said faucet, and while endeavoring to turn on same in a cautious, proper and prudent manner, the defendant, by and through its agents and servants, superior in authority to this plaintiff, did cause a large quantity of hot water to be turned on at or near the same place from said mash tub, and did allow, permit and order the same to be turned on without removing a certain plate, which it was necessary to remove before turning on said water, in order to allow the same to get into the said mash tub; that by reason of the said negligence and carelessness of the defendant and its agents, servants and employes superior in authority to him in the turning on of said hot water, which was done without any notice or warning to him whatever, he was deluged with scalding hot water and was greatly burned and scalded; \* \* \* that at said time and place the defendants, and each of them, their agent, servants and employes superior in authority to him neglected each and every precaution usual and customary under the same or similar circumstances, and by reason of their neglect caused and occasioned the said injuries, and that said injuries, and each of them, were received by him by reason of the gross carelessness and negligence of the defendants, their agents and servants superior in authority to him."

The appellants filed separate answers, each of which contains a traverse of the averments of the petition, and in addition it is further alleged in each that at the time, and in the matter of receiving his injuries, the appellee was himself guilty of negligence, which contributed to his injuries to such an extent that but for same he would not have been injured. It is, however,

proper to say in this connection that the evidence found in the record wholly fails to show any contributory negligence on the part of appellee.

While there are numerous alleged errors set forth in the motion and grounds for a new trial, the refusal of the lower court to peremptorily instruct the jury to find for the appellants is practically the only thing complained of by counsel in the brief filed for appellants, and this contention is based upon the theory that as both appellee and Saur were acting under the direction of Monz, their superior, he had a right to assume that each of them would properly perform the duty required of him, and when injury resulted to one of them by the negligent act of the other, a recovery for the injury will not be allowed against the master as the negligence was that of a fellow servant.

The only Kentucky authority cited by counsel for appellants as supporting this contention is the case of *Coffman v. L. & N. R. R. Co.*, 13 Ky. Law Rep., 866. It appears from the opinion in that case that Coffman and other employees of the railroad company were by direction of the section boss carrying a rail to be laid on the track; the latter ordered them to drop the rail, the order was obeyed by the hands having hold of the front end of the rail, and the dropping of that end of the rail caused the end held by Coffman to jar out of his and the others hands, and to fall, and to catch Coffman's leg between the falling rail and another rail lying on the track. In passing upon the action of the lower court in giving a peremptory instruction in behalf of the railroad company, and in approval of that ruling of the circuit court, this court, in part, said: "But the leading fact is that the section boss had the right to order the rail to be thrown down at any place that he might select, and when the appellant was ordered to throw it down, it was his duty to do so without question. All that he could require of the section boss in such a case was notice to throw it down, which notice he received, and which he could have executed, and his failure to do so was not the fault of the section boss."

It is apparent that Coffman was nonsuited upon the ground that the injury received by him was caused by his own negligence, for which reason we are unable to regard that case as an authority in the case at bar, and the same may be said of the other cases cited by counsel for appellants in support of their contention, for neither in point of law or fact do they, in our opinion, throw any light upon the questions involved in this case. The evidence furnished by the record in this case conduces to prove that appellants' agent was the superior in service of appellee, with authority to command his services and direct his work in the mash room, and though the latter's place of labor was in the meal room of the second floor, he was frequently called on to render service in the mash room.

It is further shown by the evidence that appellee was ordered by Monz to turn the cold water into the mash tub, and that it was his duty to obey the order of Monz. The work thus required of him was not familiar to him, and though not dangerous per se, its performance was liable to be attended with dangerous consequences, as the turning on of the hot water while he was engaged in turning on the cold would inevitably result in great injury, perhaps death, to him. He undertook to obey the order of Monz, mounted the trestle used to reach the water pipe over the tub, removed the plate

under the cold water pipe, and turned on the cold water; at this juncture the hot water was turned on by Saur from the adjoining room, and appellee was thereby scalded and injured. Having ordered appellee into a place of danger, or probable danger, it was the duty of Monz to use reasonable or ordinary care to protect him from injury, instead of doing which, while appellee was thus exposed to such danger, or probable danger, Monz ordered Saur, who was standing near him, and on the opposite side of the tub from appellee, to turn on the hot water without ascertaining whether the plate in the covering of the mash tub under the hot water pipe had been removed, or requiring Saur to remove it. Saur had to go into the adjoining room to turn on the hot water, and at no time after receiving the order from Monz was Saur where he could see or be seen by appellee, and the first intimation that he had of appellee's peril was given by the cry or exclamation of the latter when the hot water struck him.

We are of the opinion that Monz in thus failing to protect appellee from injury was guilty of gross negligence, for which appellants are liable.

As said by this court in *Southern Railway Co. v. Hart*, 23 Ky. Law Rep., 1056: "It is the duty of the servant who takes employment to submit himself to the reasonable demands of his employer, not only as to the work to be done, but as to the manner of doing it, and he has the right to believe that his superior would not require him to perform a dangerous act without acquainting him with the special peril attending its performance."

So in the case at bar appellee had the right, in attempting to perform the duty required of him by Monz, to rely upon being protected from injury by him during its performance. Saur may have been negligent in turning on the hot water at the time and in the manner in which he did it. If he was performing that duty by order of Monz, it was the duty of the latter to see that it was done in such manner as to prevent injury to appellee, especially as appellee and Saur were so separated as that neither could see the other during the performance of their respective duties.

If there were any doubt of the view of the law herein expressed we would nevertheless have to hold that the case should have gone to the jury, for in any event appellee's injuries were caused by the negligence of either Monz or Saur, and in case of doubt as to whether Monz or Saur was the negligent party the court must have submitted the question to the decision of the jury. The question of negligence is a mixed question of law and fact; if disputed, it is the duty of the jury to find the degree. If undisputed, the court determines the question. If it be questionable where the duty rests in a particular case, or which of two parties charged have been guilty of negligence, it should be left to the jury. (*Davidson v. L. & N. R. R. Co.*, 4 Ky. Law Rep., 810; *L. S. R. Co. v. Minouge*, 90 Ky., 389; *N. N. & M. V. Co. v. Deutzell*, 91 Ky., 42.)

We are of opinion that no error was committed by the lower court in refusing the peremptory or other instructions asked by appellants, and we think those given, with the exception of No. 5, fairly presented to the jury the law of the case, but instruction No. 5, after defining the measure of compensatory damages to be awarded appellee, if the jury found for him, allows the finding of exemplary damages in addition. This was error, as this court in recent years has repeatedly held that no recovery of damages

will be allowed to an employe against an employer for injuries not resulting in death received through the negligence of a superior in the service of such employer, unless such negligence be gross, and even then the recovery is limited to compensatory damages. (C., N. O. & T. P. Ry. Co. v. Palmer, 17 Ky. Law Rep., 998.) But the error contained in the instruction mentioned was not prejudicial, as it is perfectly manifest from the smallness of the verdict that exemplary damages were not allowed. The evidence shows that appellee was confined to his bed for several months by his injuries; that he suffered excruciatingly from the burns received by him, and that his arm will never regain its former strength, and for these injuries, and the permanent impairment of his ability to earn money, the \$800 allowed him by the jury is poor compensation, indeed.

Finding no error in the record by which the appellants were, or could have been, prejudiced the judgment of the lower court is affirmed.

#### DINKELSPIEL v. CENTRAL KENTUCKY ASYLUM, &c.

(Filed April 23, 1903—Not to be reported.)

1. Lunatics—Judicial sales—Process—In this action a judgment was rendered in favor of appellee for \$2,200 for board of S., a lunatic, and his land was ordered to be sold to satisfy said debt. This judgment was reversed and on the second trial a judgment for \$750 was given, and the land was ordered to be sold to satisfy same. A lot was sold under said decree as indivisible for \$1,650, and the sufficiency of the proceedings had therein to vest a perfect title are presented on this appeal by appellee, the purchaser. It is urged that the city court had no jurisdiction to adjudge S. a lunatic, and that the record failed to show the personal presence of S. at the inquest, and that there were no affidavits of physicians showing his inability to be present. Held—That the statutes expressly confer jurisdiction on city courts to hold inquests in cases of lunacy, but even though the proceedings of the inquest are void, it can not affect the title as the law presumes every person to be sane until the contrary is made to appear, and it appears that the process was duly served on him. It is urged that the judgment is void as no process was served on the physician in charge of him in the asylum. Held—That the Code does not require that the summons be served upon the physician in charge of the lunatic unless it appear from the certificate of such physician, attested by the officer delivering it, that a personal service, in his opinion, would be injurious to such person of unsound mind. The summons was served upon S. and his committee, and a guardian ad litem was regularly appointed to defend for him, who made a successful and beneficial defense.

2. Res judicata—All questions raised on the former appeal, and that were in the record and might have been presented, must be construed as having been adjudicated. The judgment should be affirmed for this reason.

L. N. Dembitz for appellant.

A. L. Dembitz and G. L. Everback for appellee, Mary Hulsmeyer, Committee.

Holt & Alexander for appellee asylum.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Nunn.

On the 12th day of April, 1900, the Central Kentucky Asylum for the insane instituted an action in the Jefferson Circuit Court against Joseph Schrorer, Annie Schrorer, Mary Hulsmeler and Mary Hulsmeler, committee of Joseph Schrorer and Annie Schrorer, etc., by which it sought to recover of and subject the estate of Joseph Schrorer for the payment of \$2,200 for board and necessities furnished him from the year 1889 to the year 1900, and summons was served upon each and all of the defendants and also upon Mary Hulsmeler, committee for Joseph Schrorer. This action was litigated and on the trial the lower court adjudged that the plaintiff was entitled to \$3,200, and adjudged that Joseph Schrorer's real estate should be subjected to the payment thereof. The appellee and his committee, Mary Hulsmeler, superseded that judgment and appealed from it to this court, and that judgment was reversed. (24 Ky. Law Rep., 150.) This court in that case adjudged that Joseph Schrorer's estate was not responsible for more than \$750, and that his real estate was bound for the payment thereof. Upon the return of the case to the lower court it was determined that one piece of his real estate should be sold as a whole, it not being susceptible of division without greatly impairing its value. At the sale it brought the sum of \$1,550, and the appellant herein, Joseph Dinkelspiel, became the purchaser. The commissioner filed his report of the sale the 2d day of November, 1902, and on the 8th day of the same month, on motion of the appellant, the report of sale was confirmed and the commissioner was ordered to convey to appellant the property purchased by him. On the 4th day of December, 1902, the commissioner executed and acknowledged a deed to appellant for the property, which deed was examined and approved by the court. On the 24th day of February, 1903, the following order was entered in the action: "Came the purchaser, Joseph Dinkelspiel, personally, and suggests his willingness to pay off the purchase bonds herein in the event that the court decides that he can obtain good title to the property purchased by him herein, and in order that the question of title may be promptly decided he expressly waives the fact that the bonds are not yet due, and consents that the case may proceed in the same manner as if they were both now due. Thereupon, on joint motion of plaintiff and defendant, a rule is awarded against the purchaser to show cause why he should not pay into court the amount of the purchase bonds with interest."

The appellant entered his appearance to this rule and filed his response, and claimed that the judgment directing the sale of the property and the confirmation of the report of the sale thereof were void because Joseph Schrorer was not before the court. He offers two reasons why said Schrorer was not before the court:

1st. That Joseph Schrorer was insane and confined in the asylum, and that the physician in charge of him was not served with a copy of the process.

2d. That the order of the county court, appointing Mary Hulsmeler his committee, was void, because Joseph Schrorer had not been legally declared by any court to be a lunatic for the reasons that the city court of Louisville had no jurisdiction to try such proceedings, and even if it had such jurisdiction the record thereof failed to show affirmatively the personal presence of Joseph Schrorer at the time of the trial, and there were no affidavits of physicians showing his inability to be present.

As to the second reason offered by appellant, we are of the opinion that by an act of the legislature, approved January 16, 1882, page 751, 1888 edition of the General Statutes, the legislature authorized city or police courts, when no circuit court was in session, to hold such inquests. But even admitting the contention of appellant, that the inquest and the appointment of Mary Hulsmeler as committee by the county court were void, it can not avail appellant in this case, for the law presumes every person to be sane until the contrary is made to appear, and it appears that the process was duly served upon him.

As to the first reason offered by appellant, we are of the opinion that the Code does not require that the summons be served upon the physician in charge of the lunatic unless it appear from the certificate of such physician, attested by the officer delivering it, that a personal service, in his opinion, would be injurious to such person of unsound mind.

It appears from the record that a summons was served upon Joseph Schrorer and his alleged committee, Mary Hulsmeler, the person having charge of him and his estate, and also that a guardian ad litem was regularly appointed to defend for him; and it also appears from the record and the former opinion of this court in this case that they made a very successful and beneficial defense.

As a further reason why the judgment of the lower court should be affirmed it may be said that all questions raised on the former appeal, and that were in the record and might have been presented, must be construed as having been adjudicated.

For the foregoing reasons we are of the opinion that the judgment of the lower court was not void and is binding upon his estate, and it is, therefore, affirmed.

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#### HIGHLAND v. HIGHLAND.

(Filed April 23, 1903—Not to be reported.)

Husband and wife—Conveyance—Fraud and undue influence—Appellee, a lady aged about forty-five or fifty years, married appellant, aged about twenty four, after an acquaintance of only twelve days, and within less than a month thereafter she was induced to execute to him, through a third person, a deed to a one-half interest in about 600 acres of valuable land in Kentucky, which she alleges she was induced to sign by fraud and misrepresentation of her husband. The conveyance was made while the parties were spending their honeymoon in Atlantic City. Held—That it is evident from a letter written by the husband to his wife before the deed was made, and from other evidence in the case, that the deed was obtained from the wife under such circumstances as, in law, amounted to fraud, misrepresentation and improper and undue influence, and the lower court properly ordered the deed to be cancelled.

McMillan & Talbott and Harmon Stitt for appellant.

Brent & Thomas and T. L. Edelen for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Nunn.



This case has been prepared by able counsel on both sides, who understand what is evidence and the effect of it and the principles of law and the application of it to the questions involved.

From the record it appears that appellee had, for some time prior to July 16, 1900, been under the treatment of a physician, and on that date, by the advice of her physician, started to Mt. Clemens, Mich., a health resort, to recuperate her health. She arrived there on the 17th inst., and there met for the first time the appellant, and on the 29th of the same month they were married. They then started for Atlantic City, N. J., to spend their honeymoon, arriving there on the 1st day of August. On the 18th day of August appellee and her husband joined in a conveyance of the one-half interest in a valuable tract of land, containing about 600 acres adjoining the town of Paris, Bourbon county, Ky., to one Enoch Higbee, for the recited consideration of \$1 cash in hand. Higbee then conveyed the land to the appellant for the same recited consideration. On the 22d day of February, 1901, the appellee filed her petition in the Bourbon Circuit Court against appellant, charging that he, by fraud and misrepresentation, and by the improper exercise of his power and influence over her as her husband, procured and induced her to execute and deliver to him this deed, and that it was made without any valuable consideration whatever, and asked that the deed be cancelled and declared void. Appellant filed answer, denying the allegations of the petition.

The lower court upon the trial of the cause adjudged the deed void and cancelled it, and the appellant has appealed from that judgment. The proof, as shown by the record, presents this state of facts: The appellee was about forty-five or fifty years of age, and the appellant about twenty-four years of age; that appellee was of an impetuous and emotional, and appellant of a quiet and reticent, temperament.

In a few days after they arrived at Atlantic City appellant visited a lawyer's office and made inquiry as to the marital rights of a husband in the wife's property in the State of Kentucky. The lawyer informed him that he was not acquainted with the statutes of Kentucky, but offered to communicate with some attorney in Kentucky and get the information from him. This the appellant declined, giving as his reason that he had married a wealthy lady from Kentucky; that she was of considerable prominence, and that he did not want it known in Kentucky that he was making an investigation of the subject. During this conversation he stated to the attorney that he had been endeavoring to obtain a consulship in Canada, which would pay him about \$2,000 a year, but that since he had married this wealthy Kentucky lady, which would give him influence and position, he had declined to proceed further with his efforts to obtain the consulship. On the next day he returned to the attorney's office and stated to the attorney that he need not investigate that question any further as he believed that his wife had about concluded to convey him a half interest in her property. The lawyer informed him that a deed from his wife to him direct would not be valid; that the deed would have to be made to a third person and in that way get the title in him. He said that he would be back the next day and have the deeds drawn. He went the next day with his wife, the deed was prepared, and while the lawyer was dictating to his stenographer, he over-

heard her remark to her husband, "this property is not to be sold while I live; you are not to dispose of it," and he said, "Oh, no," and then the draftsman inserted the clause to that effect; that during the preparation of the deed appellee remarked to her husband, "you know this deed is not to be recorded." After the deed was completed and ready for signatures appellee declined to sign it. Appellant took her to the far corner of one of the rooms and took a seat with her upon the sofa; they talked there in low tones for a half or three-quarters of an hour, some portion of the time with his arm around her, and part of the time hold of her hand, and appeared to be in an imploring attitude. After that she signed and acknowledged it. It was in evidence by three or four other witnesses, upon as many occasions, that they heard her demanding of him the deed, and stating to him that "you know that you promised me that you would return to me the deed after you had shown it to your Virginia people." The appellant would not affirm or deny the statement. After they left Atlantic City they traveled together as far as Cincinnati, she going to her home and he to Clarksburg, W. Va., and there he remained for two or three weeks, during which time she wrote him some three or four letters, professing excessive love for him, without any reference to property or business matters.

It appears that while they were at Atlantic City, and after they had been there but a few days, the appellant placed in the lap of appellee an undressed envelope containing a letter, and left the room, which letter is as follows:

"My Dear Wife:

"You now know that you have married no adventurer, but one whose motives are pure, and only ambition to make you happy.

"I have most flattering prospects, and, as you well know, it is within my reach to obtain a position of honor and influence.

"I will admit that from your story of the past, that you have been the most self-sacrificing woman in existence; but while that is true, I feel that the request which I am about to make is not an unreasonable one (and if so, I hope it shall be denied me).

"It is needless for me to tell you that I am happily married, for you have already placed more love and sunshine into my life than I have ever experienced before, and I shall love and cherish you as long as ever I shall live.

"My youth and diffidence alone prevents me from saying to you in person what I now write you.

"You have wealth and honor; I am full of energy and ambitions; two things that go together to bring about the grandest and highest accomplishments in life.

"And with your love and assistance, I can make the whole community marvel at our advancement and achievements.

"I am certainly proud of you, and I shall never regret the step I have taken.

"I shall so conduct my future as to never give you cause to believe me other than you hope me to be.

"It is within your power to make me the happiest man, as well as place me in a position of influence, which honor I hope you to share with me.

"I know that it is your intention to do a good part by me some time, and

I perhaps flatter myself when I tell you that I believe that you have sufficient confidence of doing so now.

"I am going to ask you to give me one-half of the farm, which will give me a standing before the world, and I shall later prove myself worthy of the trust and generosity.

"I will get that appointment, and we will live by ourselves and for ourselves, and in defiance of what the outside world may think.

"What matter it if I am young, so long as I love you, and is it not better that you should have the love, care and protection of a young man during the hours of sickness and affliction which may come to every one some time in their life?

"In conclusion, I will say that it matters not what your decision be, I shall always love you.

"SCOTLAND."

It appears from the evidence that this letter was typewritten, except the address and signature. And it further appears from the evidence that appellant had but one hand, and there is nothing in the evidence showing that he had a typewriter with him, and it is difficult to understand how he procured this typewritten letter unless he obtained the assistance of some one, and there is no evidence that he had any acquaintances in the city except a brother and a cousin, who was a lawyer, who happened to be visiting in the city at the same time. It is possible that he received aid from one or both of them.

Considering their short acquaintance; the disparity in their ages; that their marriage had occurred only some twelve or fifteen days before the letter was handed to appellee by appellant; that he had been with her all the time since their marriage in a strange city; that he had been to see a lawyer to ascertain the rights and interests of a husband in the wife's property in the State of Kentucky; his desire to keep the matter from his wife's Kentucky friends; in getting the deed before she arrived at home, and, in connection with these facts, the language of this letter, and we are impressed with the idea that it emanated from the mind of a cool, calculating and mercenary person; that his sole object was, if possible, to impress her with his professed great love and flatter her by appealing to her vanity, and in this way to obtain her property. From the whole record we are impressed with the belief that possibly appellant was mistaken in his letter to appellee in stating that he was not an "adventurer."

We are of the opinion that the deed was obtained from appellee under such circumstances as, in law, amounted to fraud, misrepresentation, and improper and undue influence. We deem it unnecessary and useless to quote and discuss authorities with reference to the issues herein involved, but refer to the cases of *Wilson, &c. v. Letten, &c.*, 24 Ky. Law Rep., 2d part, page 1844; *Golding v. Golding*, 82 Ky. 55; *Smith, &c. v. Snowden*, 96 Ky. 36, and *Todd's Heirs v. Wickliffe*, 18 B. M., 908.

For the above reasons the judgment of the lower court must be affirmed.

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JACKMAN, &c. v. JACKMAN.

(Filed April 23, 1903—Not to be reported.)

Wills—Testator by his will devised his real estate in equal shares to his three children. In a subsequent clause he provided that if either of his chil-

dren should die childless, then his or her share in the land at the death of the surviving one or two shall descend in equal shares to all the heirs of his estate. One of his daughters survived the testator, and her share of the land was allotted to her. She subsequently died childless, and this appeal involves the correct construction of the will relative to her share of the estate. Held —That it is the policy of the law to treat all estates as vested at the death of the testator. The contingency of death of the devisee childless refers to the death prior to that of the testator, and it was the evident intention of the testator to vest his devisees with a defeasible fee, subject to be defeated by her death without leaving issue before her father. As she survived him, she became invested with the complete fee-simple title, which at her death passed to her heirs at law.

Baird & Richardson for appellants.

W. L. Porter for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Chief Justice Burnam.

This is an appeal from a judgment of the Barren Circuit Court construing the tenth clause of the will of William Jackman, and the codicil changing the provision made therein for his daughters Sarah Elrado Jackman and Pocahontas Page, and his son, John L. Jackman. It reads as follows:

"To my daughter, Sarah Elrado, and my son, John Jackman, and my daughter, Pocahontas Page, I devise and bequeath in equal shares the farm upon which I now reside, containing about 225 acres, and also in like manner the tract of land adjoining the home tract which I bought of Dora Hulsry, containing sixty acres, more or less. \* \* \* If either of said children should die childless, then his or her share in the land at the death of the surviving one or two shall descend in equal shares to all the heirs to my estate.

'Codicil. Since making the foregoing will, it now seems best that I make a change in item 'ten,' in this, that therein I bequeathed certain lands to my daughters, Sarah Elrado Jackman and Pocahontas Page, and my son, John L. Jackman, altogether, I now direct by way of codicil that Elrado's share, or one-third in value of all the land described in said item ten, be laid off so as to include my residence and buildings, and John's share must be laid off next to and adjoining said Elrado's share, so that these two shares may be used together, if said devisees see fit to do so, and Pocahontas the other one third.'

Sarah Elrado, John and Pocahontas divided the land devised to them as directed by the codicil, and the executors of testator conveyed to Sarah Elrado ninety-two acres thereof, including the residence, buildings, etc., in compliance with the stipulations of the will, on the 10th of November, 1899. Sarah Elrado died childless in 1901. After her death the appellee, John L. Jackman, took possession of the land allotted to her and claimed that it belonged to him during his life, and this action was brought against him by his brothers and sisters and the children of those who were dead for a sale thereof and division of the proceeds according to their respective rights; and they also asked that appellee be charged with rents thereof from the time he took possession after the death of this sister. A general demurrer was inter-

posed by John L. Jackman, which was sustained by the circuit court and the petition dismissed, and the plaintiffs have appealed.

The settled policy of this State has been to favor the vesting of titles. Early in its history the following statute was enacted:

"Section 2342. Unless a different purpose appear from express words or necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple or such estate as the grantor or testator has power to dispose of."

In *Ferguson, &c. v. Thomason*, 87 Ky., 620, the court had under consideration a clause in the will of testator which reads as follows: "If any of my children should die without children or heirs of their body, the estate above devised to them shall be equally divided between my surviving children and the heirs of those who have died, in equal shares."

And it was held that each of the children of testator took his share in fee, subject to be defeated only in the event of his death before the testator, the court saying: "Where a devise is made to several as a class, with words of survivorship annexed, and the gift as to enjoyment is to take effect immediately upon the decease of testator, the rule is to refer the words of survivorship to that event and consider them as intended to provide against the contingency of the death of the devisee during the lifetime of the testator."

In the recent case of *Lewis v. Shropshire, Trustee*, 24 Ky. Law Rep., 381, a testator devised his entire estate to his wife for life, and directed that at her death it be equally divided among his seven children. By a subsequent clause of the will he provided that if any of his children should die leaving no heirs or heirs of their body, that their portion of the estate should be equally divided between his grandchildren. His land was divided at the death of his widow, and twenty-five acres of land allotted to his daughter, Elizabeth, who sold it to Shropshire. She subsequently died, having no children, and suit was brought to recover the land for the purpose of having it sold and the proceeds distributed under the last clause of the will. In that case it was held that as Elizabeth Stevenson survived her mother, her interest in the land ripened into a fee simple. And the rule announced in that case was followed in *Baxter v. Isaacs*, 24 Ky. Law Rep., 1618, and is supported by numerous other decisions there cited. We are, therefore, of the opinion that Sarah Elrado Jackman took under her father's will a defeasible fee, subject to be defeated by her death without leaving issue before her father. As she survived him, she became invested with the complete fee-simple title, which at her death passed to her heirs at law.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent herewith.

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CLARK v. LEXINGTON STOVE WORKS.

(Filed April 23, 1908—Not to be reported.)

Geo. C. Webb for appellant.

Forman & Forman and A. M. Eaker for appellee.

Appeal from Fayette Circuit Court.

Judge Settle delivered the following response to petition for rehearing:

Appellee petitions for a modification of the opinion here, and complains that the following expressions in the opinion, "so after all it may be inferred from the facts adduced upon the trial in the lower court that the note and policy were lost to appellant by the negligence of appellee's general manager," and further, that "the money would immediately have been obtained on it (referring to the life policy) but for the negligence of appellee's agent in putting it into the hands of an unreliable man," may be construed by the lower court as a judicial assertion on the part of this court that said facts not only establish the negligence of the agent, but are conclusive of the issue on that point.

The language objected to was not intended to have that effect; it merely expresses the views and conclusions of this court upon the evidence adduced upon the trial had in the lower court. It will not prevent that court from submitting to the jury, under proper instructions, as directed in the opinion, the question of whether the manager of appellee, to whom appellant entrusted the note and policy, was negligent in the performance of the duty required of him in the matter of procuring the money thereon.

The obvious meaning of the language complained of is that the record before this court furnished evidence of negligence on the part of appellee's manager, which, upon the state of case presented, would make it liable, but on the trial yet to occur the evidence may not be the same, or evidence may be introduced by appellee that will wholly disprove such negligence.

The petition for modification is overruled.

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CITY OF UNIONTOWN v. BERRY, &c.

(Filed April 23, 1903—Not to be reported.)

H. X. Morton for appellant.

Allen & Hughes and P. B. Miller for appellees.

Appeal from Union Circuit Court.

Judge O'Rear delivered the following extension of opinion:

On the plat used in the preparation of this case the streets were not designated by names except Water street and Main. The names that the other streets now bear seem to have been given to them recently. In this way the court was misled as to the correct location of the street, which, in the opinion, is denominated Dewey. As a matter of fact it develops upon the petition for rehearing that the street at the northern extremity of Water street, as indicated in the original opinion, is named Watson street, while Dewey is some squares to the west of Watson.

Applying the principles announced in the original opinion, it results that the judgment of the lower court must be reversed, as that judgment confines the city's right to recover to the line lying west of the line drawn from Dewey street to the river, instead of from the street named in the opinion as Dewey, but which was and is in fact Watson street, to the river. The cause is remanded for proceedings not inconsistent with the opinion herein.

FRANK v. FRANK.

(Filed April 23, 1903—Not to be reported.)

Burnett & Burnett and Wallace Coulter for appellant.

Harris & Marshall for appellee.

Appeal from Jefferson Circuit Court.

The court delivered the following response to petition for extension:

There is nothing in the opinion delivered in this case which intimates that the order of the Jefferson Circuit Court of December 1, 1900, stopping the allowance of alimony from and after the original judgment in the divorce case should be set aside, on the contrary we fully approved the entry of that order, and it is in conformity with the former opinion in this case, and which is not disturbed by the judgment upon this appeal.

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LANCASTER, &c. v. CITY OF OWENSBORO, &c.

(Filed April 23, 1903—Not to be reported.)

Wilfred Carrico and W. S. Morrison for appellants.

Geo. W. Jolly for appellees.

Appeal from Daviess Circuit Court.

Judge O'Rear delivered the following response to petition for rehearing:

The question that because the voters residing in the territory added to the city in July before the election were not afforded an opportunity to vote invalidated the election in this case, is presented in the petition for rehearing for the first time in this case. The court declines to recede from the opinion heretofore announced. Although the facts involved in that part of appellant's pleading are not denied, the court is of opinion that, taking them as true, they do not constitute a cause against the validity of the election. This question was fully considered and disposed of by the opinion in O'Bryan, Clerk v. City of Owensboro, 24 Ky. Law Rep., 469, to which we adhere.

Petition overruled.

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HATFIELD, &c. v. ESTEP, &c.

(Filed April 23, 1903—Not to be reported.)

Wills—Boundary—This appeal involves the construction of a will as to the location of property devised to P., his daughter, in which he gives to her all the lands and premises he holds above Elijah Fuller's line on the Bill Allen branch. Held—That it was the evident intention of the testator to devise the land covered by this description as this would only make her about equal with the other heirs.

Belcher & Harman for appellants.

J. F. Butler and Roscoe Vanover for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Judge O'Rear.

Joseph Hatfield, deceased, by a will which has been admitted to record, disposed of all his estate, consisting mainly of lands in Pike county, dividing it among his children and widow, by what was apparently an equal apportionment. By the 7th clause of his will he devised to appellee, Phoebe Estep, his daughter, as follows: "I give to my daughter, Phoebe Estep, all the lands and premises I hold above Elijah Fuller's line on the Bill Allen branch."

As a matter of fact decedent owned a tract of land on the Bill Allen branch, but it extended across the ridge onto the waters of other branches of the main stream, of which the Bill Allen branch was a tributary. The remainder of the testator's land did not adjoin the particle beyond the ridge mentioned. The evidence is conclusive that if all of the land in that tract lying above Elijah Fuller's line is given to appellee, Phoebe Estep, it would not more than equalize her with testator's other children. The will manifests no purpose on the part of the testator to discriminate among his children. This fact and the location of the property all tend to confirm the belief that the testator intended by the description to give to appellee all of that tract of land. The expression, "all the land and premises I hold above Elijah Fuller's line on the Bill Allen branch," in view of the other circumstances of the case shown, is susceptible of the construction, and we are inclined to believe it was the testator's meaning that he gave to this daughter all of the land that he owned in that vicinity which was above a line on the Bill Allen branch, known as Elijah Fuller's line. This construction gives to the appellee the whole of the boundary in dispute. Such was the judgment of the learned chancellor who tried this case.

The judgment is affirmed.

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HOSKINS, &c. v. SOUTHERN NATIONAL BANK, &c.

(Filed April 23, 1903—Not to be reported.)

Supersedeas bond—Pleading—This action was instituted on a supersedeas bond to stay proceedings on a judgment for money, pending an appeal to the Court of Appeals. The sureties on the bond filed an answer and amended answer, to which a demurrer was sustained and judgment was rendered for plaintiff, from which this appeal is prosecuted. Held—That the demurrer to the answer should have been carried back to the petition and sustained. The failure to allege in the petition that a supersedeas was issued by the clerk following the execution of the bond was and is fatal to a right of recovery on the bond; in other words, that without an averment in the petition of that fact it does not state a cause of action.

Lane & Harrison for appellants.

B. H. Young, M. W. Ripy and E. C. Walde for appellees.

• Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Settle.

This is an action upon an appeal bond, which was executed by one Bettie Williams, and appellants, R. H. and J. C. Hoskins, as her sureties, to stay proceedings on, and prevent the collection of, a judgment rendered in the



Jefferson Circuit Court, Common Pleas division, against Bettie Williams, and in favor of the Farmers and Drovers Bank, pending an appeal which was brought to this court by Bettie Williams in an effort to reverse the judgment mentioned. The judgment appealed from was, however, duly affirmed by this court, with damages, and Bettie Williams having thereafter failed to fully pay and satisfy the judgment and damages standing against her, and the same having been assigned by the Farmers and Drovers Bank to the Southern National Bank, the latter seeks by this action to recover of the sureties in the appeal bond the sum and balance due it on the assigned judgment. Answer was filed by the sureties, appellants, R. H. and J. C. Hoskins, in which several matters of defense were set up and relied on. A general demurrer was filed to the answer by appellees, and the answer being defective and insufficient the demurrer was sustained by the court, to which appellants excepted, and thereafter they filed an amended answer, to which appellees filed a reply. The case was then referred to the commissioner to take proof, and to make a report as to the amount due from appellants on the appeal bond. His report was made, and though excepted to on various grounds by appellants, it seems to have been confirmed by the lower court, and judgment duly entered for the amount shown thereby to be due, and for which appellants are liable on the bond, from which judgment this appeal is prosecuted.

Practically but one ground is urged for the reversal of the judgment appealed from, and that is that the petition is fatally defective in that it is not affirmatively alleged therein that the appeal or supersedeas bond was executed before, or taken by, or approved by, the clerk of the court rendering the judgment appealed from; and further, that it is not averred in the petition that a supersedeas was issued by the clerk because and in consequence of the execution of the appeal bond.

The record fails to show that a demurrer was filed to the petition, and it must, therefore, be assumed that none was filed, but as it does appear that a general demurrer was filed by appellees to the answer which was sustained by the lower court, and that appellants excepted to the judgment sustaining the demurrer, if the alleged defects in the petition are to be regarded as fatal to the cause of action therein attempted to be stated, the demurrer should have been carried back to the petition, and sustained by the lower court, and as this was not done the failure of the court to so rule should be treated as error, excepted to at the time, which may be reviewed by this court.

Waiving the question of whether it was necessary for the petition to contain an averment to the effect that the bond sued on was duly executed before, or to, the clerk of the court, we are constrained, in view of the repeated adjudications of this court to that effect, to hold that the failure to allege in the petition that a supersedeas was issued by the clerk following the execution of the bond, was and is fatal to a right of recovery on the bond; in other words, that without an averment in the petition of that fact it does not state a cause of action.

In *Reed v. Lander*, 68 Ky., 598, it was held by this court that a judgment is not superseded by the execution of an appeal bond, nor until an order of supersedeas is issued by the proper clerk as provided by the Civil Code, hence in that case the Court of Appeals refused on the affirmance of a judgment to

award ten per cent. damages because an order of supersedeas had not been issued.

In *Jones v. Green*, 75 Ky., 127, suit was instituted upon an appeal bond; the petition set out the proper execution of the bond, and that the principal by executing the bond "thereby procured a supersedeas from said clerk superseding plaintiff's said judgment." \* \* \* The answer filed to the petition was fatally defective; a demurrer was sustained to it, and no further defense being made, judgment went against the defendants; they appealed and in this court insisted that the demurrer filed to the answer should have been carried back to the petition, hence the inquiry was whether the petition set out a cause of action. In discussing that question this court said: "But it is not averred as a substantive and specific fact that a supersedeas was issued at all, the allegation is that the judgment debtor executed the bond sued on, and thereby procured a supersedeas from said clerk superseding the plaintiff's said judgment. \* \* \* As the mere execution of the bond did not obstruct appellee in the collection of his judgment, as he fails to allege in direct terms that a supersedeas was issued at all, and as his petition shows that all the steps relative to the bond and the supersedeas were taken by the clerk of the circuit court, and as it fails to state facts showing that said clerk had the authority to do more than to accept the bond and forward a copy thereof to the clerk of this court, it is manifestly insufficient. The judgment must be reversed, the cause is remanded, with instructions to the circuit court to carry the demurrer back to the petition, and to sustain it, etc."

It will be observed that the condition of the pleadings in the case *supra* presents a case strikingly similar to the one at bar; it will also be observed that the petition in this case does not even attempt to allege the issue of a supersedeas, and that this omission is not cured or supplied by any statement or averment in the answer filed by appellants. A more recent deliverance of this court on the question under consideration will be found in the case of the *L. & N. R. R. Co. v. Barclay*, 19 Ky. Law Rep., 899, wherein it is said: "A further objection urged to the right of appellee to prosecute this action is the averment in the petition that the father of Hugh Barclay, Jr., had, previous to the order appointing appellee administrator, applied to the county court to be appointed; that the same order which appointed appellee, denied the father's application, and he thereupon took an appeal from the order, executed a supersedeas bond, and took all other necessary steps to bring up the judgment and proceedings of the county court to the circuit court for review and reversal, and that said appeal was then pending in the circuit court. This pleading, however, does not state that a supersedeas was ever issued. Unless a supersedeas was issued there was no stay of proceedings upon the judgment appealed from; \* \* \* we regard the issuance of the supersedeas as a necessary averment."

The foregoing decisions are based upon the well-known provisions of the Civil Code, which remain as they were when the earliest of the cases herein cited was decided. Under these authorities we must hold that the appellees' petition does not state a cause of action, as it failed to allege that an order of supersedeas was issued to stay proceedings on the judgment, from which the former appeal was taken.

The judgment of the lower court in this case is, therefore, reversed and the cause remanded, with directions to the lower court to carry the demurrer back to the petition, and to sustain it, and for such other proceedings as may not be inconsistent with this opinion.

## SWINEBROAD v. BRIGHT.

(Filed April 24, 1908—Not to be reported.)

1. Evidence—In this action involving the question as to whether money paid by a testator to his daughter after making his will was intended as an ademption of the legacy of \$1,000, the executor and his surety are competent witnesses to prove the declarations of the testator, as they are not interested in the estate. In such actions and in contest of wills all devisees are competent to prove the declarations of the testator. The husband of a devisee is competent to testify to any facts within his knowledge which his wife could testify to.

2. Pleading—A defective answer alleging that a payment was intended as an ademption of the legacy was cured by verdict.

G. B. Swinebroad, R. H. Tomlinson and R. P. Jacobs for appellant.

Hill & McRoberts for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Hobson.

Appellant's father devised to her \$1,000; appellee, as his executor, refused to pay her the amount on the ground that the legacy had been adeemed.

The facts in this case are stated in the former opinion. (Swinebroad v. Bright, 23 Ky. Law Rep., 55.) On that appeal there had been a judgment for defendant, which was reversed on the ground that under the statute the burden of proof was on the executor to show that the \$1,000 paid appellant after the date of the will was intended by the testator in satisfaction of the bequest to her. On the return of the case the defendants amended their answer in conformity to the opinion and the case being tried before a jury, a verdict was returned in favor of the defendant, on which judgment was again entered, and the plaintiff appeals. The only ground of complaint necessary to be noticed relates to the admission of evidence, as no objection is taken to the instructions of the court and the amended answer was sufficient, for the allegation that the payment was intended by the testator in satisfaction of the legacy is necessarily an allegation that it was so intended by him at the time the gift was made; and the court in its instructions thus submitted the issue to the jury. The verdict of the jury, therefore, supplied this averment in the answer and cured the omission, if material.

The executor himself and his surety in his bond were introduced as witnesses to prove the declarations of the testator as to the purpose of the gift of \$1,000. It is insisted for the defendant that being defendants in the action, they were testifying for themselves as to a verbal statement of the decedent and that their testimony was incompetent under section 606 of the Civil Code. We do not so understand the rule. The question before the court was whether the estate of the testator owed the plaintiff \$1,000. The testimony of the executor and his sureties was to the effect that the estate

did not owe the money. It was the duty of the executor to protect the estate, and we know of no rule of law making him an incompetent witness for the estate as to a transaction of his own decedent with him. If the \$1,000 was not going to the plaintiff it belonged to the residuary devisee. The executor had no interest in the fund. The judgment in the case did not affect his liability in any way, as in either case he had to pay the money over to somebody. He was not, therefore, interested in the result at all, and was not testifying for himself. Neither was the surety, J. B. Owsley. The Code of Practice was aimed to widen, not narrow, the admissibility of witnesses, and one of the purposes of the section was to protect the estate of decedents. To hold the executor incompetent in a case like this would be to defeat the purpose of the statute. For this is really a controversy between the devisees under the will as to which of them is entitled to the part of the estate in question, and the executor is only in effect the stakeholder between them. The cost of the action if decided against the executor would be paid out of the estate, and he has no interest in the controversy except to procure the direction of the court in the execution of his trusts.

The court also allowed one of the residuary devisees to testify as to a verbal statement of the testator to him. This testimony is objected to on the ground that being one of the residuary devisees, and, therefore, entitled to the fund in contest, or a part of it, if not recovered by the plaintiff, he was testifying for himself, and the evidence should not have been admitted under section 606 of the Code. It is true he was testifying for himself, but it has been held by this court that in a contest over a will all the devisees are competent witnesses as to transactions with the deceased. (*Flood v. Pragoff*, 79 Ky., 607; *Williams v. Williams*, 90 Ky., 28.) The same principle has been applied in other controversies between devisees or other persons claiming under the decedent, whose declarations are sought to be proved by one of them. (*Whalen v. Nisbet*, 95 Ky., 464; *Murphy v. Murphy*, 23 Ky. Law Rep., 1460.)

Under these authorities we conclude that all of the devisees were competent to prove the declarations of the testator to them. The plaintiff did not offer herself as a witness, and her husband was introduced, and certain declarations of the testator to him were offered to be proved by him. It has heretofore been held that the husband in such case may testify to any matters which the wife might testify to. (*Bright v. Swinebroad*, 21 Ky. Law Rep., 369.) The husband should, therefore, have been allowed to testify to the entire conversation between him and the testator as the wife might have testified to it had the conversation occurred with her. But the court did allow the substance of the testator's statements to go to the jury, and in view of all the evidence in the case we are unable to see that the admission of what was rejected could have affected the result. The part that was rejected simply amplified what was admitted, and the weight of the evidence and the facts established by them are so clearly with the defendant that we are of opinion that the rejection of this evidence was not prejudicial to the substantial rights of the appellant on the whole case.

The declarations of the testator, whether made before or after the notes were placed in the hands of the attorney, were properly admitted, as they were so interwoven and so closely connected. They were all made before the money was collected and the transaction closed up.

The judgment complained of is, therefore, affirmed.

## CITY OF LOUISVILLE v. KREMER.

(Filed April 24, 1908—Not to be reported.)

Street improvements—In this action on an apportionment warrant, seeking to enforce a lien on the property of W. for the improvement of Daisy lane in Louisville, the court properly gave a judgment against the city for the amount of said warrant.

H. L. Stone for appellant.

M. S. Tyler for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hobson.

The city of Louisville issued to appellee Kremer an apportionment warrant for \$2,258.72 against the property of Nannie M. Wilson for the improvement of Daisy lane, or Transit avenue. The property was afterwards sold by her to Cave Hill Cemetery, and this suit was brought by Kremer against the cemetery and the city of Louisville to enforce the lien upon the property and to recover against the city in case the property was held not liable. The proof showed that the property taxed was of value not exceeding \$100, and received no benefit from the improvement. The court held the property not liable on the ground that a case was made out in which it would be spoliation to enforce the lien, and he gave judgment against the city for the amount of the warrant. From this judgment the city appeals. Cave Hill Cemetery is not before the court, and the only question here is between the contractor and the city as to the propriety of the judgment in his favor against it. It is insisted for the city that by the contract that the contractor agreed that in no event he should be entitled to recover any part of the cost of the work from the city of Louisville, and that he is bound by his contract, and, therefore, can not recover. The contract is the same as in the case of City of Louisville v. Peter Bitzer, this day decided, wherein it is held that the contract was in legal effect the same as the provisions of 2834, Kentucky Statutes, and, therefore, did not protect the city from liability in those cases where the city was without authority to contract for the improvement at the cost of the abutting property.

Judgment affirmed.

## DOW-HAYDEN GROCERY CO. v. MUNCY, &amp;c.

(Filed April 24, 1908—Not to be reported.)

Bills and notes—Surety—Consideration—Appellee M., being indebted to appellant in the sum of \$389.42, applied to appellee B. to become his surety and induced him to sign a blank note, assuring him that it would not exceed \$185. Appellee M. filled up this note so that by its terms appellees agreed to pay to appellant ninety days thereafter the sum of \$389.42, which was delivered to appellant and upon which it brought suit at maturity. Appellee C. entered a plea of no consideration and a violation of the agreement between him and M. The court gave a peremptory instruction to find for appellee. On appeal, Held—That the forbearance to sue on the indebtedness was a sufficient consideration to uphold the undertaking of the principal and surety. The delivery of the blank note to the principal for the

purpose of raising money, the principal became his agent for the purpose of filling it, and binds him by any contract written therein not inconsistent with the nature of the instrument, and where the paper passes into the hands of an innocent holder the surety is bound.

Wm. Lewis, Neville C. Fisher and W. W. Rawlings for appellants.

B. B. Golden and J. H. Jeffries for appellees.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Barker.

The appellee, J. M. Muncy, being indebted to the appellants, Dow-Hayden Grocery Co., in the sum of \$389.42, for goods sold and delivered to him by them, applied to appellee, J. M. Baker, to become his surety on a note with which he proposed to settle the indebtedness in question. Upon being asked by Baker as to the amount of his indebtedness to appellants, Muncy replied that it would not exceed \$185; whereupon Baker signed a blank note, and delivered it to Muncy, which was to be filled up in such manner as to pay off the indebtedness to appellants, the sum not to exceed \$185.

With this blank note in his possession J. M. Muncy had a settlement of his account with appellants, which was ascertained to be \$389.42; whereupon the blank note was filled up to read as follows:

"\$389.42.

Winchester, Ky., January 10, 1900.

"Ninety days after date we promise to pay to the order of Dow-Hayden Grocery Co. \$389.42, value received, negotiable and payable at the Clark County National Bank of Winchester, Ky., with interest at the rate of 6 per cent. per annum from maturity until paid, due April 10, 1900.

"J. M. MUNCY,

"J. M. BAKER."

This note was delivered to appellants in payment of the open account which was then due from J. M. Muncy to them. The note having become due and not paid, the appellants instituted this action in the Leslie Circuit Court for judgment against the appellees.

J. M. Muncy made no defense. J. M. Baker filed an answer, alleging, first, the agreement between him and Muncy, when he signed the note in blank, that it should be filled up for a sum not exceeding \$185; and, second, that the note was without consideration as to him. Upon the trial of the case the facts appeared as above stated. At the close of all the testimony both sides moved for peremptory instructions; that of appellants was overruled; that of appellee, J. M. Baker, was sustained. To reverse this judgment appellants have brought the case to this court. We think the motion of appellants for a peremptory instruction to the jury to find for them, as prayed for in their petition, should have been sustained. The forbearance to sue on the past due account, and the extension of time for ninety days in which to pay, was sufficient consideration as between Baker, the surety, and appellants, the payees of the note. The rule upon this subject is thus stated in the Am. and Eng. Ency. of Law, volume 6, title "Consideration," page 748: "Forbearance to sue upon any legal demand is a valid consideration for a promise either by the party liable or by a third party."

The same rule is announced by this court in the case of *Allen v. Pryor*, 3 A. K. Mar., 305; and in the case of *Pulliam v. Payne & Withers*, 8 Dana,

98, it is said: "Promise to give day, or extend the time of payment, has ever been a valid consideration, and such as will sustain a promise to pay at the expiration of the time. Nor does it matter whether the indulgence, or time given, is to the party assuming, on his own debts, or to a third person on his debt, especially if the latter avails himself of the indulgence. In either case it is equally a disadvantage to the party giving the time; and disadvantage on the one side, as well as advantage on the other, has ever been held a good consideration."

Nor does the plea of the surety Baker, that he signed the note in blank, upon an agreement between him and Muncy that it was to be filled up for a sum not to exceed \$185, constitute a valid defense to the note. There was no pretense that appellants knew anything of the secret agreement between the surety and the principal. Nor does it make any difference that the blanks in the note were filled up by T. M. Hill, the agent of appellants; it was done in the presence of Muncy, and with his knowledge and consent; it can not be material to surety whose hand held the pen when the blanks were filled; the effect was the same to him, whether the writing was done by his principal, into whose hands he had intrusted the blank note, or some one else, at his instance.

Where one signs a note in blank, and places it in the hands of another, for the purpose of raising money, or paying off an indebtedness, the person so intrusted with the blank note becomes the agent of the person signing it, and binds him by any contract written therein not inconsistent with the nature of the instrument; and where the paper passes into the hands of an innocent holder, the party thus signing becomes as absolutely bound as if he had signed it after its terms were written out. (Daniels on Negotiable Instruments, section 142; Sowders v. Citizens National Bank of Lancaster, 12 Ky. Law Rep., 356; Smith v. Lockridge, 8 Bush, 423; Keene's Adm'r v. Miller, 20 Ky. Law, 279.)

As appellee's own testimony brought him within the pale of the principles herein announced the judge of the trial court should have sustained appellant's motion for a peremptory instruction.

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

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ALLEN, &c. v. COMMONWEALTH.

(Filed April 24, 1903—Not to be reported.)

Surety—Bonds—D. was indicted for a violation of the local option law, upon which bench warrants were issued and defendant was permitted to execute bond to the sheriff in the sum of \$100 for his appearance to answer the indictments at the succeeding term of the circuit court. D. was arrested by the sheriff, and executed bond with appellants as his surety. D. failed to appear in court and his bond was forfeited. In response to a summons on this forfeiture appellants responded that they were not bound because the bonds were null and void for the reason that the letters V. L. O. L. on the indictment and bench warrant did not name or describe an offense as required by section 82 of Criminal Code of Practice. Held—That the indictment was sufficient, and the bonds are valid under section 85, Criminal Code of Practice. Appellants knew that D. was in legal custody charged with a

public offense, and that he was released by the execution of said bonds, and this was sufficient to bind them as sureties.

R. A. Burnett and J. B. Garnett for appellants.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Trigg Circuit Court.

Opinion of the court by Chief Justice Burnam.

At the May term, 1901, of the Trigg Circuit Court the grand jury reported three indictments against Ben F. Davis for selling liquor in Trigg county in violation of the local option law, which were numbered by the clerk respectively 433, 434 and 435, and upon the back of which appeared the following endorsement:

"No. 433.

"The Commonwealth of Kentucky,

"vs. Indictment for V. L. O. L.

"Ben F. Davis.

"A True Bill.

"L. D. Dunning, Foreman.

"Bail \$100.00L.

"Presented by the foreman of the grand jury to the court in the presence of the entire grand jury, and received from the court by me and filed in open court this 27th of May, 1901.

"A. C. BURNETT, Clerk."

Upon these indictments bench warrants were issued directed to the sheriff, commanding him to forthwith arrest Ben F. Davis, and to bring him before the Trigg Circuit Court to answer an indictment in that court against him for "V. L. O. L." These bench warrants bore the same numbers as the indictments upon which they were issued, and upon the back of each there was this endorsement:

"It is ordered by the court that the defendant may give bail in the sum of \$100, and if he desires to give such bail, it may be taken by the sheriff of the county in which he resides, or by the sheriff of Trigg county.

(Signed) "A. C. BURNETT, C. T. C. C."

Each of the bench warrants were executed by arresting the defendant, Ben F. Davis, and whilst in the custody of the sheriff bonds were executed in the following form:

"The defendant, B. F. Davis, being in the custody of the sheriff charged with the offense of V. L. O. L., and being admitted to give bail in the sum of \$100, now we, B. F. Davis, etc., of Trigg county, Kentucky, hereby undertake that the above-named B. F. Davis shall appear in the Trigg Circuit Court on the first day of its next September term to answer said charge, and will at all times render himself amenable to the order and process of said court in the prosecution of said charge, and if convicted will render himself in execution thereof, or if he shall fail to perform either of the conditions that we will pay to the Commonwealth the sum of \$100. Witness our hands this 28th day of August, 1901.

"BEN F. DAVIS,  
"J. L. FRITH,  
"C. T. ALLEN,  
"G. W. VINSON."



The defendant, Davis, failing to appear in the Trigg Circuit Court, his bonds were forfeited, and summons issued against the securities to appear and show cause, if any they could, why judgment should not be rendered against them. For response to this summons they say that the bonds signed by them were null and void for the reason that the letters V. L. O. L. did not name or describe an offense as required by section 82 of the Criminal Code. They do not controvert that the defendant, Davis, was in the custody of the sheriff upon a bench warrant issued upon an indictment against him, or that he was discharged therefrom by reason of their undertaking that he should appear in the Trigg Circuit Court on the first day of its next September term to answer the charge contained therein. Nor do they plead that they did not understand at the time they signed the bond what these letters stood for, or the offense which they purported to name, or that they were in any way deceived or misled in the execution of the bonds. Letters are habitually used as an abbreviation for words; for instance, the letters U. S. are universally understood to stand for the United States; the letters Ky. for Kentucky; and in the same way the letters V. L. O. L. were simply used as an abbreviation to describe the offense charged against Davis by the indictment, which had been returned against him by the grand jury, and on which the bench warrant issued, and by virtue of which the sheriff had taken him into custody. Section 85 of the Criminal Code provides: "No bail bond or bail recognizance shall be deemed to be invalid by reason of any variance between its stipulations and the provisions of this Code, nor by the failure of the magistrate or officer to transmit or deliver the same at the times herein provided, nor by any other irregularity, provided it be made to appear that the defendant was legally in custody, charged with a public offense, and that he was discharged by reason of the giving of the bond or recognizance, and provided it can be ascertained from the bond or recognizance that the bail undertook that the defendant should appear before a magistrate for the examination of the charge, or before the court for the trial thereof. If no day be fixed for such appearance, or an impossible day, or a day in vacation, the bond or recognizance, if for his appearance before a magistrate, shall be considered as binding the defendant so as to appear and surrender himself into custody, for an examination of the charge within twenty days from the time the bond or recognizance was given; and if for his appearance in a court for trial, shall be considered as binding the defendant so to appear and surrender himself into custody on the first day of the next term of the court, which shall commence more than ten days after the time when the bond or recognizance is given."

Even if the defendant had not fully understood the offense which the letters purported to name, they did know that the defendant was indicted for some offense, and that they were pledging themselves that he would appear in answer thereto on the first day of the next September term of the Trigg Circuit Court. We are of the opinion that the averments of the response are insufficient to support a defense, and that the trial court properly gave judgment for plaintiff.

Judgment affirmed.

2060 MICHIGAN M. L. INS. CO. V. LESTER'S EX'OR.

MICHIGAN MUTUAL LIFE INSURANCE CO. v. LESTER'S EX'OR.

(Filed April 24, 1903—Not to be reported.)

1. Insurance—Evidence—Instructions—This action was brought on a policy of insurance issued on the life of L. The defendant interposed the defense that L. made false answers as to her age and as to discharges from her ear and as to open sores on her body. The plaintiff contended that said defense was insufficient as no copy of the application accompanied the policy. A trial resulted in a verdict for appellee, from which this appeal is prosecuted. Appellant urges as ground for reversal that the court refused to allow a doctor to testify as to the answers which the insured made with reference to sores upon her body. Held—That this was not prejudicial as the court permitted to be read to the jury what purported to be a copy of the application and the medical examination.

2. Instructions—It was not proper for the court to tell the jury that so far as the defense rested upon alleged misstatements as to age it had failed, but this was not prejudicial as there was an entire absence of proof to sustain this defense.

Bennett H. Young for appellant.

Clayton B. Blakey for appellee.

Appeal from Jefferson Circuit Court, Chancery division, No. 2.

Opinion of the court by Judge Paynter.

This suit is based upon a policy issued upon the life of Mary A. Lester for \$1,000. The defendant sought to avoid its payment upon the ground that the insured had made false answers to material questions in her application for the policy. Among other alleged false answers was one as to her age; one as to the discharges from her ear and another as to open sores on her body. The plaintiff sought to avoid this issue by showing that no copy of the application was attached to the policy when delivered to the insured. It is urged that prejudicial errors were committed upon the trial as follows: First, that the court refused to allow Dr. Taylor to testify as to the answers which the insured made with reference to sores upon her body; second, in instructing the jury.

There was an issue as to whether a copy of the application was attached to the policy and delivered to the insured with it. The defendant produced what it claimed was a copy of the application, claiming that one had also been attached to and delivered with the policy. At first the court refused to allow the purported copy of the application and report of the medical examination to be read as evidence, but upon reconsideration permitted it to be done. It appeared in the purported copy of the application that the insured answered that she did not have discharges from the ear and open sores upon her body. If the jurors believed that it was a copy of the application which insured made, then they must have believed that she had made a false answer as to open sores upon her body, etc. The testimony of Dr. Taylor could have done no more than to prove that such answers were made. It is, therefore, our opinion that the court did not err in refusing to allow the witness to testify upon the question stated. If the application had not been attached to and delivered with the policy, then his proposed testimony would have been incompetent under the doctrine of the case of Provident Savings Life Assurance Society v. Puryear's Adm'r, 22 Ky. Law Rep., 980, because it

was there held, under sections 656 and 679, Kentucky Statutes, that a defense similar to the one in this case could not be interposed unless a correct copy of the application was attached to the policy at the time it was delivered. If such a copy was delivered with the policy, and the one claimed by the defendant on the trial to be also a copy of it was so, then it showed the facts sought to be proven by Dr. Taylor. In either state of the case the rejection of the witness' testimony was not error or prejudicial to the defendant.

By the third instruction the court told the jury that, so far as the defense rested upon alleged misstatements as to age, it had failed because the evidence was not sufficient to show that the decedent misstated her age. While we are of the opinion that it was not proper practice for the court to give this instruction, still the defendant had wholly failed to prove any misstatement as to age, therefore, it did not prejudice the rights of the defendant.

The judgment is affirmed.

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SMITH v. SMITH.

KAHN'S SONS v. SAME.

(Filed April 24, 1908.)

**Wills—Restriction of conveyances**—A testator conveyed to his son a tract of land with the restriction that he should not pledge, mortgage or sell same until he is thirty-five years of age, and creditors seek to subject same to their debts. Held—That under section 2335, Kentucky Statutes, estates of every kind held in trust are made subject to the debts of the owner. The policy of our law is that no man can hold as his own and enjoy property free from the claims of his creditors, but that all property not exempt from execution shall be subject to the payment of his debts. Said land should be subjected to said debts.

J. B. Garnett for appellant, Dorcas Smith.

R. A. Burnett for appellants, S. Kahn's Sons.

Denny P. Smith for appellee.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Hobson.

Appellants, as creditors of T. D. Smith, brought these actions against him in the Trigg Circuit Court to subject to their debts a tract of land owned by him. Attachments were taken out which were levied on the land. The attachments were sustained, but before a judgment was entered for the sale of the land it was held by this court, in the case of *Wallace v. Smith*, 24 Ky. Law Rep.; 139, that T. D. Smith, under the will of his father, from whom he got the land, could not pledge, mortgage or sell it until he was thirty-five years old. After this decision was rendered the circuit court set aside the order sustaining the attachments and adjudged that the land could not be subjected to the debts.

The clause of the will referred to is in these words: "I give to my son, Thomas D. Smith, at the death of my wife the above eighty acres of land; but if my wife shall be living when my son, Thomas D. Smith, becomes twenty-one years old, he is to have fifty acres of the above eighty acres. At

the death of my wife my son, Thomas D. Smith, shall have the remaining thirty acres of said eighty acres, but he shall not pledge, mortgage or sell the eighty acres of land hereby given to him, nor any part thereof, until he is thirty-five years old."

In the case of *Wallace v. Smith* the devisee sold the land conditionally to Wallace, and an agreed case was submitted to test his power to convey. The court held that the restriction in the will, that he should not pledge, mortgage or sell the land, was valid. But the question is in this case whether, notwithstanding this, his title may be subjected by the creditors to the payment of their debts. In *Stewart v. Brady*, 66 Ky., 623, this court, while upholding a similar restriction as to a voluntary alienation, said: "The interdiction constructively applies to any such sale unless for payment of debts for which he might be legally bound." This exception as to debts for which the devisee was legally bound is again brought out by the court when the same will was before it in *Stewart v. Barrow*, 70 Ky., 368, for there the court rests its judgment on the ground that the debts for which the mortgage was given were the debts of the husband. These cases are referred to and quoted from in *Wallace v. Smith* as the basis of that opinion. By section 1681, Kentucky Statutes, it is provided: "Land to which the defendant has a legal title in fee for life or for a term, whether in possession, reversion or remainder, may be taken and sold under execution." By section 1702 a homestead of \$1,000 is exempt. By section 1709 incumbered property may be sold. By section 2355 estates of every kind held in trust are made subject to the debts of the person for whose benefit they are so held just as they would be if those persons owned a like interest in the property itself. The purpose of the statute is to make every interest which a debtor may own in land, not exempt as homestead, subject to the payment of his debts, and it has often been held that a deviser can not vest in his devisee a beneficial interest in land which shall not be subject to the payment of his debts, although the will expressly so provides. (*Johnson v. Ellis*, 51 Ky., 483; *Samuels v. Salter*, 60 Ky., 298; *Wooley v. Preston*, 82 Ky., 415; *Parsons v. Spencer*, 83 Ky., 305; *Bland v. Bland*, 90 Ky., 400.) In the case last cited the court said: "The law regards the substance rather than the form; and persons disposing of their property by will can not be permitted to really make a debtor the beneficiary of their bounty, and by evasion defeat the statute for the protection of the creditor."

While a man may dispose of his property as he pleases by will, the law will disregard any restrictions which he may place upon the property that are forbidden by law. It is the policy of our law that no man can hold as his own and enjoy property free from the claims of his creditors, but that all property not exempt from execution shall be subject to the payment of his debts. If a provision that the devisee should not pledge, mortgage or sell the property until he reached a certain age would exempt it from the claims of his creditors until that time, then the purpose of the statute might be easily defeated, and the beneficial interest in property might be secured to devisees and placed beyond the reach of their creditors. This can not be allowed.

The question is not here presented whether, under a devise like this, if it was necessary to pay debts, the devisee might not in good faith sell the property, or a part of it, for this purpose himself, to avoid the cost of judicial pro-

ceedings. The right of the creditor to subject the property comes from the statute which overrides the will where the will is in conflict with the legislative policy. The disability of the devisee to sell comes from the will under which he holds. The testator in disposing of his estate may annex any condition to his bounty he may see fit, not inconsistent with the policy of the law; and a reasonable restriction on the power of the devisee to alienate is upheld on this ground, as the testator may have a variety of reasons for such a provision. But while this is true of the devisee, it can not affect a creditor whose rights are conferred by law.

Judgment reversed and cause remanded for a judgment subjecting the land.

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CITY OF LOUISVILLE v. BITZER.

BITZER v. FULTON, ASS'EE.

(Filed April 24, 1903.)

1. Street Improvements—The city council of Louisville, by ordinance, directed that the carriage way of Daisy lane be improved at the cost of the property owners abutting thereon, and to the depth of 150 feet southeast. The cost of the improvement equalled or exceeded the value of the lots sought to be subjected to the costs, and the question is presented whether or not the lots can be subjected to said cost, and whether or not the city can be subjected to pay the cost of the improvement to the contractor. Held—That said property can not be subjected to said cost as the proof is clear that said improvement has not increased the value of the lots. Nor can the chancellor adjudge that said property should pay any part of said cost as there is nothing upon which to base an approximation of costs.

2. Contracts—The city is liable to the contractor for the amount of his claim although the contract may have contained a provision exempting the city from liability to the contractor for said improvement. Held—That as the statute makes the city primarily liable for such improvements, it can not by contract relieve itself from such liability.

H. L. Stone for city of Louisville.

Bodley, Baskin & Flexner for P. Bitzer.

Lane & Harrison for Fulton, Assignee, &c.

Appeals from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hobson.

On September 11, 1897, the general council of the city of Louisville, by ordinance, directed the carriage way of Daisy lane to be improved from the center line of Glenn Mary avenue extended to a line 150 feet southeast of and parallel to it. A contract was made with J. R. Gleason for the work, which was done by the contractor, the cost being \$1,778.48. The amount was apportioned to Nannie M. Wilson, \$757.56; to H. S. & M. S. Barker, \$1,001.10; and the property owners having refused to pay, this suit was brought to enforce the lien on the property. It was shown by the proof that the Wilson lot is on the hilly side of Daisy lane, or, as it is sometimes called, Transit avenue. It commences at the intersection of Daisy lane and Glenn Mary avenue and extends east of this 810 feet. Two-thirds of the lot fronting on

Daisy lane is from eight to ten feet higher than the street, and as it runs back from the street it ascends rapidly. The other third of the lot is a worked out quarry forty or fifty feet higher than Daisy lane, which it is impossible to ascend from the street, except by means of a ladder. The lot is not available for building purposes. The ordinance directed the cost of the street to be assessed against the property owners to a depth of 150 feet. The amount of land against which the cost is assessed under the ordinance is 46,574 square feet, or a little more than an acre. This ground, as shown by the evidence, is worth between \$300 and \$500. The Barker property is from ten to twelve feet lower than the land which had been laid out for building purposes, and is below the level of the street to such an extent that to fill it up would be so costly that it is practically valueless for building purposes. The amount of this lot, which is subject to the lien, is 61,871 square feet, or something over an acre and a half, of value from \$300 to \$400 an acre. Neither piece of property is suited for agricultural purposes and neither under the evidence has received any benefit from the improvement. Neither is worth now the amount of the charge against it. The circuit court, therefore, on final hearing dismissed the petition of the contractor against the property owners on the ground that it was spoliation to enforce the lien, but he entered judgment in favor of the contractor against the city for the amount of the warrants, and from this judgment the city and the contractor's assignee appeal. There is little or no conflict in the evidence, and on the appeal the chief contention is that the court ought at least to have charged some part of the cost of the improvement to the property, although it might have been improper to charge it all to the property, and that no judgment should have been rendered against the city.

The method of assessment by the foot has been followed so long and has been so often approved by this court that it no longer remains an open question. (*Preston v. Roberts*, 75 Ky., 570; *Nevin v. Rouch*, 86 Ky., 492.) The rule also is that while these assessments rest upon the basis of benefits, or presumed benefits, to the property assessed, it is not essential to their validity that actual enhancement in value or other benefits to each owner should be shown, the judgment of the city council being conclusive as to the propriety of the improvement. (*Pearson v. Zabel*, 78 Ky., 174; *Ludlow v. Trustees*, 78 Ky., 360; *Preston v. Rudd*, 84 Ky., 156; *Covington v. Schultz*, 16 Ky. Law Rep., 831; *Allen v. Wood*, 20 Ky. Law Rep., 61; *Bullitt v. Selvage*, 20 Ky. Law Rep., 599.) On the other hand, it is held that when owing to extraordinary facts the presumption on which the rule rests does not apply, and to force the owner to make the improvement is to confiscate his property without compensation, this is spoliation, and will not be enforced. (*Covington v. Southgate*, 54 Ky., 491; *Louisville v. Louisville Rolling Mill Co.*, 66 Ky., 416; *Broadway Baptist Church v. McAfee*, 71 Ky., 508; *Preston v. Rudd*, 84 Ky., 150; *France v. Jacob*, 88 Ky., 532; *James v. Louisville*, 19 Ky. Law Rep., 447.) In other words, the judgment of the legislative municipal authorities is held conclusive in all cases of doubt as to these matters; but where the total value of the property taxed after the improvement is made is less or no more than the cost of the improvement, there is no room for difference of opinion, that to enforce the lien is to take from the owner his property without compensation. In no case decided by this court has this been

approved; and while we are unwilling to extend the rule, it has been so often laid down that it can not now be departed from. It may be objected that logically the rule should be to reject all assessments in excess of the benefits received by the property owners, and not to confine its operation to cases where the assessment equals the value of the property when improved. But in every system of taxation exact equality of benefits among those taxed is never attainable. The rule of assessment by the foot is not less arbitrary than the rule under consideration. In matters of this sort there must be some settled rule, and it is especially important that the rule should be well defined. The proper legislative authority, not the court, must judge of the propriety of the improvement and the benefits to the abutting property owners. But no department of the government can take the property of the citizen for public purposes without just compensation, and when the entire property is taken to pay for a public improvement there is no room for a presumption as to the benefits received, but a case of spoliation is shown.

The proof here showing conclusively that the cost of the improvement far exceeded the entire value of the property assessed after the improvement was made, the circuit court properly refused to enforce the lien upon the property. But it is insisted that, as under section 2884, Kentucky Statutes, the court is authorized to make all corrections, rules and orders to do justice to all parties concerned, it should at least have enforced the warrants to some extent against the property, although the whole amount was not enforceable. The difficulty with this is that we have nothing to guide us, and that to enter any judgment against the property owner would be simply an arbitrary guess. The proof is that the property received no benefit at all from the improvement. The testimony to this effect by the witnesses is supported by the facts shown in the record. We can not take away from the citizen his property without proof warranting the judgment.

When the assessment is enforced on the ground that the judgment of the legislative authorities is conclusive of the question of benefits, the judgment of the court is based upon the decision of the legislative body fixing the boundary on which the burden of the special tax shall fall. But when the decision of the legislative authorities is rejected for the reason that a case of spoliation is established, the court has nothing to guide it in determining how far the property of the citizen is taken for public purposes without just compensation, except the proof in the case; and there can be no judgment against the citizen unless the evidence is sufficient to enable the court to reach a conclusion intelligently. The party on whom the burden of proof rests must make out his case. Without proof the chancellor can not assume there were benefits to a certain extent, and guess at the amount. The proof here being to the effect that the property was not benefited by the improvement and there being practically no contrary evidence, the chancellor refused to enter any judgment against the property holders, and under the evidence we can not disturb his conclusion on the facts. If the case had been prepared to present this matter, or even if a motion has been made for leave to take further proof on the subject, a different question would be presented.

It remains to consider the propriety of the judgment against the city. Section 2884, Kentucky Statutes, provides: "And in no event, if such improvement be made as is provided for, either by ordinance or contract, shall the

city be liable for such improvement without the right to enforce it against the property receiving the benefit thereof."

It is settled, however, that this statute does not apply to cases in which the city has no power to make the improvement at the cost of the owners of adjacent property, and that where the city has complete authority to contract for the work, but no authority to make a charge on the abutting property, it is liable to the contractor for the price of his work. (*Caldwell v. Rupert*, 78 Ky., 179; *Louisville v. Nevin*, 78 Ky., 549; *Craycraft v. Selvage*, 78 Ky., 696; *Louisville v. Leatherman*, 99 Ky., 218; *Gosnell v. Louisville*, 104 Ky., 212.) The contract under which the work was done, however, contains these words: "It is further agreed by the contractor that for the contract price or cost of all work mentioned above, or required to be done by him under any of the provisions of this contract, he will look alone to the lot owners or the property described in the ordinance aforesaid, and that in no event shall he be entitled to recover any part thereof from the city of Louisville."

The learned counsel for the city earnestly maintains that the contractor is bound by his contract, and that having agreed not to look to the city, he can not recover against it. A number of authorities from other States are relied on as sustaining this position. But the contract was made under the statute, and must be read in connection with it. The language of the contract is certainly no stronger than the language of the statute. Its natural construction is that it conveys the same idea as the statute. The rule is that if a contract is capable of two constructions, by one of which it is illegal, and by the other it is legal, that construction will be preferred which makes the contract legal. The city has authority to contract for the construction of streets. It has also authority in certain cases to contract for their construction at the cost of the abutting property. If the rule is that the city is responsible to the contractor where it is held that the city had no authority to contract for construction of the street at the cost of the abutting property, then the contractor in making his bid will not take into consideration uncertainty of pay as an element in fixing the price at which he will do the work. But if the rule is that only the property owner is to be looked to, and that the contractor will get no pay for his work where the city had no authority to contract for the improvement at his cost, then the contractor in undertaking the work and fixing the price must take this uncertainty into consideration, and add to the price he would otherwise charge a sum sufficient to cover the risk of nonpayment of the claim. An additional burden will, therefore, be laid upon the property owner, for in case he is held liable he will have to pay not only the fair cost of the improvement, but an additional sum to cover the risk of the contract. The legislature aimed to avoid placing this burden on the property holder, and so made the city liable in this contingency, for it re-enacted the present statute with the construction which this court had placed upon it. When the legislature has placed the burden upon the city to avoid injustice to the property holder as well as the contractor, the city can not by contract relieve itself from the liability thus imposed upon it by law, and if the contract before us required such a construction we should be compelled to hold it contrary to the policy of the statute, and not enforceable. The authorities relied on from other States are, therefore, inapplicable.

Judgment affirmed.

Judge Barker not sitting.



HOFF, By, &amp;c. v. HAHN.

(Filed April 28, 1908—Not to be reported.)

Negligence—In this action against appellee to recover damages for injuries to a child five years old from being run over by a wagon in a street, alleged to have resulted from negligence of appellee's driver, the court properly peremptorily instructed the jury to find for the defendant as the evidence fails to show that the driver was guilty of any negligence or neglected any precaution to avoid the injury.

Aubrey Barbour for appellants.

S. C. Bailey for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hobson.

Appellant, Walter Hoff, an infant five years old, by his father as next friend, brought this suit to recover of the defendant for personal injuries received by the child from being run over by a horse and wagon belonging to appellee. At the conclusion of the evidence the court instructed the jury peremptorily to find for the defendant. The proof shows that appellee is a butcher, and the wagon referred to was driven by his servant delivering meat to his customers. The little boy was playing with some children in a lot and ran out into the street to the street car track. He then returned in a run to the curb, then turned and ran back toward the street car track, and as he got about four or five feet from the curb was struck by the horse and knocked down. There were two tracks in the street of the street car company. The wheels of the wagon were not more than two or three feet from the curb. The horse was moving in a slow trot, and from the evidence there could not have been much difference in his speed and that of the child as he ran out from the curb. We see nothing in the evidence to indicate that the driver should have anticipated that the child would run immediately back into the street after reaching the curb; and from the nearness of the wagon to the curb it is evident that the driver was without power to avert the danger after the little fellow left the curb and started back into the street. To hold the driver of vehicles responsible for accidents under such circumstances would be to impose upon them more than ordinary care, and in fact to make them responsible for injuries to children which could not be averted except by driving at a very slow gait. The accident did not occur at a public crossing. The speed of the wagon was usual, and from the facts shown by other witnesses, who saw the occurrence, we are satisfied the little boy ran out just in front of the horse, and that the injury to him was not due to want of ordinary care on the part of the driver. It is true that persons driving vehicles upon the street must keep a lookout and use ordinary care to avoid injury to those upon the street. It is also true that a child five years old is not chargeable with contributory negligence. But conceding all this to warrant a recovery, there must be evidence sufficient to show negligence on the part of the driver bringing about the injury. This did not appear, and the court properly instructed the jury to find for the defendant, for the drivers of vehicles are not responsible for inevitable accidents.

Judgment affirmed.

## WARFORD, &amp;c. v. TEMPLE.

(Filed April 28, 1903—Not to be reported.)

Bills and notes—Pleadings—Premature judgment—Appellee brought this action to recover upon two notes executed by appellants as trustees of a school district. The notes recite that they, as trustees, promise to pay same with interest, and they further recite that the notes are for money borrowed to build a schoolhouse in the district. Personal judgment was prayed for—Appellants filed a demurrer to the petition, but without disposing of it the lower court gave a personal judgment against appellants. At the next term appellees moved to set aside the judgment and permit them to file an answer as the judgment was premature. In the answer they alleged that the words "we or either of us promise" were inserted in the notes by mistake. It also alleged that the money was used in building the schoolhouse. The court overruled their motion and they have appealed. Held—That the court erred in rendering judgment against appellants before disposing of their demurrer. The answer should have been filed, and appellee was not entitled to a personal judgment as the notes clearly expressed the fact that they were the obligations of the district and no personal liability was assumed by the trustees.

Oliver & Oliver for appellants.

Moss & Moss for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, Adam Temple, sought in this action to make the appellants, T. W. Warford and L. F. Green, personally responsible for the debts evidenced by the following obligations:

"February 26, 1896.

"Twelve months after date we, or either of us, trustees of district No. 6, white, of McCracken county, Kentucky, promise to pay to the order of Adam Temple the sum of \$110, without interest until after maturity, it being money borrowed of said Temple to build a schoolhouse in said district No. 6.

"T. W. WARFORD,

"L. F. GREEN,

"Trustees."

"February 21, 1896.

"Twenty-four months after date we, or either of us, the trustees of white school district No. 6, McCracken county, Kentucky, promise to pay to the order of Adam Temple the sum of \$120 for value received, without interest until after maturity, it being money this day borrowed of said Temple to build schoolhouse in said district No. 6.

"T. W. WARFORD,

"L. F. GREEN,

"Trustees."

He alleges in his petition that appellants were the trustees of common school district No. 6, and that it had been legally determined that a schoolhouse should be erected and furnished; that there was not enough money under the control of the defendants, as trustees, for this purpose, and that they borrowed and used the money for which the notes were executed for the purpose of erecting and furnishing a schoolhouse; that it was their duty as

trustees to levy and have collected a tax sufficient to have paid or discharged these notes, but that they had failed and refused to do so, and charges that in consequence of such dereliction on their part they were personally bound to him for the money so borrowed, and asked a personal judgment therefor and for all proper relief.

The defendants filed a general demurrer to plaintiff's petition, which was not acted upon, but it was adjudged that plaintiff's petition be taken for confessed, and personal judgments were rendered against each of the defendants on both of the obligations at the May term, 1901, of the McCracken Circuit Court. At the following September term of the court the defendants moved the court to set aside the judgment on the ground that it was prematurely entered under section 517 of the Civil Code. And at the same time they tendered and offered to file their answer, in which they allege in substance that they were the trustees of common school district No. 6; that the county superintendent had notified them that the schoolhouse had been condemned, and that the furniture therein was insufficient; that there were no funds in their hands available for erecting a new schoolhouse or making necessary repairs, and that the money for which the notes sued on were executed was borrowed for the use and benefit of the district pursuant to the authority conferred upon them by section 4440 of the statutes; that with full knowledge of the facts plaintiff loaned to them the money as school trustees, and not in their individual capacity; that in the year 1896 they levied a capitation tax on each white male citizen in the district over twenty-one years of age of \$1 and an ad valorem tax of 25 cents on each \$100 worth of property for four years; and that as long as they were trustees of the district the tax so levied was collected and applied to the erection and equipping of the schoolhouse for the district; that their terms as trustees expired in the year 1897, and they were not trustees for the years 1898, 1899 or 1900, but that at the date on which their answer was filed they were again in office and would make every effort to collect the money to pay the plaintiff's debt. They also charge that the words, "we, or either of us, promise to pay," were inserted in the note by mistake and oversight of the draughtsman, and that it was never intended or understood, either by them or by the plaintiff, that they were in any event to be personally bound therefor; but that they were executed and accepted as the obligations of the common school district. The motion of defendants to vacate the judgment and file their answer were both overruled, and they have appealed.

The judgment of the lower court must be reversed for two reasons: First, it was erroneous for the trial court to have rendered a judgment by default against a defendant who had filed a demurrer to the petition and which remained undisposed of. (Black on Judgments, volume 1, section 86; En. Pl. & Pr., volume 6, page 80; Grady v. Prewitt, 28 Ky. Law Rep., 506.) Besides, it seems to us that the language of the obligations sued on conclusively shows that the makers did not intend to promise in their individual capacity. They show that the money was to be expended in the erection of a schoolhouse for the district, and the promise, both in the body of the instruments and in their signature thereto, is in their official capacity. It is difficult to understand how they could have used more explicit language. But even if we are mistaken in this construction of the language employed,

there can be no doubt that the answer tendered by the defendants set out a complete and valid defense thereto, and one that is not at all inconsistent with the rational interpretation of the note. We are supported in this conclusion by *Yowell v. Dodd*, 66 Ky., 58, and the authorities there cited. In *Pack, &c. v. White*, 78 Ky., 243, *White* sued *Pack, &c.*, upon an obligation which reads as follows: "Twelve months after date we, the directors of the Big Eagle and Harrison County Turnpike Co., promise to pay to the order of Mrs. Mary E. White the sum of \$1,500 for value received, negotiable and payable without defalcation or discount at the Branch Bank of the Farmer's Bank at Georgetown, with interest at the rate of 8 per cent. from date until paid."

The notes were signed by the defendants as individuals. In that case the defendants were held liable as individuals, the court saying: "There is nothing on the face of the paper showing that the money was to be applied for the benefit of the corporation, or to discharge a debt due by it. The corporate name embodied in a note may imply that the corporation was interested in some manner in the consideration, but to make it liable on the obligation it must be averred and proven that it was executed and received as the obligation of the company, and by mutual mistake the parties failed to use language creating the liability. This is the proper test in determining the liability of the parties upon the face of an instrument like this."

The notes sued on show on their face that the money borrowed was to be used to build a schoolhouse for the benefit of the district, and it appears from the averments, both of the petition and answer, that the plaintiff knew the purpose for which the money was borrowed, and that it had been so applied. Under section 4440 of the Kentucky Statutes appellants were not only authorized to borrow money to build or repair the district schoolhouse after its condemnation by the county superintendent, but were liable to be indicted and fined for failing to do so. But for the use of the words "we, or either of us," in the obligations sued on the demurrer filed by the defendants should have been sustained, and in the answer tendered by them it is plead that these words were used by mistake of the draughtsman. With this correction, we think that the pleadings conclusively show that it was understood by both parties that the obligation was that of the district, and not of the individual defendants.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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McDOWELL, &c. v. McDOWELL, &c.

(Filed April 28, 1908—Not to be reported.)

Cancellation of conveyance—M. owned a farm and he and his wife being old and needing attention, made a deed conveying the land to his son and the wife of M., in consideration that the son would care for both of them during their lives. After several months both parties became dissatisfied with the arrangement and the son agreed to reconvey the property, but before the deed could be made M. shot himself. Afterwards his widow and a daughter brought this suit to cancel the deed. The lower court granted the relief prayed for, and this appeal is prosecuted. Held—That this court is dis-

posed to give some weight to the finding of the chancellor, and it seems to be a fair and equitable adjustment of the trouble, and will not, therefore, be disturbed.

Nat W. Halstead for appellants.

Twynan & Handley for appellees.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Hobson.

Peter McDowell owned a farm in Larue county worth about \$4,000. He had two children, Alonzo McDowell and Sarah Sowers. He had been twice married. The children were by his first wife. He was quite advanced in years; his wife, who was some sixty odd years of age, was addicted to the morphine habit, and by reason of his feebleness and her habits, in January, 1899, they made a deed to the farm to his son, Alonzo McDowell, and wife in consideration that they would furnish them a home and take care of them as long as they lived. He put an addition to his house and they moved over. In the following spring the old lady became somewhat dissatisfied, and there is some proof that later the old gentleman also complained. In April, 1900, neither party being pleased with the arrangement, it was agreed between them mutually that Alonzo McDowell and his wife would deed back the farm of his father, and the father would pay him \$200 for board up to that time. The deed would have been made, but Mrs. McDowell was sick and could not acknowledge it. On the following Monday the old people arranged to return home, and on Sunday night Peter McDowell shot himself. Two weeks after this the widow left Alonzo's house, and a few days later she and Sarah Sowers and the latter's husband filed this suit to cancel the deed. On final hearing the circuit court cancelled the deed, and Alonzo McDowell appeals.

Our rule is to give considerable weight to the chancellor's finding on questions of this sort, for the reason that the chancellor is on the ground and his conclusions of fact in the exercise of his discretion should not be disturbed in matters of doubt. We attach no importance to the proof for appellees, that the deed was obtained from Mrs. McDowell when she was under the influence of opium. On the contrary, we are satisfied from all the circumstances the contract was deliberately and fairly made. We are also satisfied that Alonzo McDowell in making the contract was prompted by the motive of advancing his father's happiness in his declining years, and that he was largely actuated by the same motive in agreeing to rescind the contract. We are also satisfied from the proof that he and his wife tried in good faith to carry out their contract. But still the fact remains that after fifteen months' trial neither party to this contract was satisfied with it, and both were willing for it to terminate. From this fact, and all the circumstances shown by the evidence, we are constrained to the conclusion that the home at Alonzo McDowell's, by reason of the old lady's unfortunate habits and some other facts not necessary to be mentioned, had become such as the contract did not contemplate, and both parties realized that their happiness depended on a rescission of it. The purpose of the arrangement was to give the old people a home. There can be no real home when the spirit of peace has departed and unkindness takes its place. The agreement of the parties to rescind the con-

tract is conclusive confirmation of the proof for appellees as to the state of feeling then existing between the parties, and under this state of feeling the best thing for them was to terminate the arrangement. Such a state of feeling was sufficient reason for rescinding the conveyance.

The court left appellant in possession of the rents of the property during the time he held it. It also left him in possession of a mule worth about \$100 and the wheat drill. It seems to us that these were sufficient compensation for what he was out in the way of boarding the old people, and on the whole case we see no reason for disturbing the chancellor's judgment. Equality is equity; after the son is paid for the board furnished the father and his wife substantial justice is done as between the son and daughter when the estate is equally divided between them, after setting apart to the widow her share under the law. It is true the judgment complained of gives the widow less than she would have got under the deed, but this is of her own seeking, and of it she does not complain. We see nothing in the record to indicate that she is not competent to manage her own affairs and make an election for herself. In excluding the deposition of Mrs. Bell McDowell the circuit court followed *Covington v. Geyler*, 98 Ky., 275, and this ruling was not prejudicial to appellant, for the reason that there was nothing new in her testimony and the admission of her deposition could not have affected the result.

Judgment affirmed.

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HUFF, &c. v. MINIARD, &c.

(Filed April 28, 1908—Not to be reported.)

**Title—Patents—Evidence**—This action was instituted by appellees to recover of appellants logs cut from a 100-acre tract of land alleged to be of the value of \$408. Appellees claim title to said land under deed made to them by A., who claims to be the patentee, while appellants claim same from B., the father of A., and who made the survey and obtained the patent in his own name and under whom appellants claim as heirs of a vendee by regular conveyances from B. A. claims that B. had the survey made for him, and the patent was made to the father instead of the son by mistake. The presumption is that the survey and patent were made in the name of the father, as they show on their faces, and the testimony of the son after the death of the father, and after the son had assigned his interest, as to the declarations of the father is incompetent. After possession held under title from B., since 1844, appellant's title will not be disturbed, and appellees are entitled to recover nothing from them. The proof in the record is sufficient that the 100-acre survey in controversy was included in the general description of a large body of land conveyed by B.

Jas. H. Jeffries and Wm. Lewis for appellants.

H. C. Faulkner for appellees.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Hobson.

On December 4, 1844, William Turner, of Harlan county, made a survey of 100 acres of land, which was carried into grant on July 2, 1845. The survey describes the land as lying in Harlan county on Turner's creek of Cressy

Fork. On March 3, 1857, William Turner and John S. Turner by deed conveyed to Robert Turner "a certain farm, composed of various tracts of land situated in the county and State aforesaid, consisting of about 700 acres, beginning on a sycamore standing on the south bank of the Creasy river; thence running so as to include all the various tracts of land owned by the said William Turner and John S. Turner on both sides of said Creasy river." Eli Huff, the ancestor of appellants, got the land from Robert Turner or his heirs, who made him a deed for it. Eli Huff lived on the farm for a number of years, and finding that the 100-acre survey above referred to did not adjoin the other land, took out a patent for the intervening land, so as to get all his land in one boundary. After this he died in the year 1838, leaving appellants in possession as his heirs at law.

William Turner had a son named William Turner, who in 1844 was some five or ten years old, and this son, on September 14, 1895, for an alleged consideration of \$450, conveyed the hundred acres above referred to to appellee, John B. Miniard. The real consideration of the deed was \$30. And it was not recorded until March 25, 1899. On March 20, 1899, Miniard and John M. Bailey, to whom he had conveyed an interest in the land, instituted this action to recover for 136 poplar logs cut by appellants from the land, alleged to be of value \$408. On the trial of the case the court fixed the value of the logs at \$222.41, and entered a judgment to the effect that the plaintiffs had shown themselves to have the better right to the land from which the timber in controversy was cut, and it was, therefore, adjudged that the plaintiffs recover of the defendants the value of the timber, \$222.41, and their costs.

It is insisted for appellees that as there was no demand made on the court for a separation of the conclusions of law from the findings of fact, the judgment of the court on all questions raised by the pleadings must be treated as the verdict of a properly instructed jury. This is true, but the judgment of the court is in substance a finding of fact in favor of the plaintiffs' title, and it is insisted for appellant that this finding is palpably against the evidence.

The only ground upon which William Turner, Jr., who made the deed to Miniard in March, 1895, claimed title to the land was that his father, William Turner, Sr., made the survey and obtained the grant in his name and for him. The proof shows that William Turner, Jr., was about ten years old at the time this survey was made, if we take his statement as to his age; or some five years younger, if we fix his age by that of another man, who, he says, was older than he. The surveyor who made the survey says that it was made by William Turner, the father. There is nothing in the record of the survey or patent to indicate that it was made in the name of William Turner, Jr. The presumption is that the William Turner therein named is the William Turner who had the survey made and obtained the patent. This legal presumption, after the lapse of half a century and the death of all the parties, can not be overthrown but by the clearest evidence. The only proof to sustain the conclusion of the circuit court are some alleged declarations of William Turner proved by William Turner, Jr., and the father of plaintiff Miniard, to the effect that he intended the land for William Turner, Jr., and had the survey made and the patent issued in his name, but this evidence, so far as testified to by William Turner, Jr., is incompetent, as he can no

testify for himself as to the declarations of his father, and by the provisions of the Code his competency in this respect is not affected by his assignment of his interest in the land to another; and waiving this, we are clearly of the opinion that such evidence can not overturn the record after the death of all the parties under the circumstances shown in the case. William Turner, Jr., asserted no right to the land in the lifetime of his father, or Robert Turner, his vendee, or Eli Huff, who bought the land when it was sold to settle the estate of Robert Turner. In fact, so far as appears, for something over thirty years, he acquiesced in the claim of Huff and Robert Turner to this land, and in 1895 he conveyed away to Minlard the tract for \$30, putting in the deed an alleged consideration of \$450.

The land has valuable timber upon it, and his sale of it for \$30 is in keeping with his previous conduct showing that he had no title to it. If the title to land could be destroyed by such proof no confidence could be placed in record titles. A question is also made as to whether the deed from William Turner to Robert Turner covered this 100-acre survey. The purpose of the deed on its face was to convey all the land of William Turner on Creasy Fork. Neither William Turner, nor any of his children, have set up any claim to the land. The claim of William Turner, Jr., is not made as the heir of his father, but on the idea that he was the patentee. If this body of land had not at the time been understood to be included in the deed which William Turner made, it is incredible that none of the parties in interest should have set up claim to it or looked after it. The acquiescence in Huff's claim of the land for so many years, and until after his death, as well as the death of William and Robert Turner, is a practical construction of the deed which can not now be disregarded.

On the admitted facts the judgment of the circuit court is not sustained by sufficient evidence, and it is, therefore, reversed and the cause remanded with directions to grant appellant a new trial.

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BEDFORD-BOWLING GREEN STONE CO., &c. v. OMAN, &c.

(Filed April 28, 1903.)

Contracts—Leases—Common carrier—Conveyances—The original vendors of the appellant, Bedford-Bowling Green Stone Co. and John Oman owned or leased the land or privilege of quarrying valuable cutting stone from same, and in order to facilitate the transportation of stone and necessary machinery to and from the quarries, built a switch railroad about three and one half miles in length to connect with the L. & N. R. R. Co., and made a transportation contract with it. Subsequently it was agreed that the said railroad company should operate, control and keep said switch road and furnish transportation for the stone company. Appellee Oman subsequently became the purchaser of a one-third interest in the quarries at a judicial sale of the interest of a former interest, and this share was divided off and set apart to him by commissioners appointed by the court. In this action Oman claims to be a part owner in the railroad switch and as such entitled to require the L. & N. R. R. Co. to furnish him transportation to and from his quarry, and seeks to enjoin appellant, Bowling Green Stone Co., who own the other two thirds interest in said quarries, from interfering with its hts. Held—That under his purchase appellee Oman acquired no rights to



the switch railroad as it has virtually become a part of the system of the railroad company, and is under obligation to transport stone and machinery for said Oman only as a common carrier, to and from reasonable points along the line at which appellee may lawfully ship or receive it. Although the part of the tract of land on which the switch road now lies is owned by appellant, the Bedford-Bowling Green Stone Co., yet the right to take the cutting stone which belongs to appellee Oman necessarily carries with it such reasonable use of the surface over the land as is necessary to make the interest of Oman in the land available.

Bodley, Baskin & Morancy and John E. DuBose for B.-B. G. Stone Co.

Jas. E. Mitchell, Mitchell & DuBose, E. W. Hines, B. D. Warfield and Thos. B. Harrison, Jr., for L. & N. R. R. Co.

L. McQuown for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Barker.

This action involves the rights of appellees to the use of a railroad which runs from the Memphis Junction of the Louisville & Nashville R. R. Co.'s line in Warren county, Kentucky, about three and a half miles, to the quarry of the appellant, Bedford-Bowling Green Stone Co.

It is not necessary, for the purpose of this case, to set forth the statements in the pleadings with any minute particularity. It is sufficient to say that the Bedford-Bowling Green Stone Co. claims to be the exclusive owner of the switch in question, and, on the other hand, the appellees claim a part ownership, with the right to its use; and if that be not so, that it is a part of the railroad system of the appellant, Louisville & Nashville R. R. Co., and as such they have the right of shipment over it; and that the Louisville & Nashville R. R. Co. has no legal right, as a common carrier, to refuse to transport freight along its line; and that the pleadings properly present these issues for adjudication.

Upon the trial below the learned chancellor held that the appellants were part owners of the switch in question, and enjoined the Bedford-Bowling Green Stone Co. from interfering with their rights to its use, and required, by a mandatory injunction, the appellant, Louisville & Nashville R. R. Co., to transport appellees' freight over it to their quarry, at, or near, the end of the line. From this judgment an appeal has been prosecuted to this court.

In 1870 Hugh F. Smith and his wife, Lydia A. Smith, were the owners in fee simple of a tract of land in Warren county, Kentucky, known as the Howarth tract; and they and one B. C. Sanders, together, owned the perpetual right to quarry the fine cutting stone in an adjoining tract known as the Loving land. Smith and wife owned an undivided two-thirds interest and B. C. Sanders an undivided one-third interest. Sanders had no interest in the Howarth land.

On the 22d day of January, 1870, Smith and wife and B. C. Sanders entered into a written lease with Owen, McDonald & Co., whereby they leased to them for a term of thirty years the right to work and to use all the fine cutting stone contained on the two tracts of land. In consideration of this lease Owen, McDonald & Co. bound themselves to build, or cause to be built, within three years from the date of the lease, a railroad for the quarry

on the land to the Memphis branch of the Louisville & Nashville R. R. Co., and to commence operations in the quarry within three years from the date of the lease; and it was stipulated that unless this was done the lease was to be null and void. Owen, McDonald & Co. were also to pay to the lessors, as a royalty, \$1 for each 100 feet of all stone suitable for cutting or dressing quarried by the lessees during the term of the lease, and covenanted to keep their books open to the inspection of the lessors, so that they might settle between themselves as to their rights in the royalty. At the expiration of the term of the lease it was stipulated that the lessees could remove all the tools and machinery, unless the lessors paid a fair price for them.

Afterwards Owen, McDonald & Co. conveyed their interest in the lease to the White Stone Quarry Co., which acquired the right of way from the stone quarry to the Memphis Junction of the Louisville & Nashville R. R. Co., and built thereon the railroad switch involved in this litigation; since which time the interests originally acquired by Owen, McDonald & Co. have passed in regular succession from the White Stone Quarry Co. to the Belknap & Dumesnil Stone Co., and from it to the Bowling Green Stone Co., and from it to the Columbia Finance and Trust Co., which conveyed it to the Bedford-Bowling Green Stone Co.

In 1888 the Belknap and Dumesnil Stone Co. purchased all the interests of the Smiths in both the Howarth and the Loving tracts, and thus became the owner in fee simple of the first, and the owner of a two-thirds interest in the cutting stone in the latter tract.

In 1878, B. C. Sanders being indebted to Milton Feland and McElwain, conveyed to them his interest in the cutting stone in the Loving tract. Feland having died, in a suit to settle his estate, his interest in the cutting stone was sold, and bought by appellee John Oman. McElwain, in 1883, sold his interest in the cutting stone to Sallie M. Smith, and she sold it to the Belknap and Dumesnil Stone Co. in 1888, so that at the expiration of the lease in 1900 John Oman was the owner of a one-third interest in the cutting stone in the Loving tract, and the Bedford-Bowling Green Stone Co. was the owner, in fee simple, of the Howarth tract, and of an undivided two-thirds interest in the cutting stone in the Loving tract. Between them, and in the proportions mentioned, they were the owners of all the property demised by the lease of 1872.

After the expiration of the lease the Columbia Finance and Trust Co., appellants' vendor, and the appellee, John Oman, in an action that was pending in the Warren Circuit Court, etc., entered into an agreement, by which that case was settled, and a division made between the parties at interest as to their rights in the cutting stone in the Loving tract. In pursuance of this agreement commissioners were appointed to divide the interests of the parties in the cutting stone, which having been made, the commissioner of the court conveyed to each party to the settlement their respective portions. This deed having been put to record, there is now no dispute as to the rights of the parties to this litigation on this question. John Oman having opened a quarry on the Loving tract, set apart to him, very near the quarry operated by the Bedford-Bowling Green Stone Co., is naturally very anxious to use the switch in transporting his machinery to his quarry, and in transporting his stone to the main line of the Louisville & Nashville R. R., it

being impracticable to haul such heavy freight for so long a distance in any other way.

We do not think, however, he has any interest in the switch in question; it was built by the White Stone Quarry Co., a remote vendor of appellants, under the lease of 1870, and that instrument contains no covenant for its conveyance to the lessors at its expiration; at which time, being a part of the realty, in the absence of any stipulation governing the matter, it became the property of the owners of the soil to which it was affixed.

In order for appellee Oman to prove himself entitled to an interest in the railroad switch involved in this litigation, it was incumbent upon him to exhibit some muniment of title by which he acquired an interest in it; this he has wholly failed to do. Even should it be held that his remote vendor, B. C. Sanders, acquired an interest by the terms of the lease of 1870, it would still be necessary for him to show some transmission of that right to him. He purchased the interest he holds at a judicial sale in the settlement of Milton Feland's estate, and the deed of the commissioner of the court in that case to him, after describing the land containing the cutting stone to be conveyed, contains this stipulation: "That which is conveyed is the interest of M. C. Feland in the cutting stone on the land aforesaid, being one third-interest." So that all he purchased was an interest in the cutting stone, and not an interest in the railroad switch. The railroad switch involved in this litigation was built by the White Stone Quarry Co., and in so doing they entered into a contract with the Louisville & Nashville R. R. Co., by which it leased, or hired, all of the material which went into it, from the railroad company, upon a stipulated rent, to be equal to 6 per cent. per annum on the value of the material furnished; the quarry company to keep the roadway in good condition, either by doing the work themselves or paying the railroad company for what it might do in this regard.

Afterwards, on the 23d day of May, 1893, the property having passed into the ownership of the Bowling Green Stone Co., a new contract was made between it and the railroad company, in which all of the terms and conditions of the original contract concerning material furnished by the railroad company, and the rental therefor due from the quarry company, were recited; and further, that, "whereas, said Bowling Green Stone Co. wishes to increase its business, and has represented to said Louisville & Nashville R. R. Co. that if it should be relieved from the payment of said rent and for said repairs, it could largely increase its business, which would result in an increase of traffic for said Louisville & Nashville R. R. Co. Now, therefore, in consideration of the premises, the said Louisville & Nashville R. R. Co., from and after this date, releases the said Bowling Green Stone Co. from the payment of rent on said material, and also agrees to keep said track in repair during the continuation of this contract without cost to said Bowling Green Stone Co., reserving the right, however, to discontinue doing so and the right to cancel this contract on sixty days' notice in writing to said Bowling Green Stone Co. whenever and at any time, in the opinion of the management of said Louisville & Nashville R. R. Co., the shipments from said quarries to points on and reached via said Louisville & Nashville R. R. Co.'s lines are not sufficient to justify the maintenance of the track by said Louisville & Nashville R. R. Co."

This contract, and other evidence in the record bearing upon the question, shows that the Louisville & Nashville R. R. Co., during the continuance of this last contract, has the control and management of the railroad switch; it owns, controls and operates the engines and other rolling stock which passes over the line; it keeps the roadbed in repair, and owns all of the material which goes into it. So far as this record shows it exercises the same control and dominion over this line that it does over any other part of its system, and we think, by the terms of the contract in question, the switch, during the continuance of the contract, at least, becomes a part of the general system of the Louisville & Nashville R. R. Co. This being so, it can not lawfully refuse to receive and transport freight belonging to appellees to and from such reasonable points along the line at which they may lawfully ship or receive it.

This is clearly settled by the opinion of this court in the case of the Louisville & Nashville R. R. Co. v. Pittsburg and Kanawha Coal Co., 23 Ky. Law Rep., 1818, in which it is said "railroad companies are quasi public corporations, created for the purpose of exercising the functions and performing the duties of common carriers. These duties are defined by law, and in accepting their charters they necessarily take with them all the duties and liabilities annexed; and they are required to supply to the extent of their resources adequate facilities for the transaction of all business offered, and to deal fairly and impartially with their patrons. (McCoy v. C., I. St. L. & C. R. R. Co., 18 Fed. Rep., 5; Mun v. Illinois, 94 U. S., 126.) And they have no right to contract with a corporation or individual to give exclusive rights to transfer any commodity over any part of their line. \* \* \* The contention is made for the railroad company that appellee is not entitled to a mandatory injunction requiring them to fulfill their corporate obligations to furnish impartial service, because they have adequate relief in a court of law by suit to recover damages for the wrong done. Undoubtedly this remedy exists, but it is not the only means of relief which the law provides. By accepting its charter the railroad company assumed obligations to the public, and the duty of enforcing these obligations, in the absence of some statute providing a different remedy, necessarily devolves upon courts of equity. Their jurisdiction to grant relief of this sort has been well established and defined. (Hays v. Penn. Co., 12 Fed., 309; also the express case, decided by Justice Miller and Judge McCreary, 10 Fed. Rep., 869; and the case of the State v. The Hartford & New Haven R. R. Co., 29 Conn., 546.) It is plainly laid down in these and other cases that a railway company may be compelled by a mandatory injunction to carry out the object for which they were created, and to impartially and without discrimination serve the public."

While it is the duty of the railroad company thus to receive and transfer freight for appellee, this can be done only at points along the line of the railroad switch in question, at which appellee may lawfully receive or ship it; he has no right to trespass upon the private property of appellants in order to reach the road.

We think, under his right to the cutting stone as now fixed by contract, appellee is entitled to ship and receive freight at any reasonable point along the road as now constructed, which lies upon any part of the Loving tract,

which was set apart and conveyed to him in the settlement had between him and the Columbia Finance and Trust Co. Although the part of the Loving tract upon which the railroad switch lies (being No. 4 on the plat) is now owned in fee by appellants, Bedford-Bowling Green Stone Co., the right to take the cutting stone which belongs to appellee necessarily carries with it such reasonable use of the surface over the stone as is necessary to make appellees' interest in the land available.

If it should be found impracticable, from the topography of the land, to reach the railroad on tract No. 4, then appellees may acquire the right of way by contract with appellants, or condemnation, under section 815 of the Kentucky Statutes, to any practicable point on the line, which will not unnecessarily interfere with appellants' quarry as now operated.

For the reasons herein given this case is affirmed as to the Louisville & Nashville R. R. Co., and reversed as to the Bedford-Bowling Green Stone Co., for proceedings consistent with this opinion.

Whole court sitting, except Judge Settle.

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ZENDER, &c. v. BARBER ASPHALT PAVING CO.

(Filed April 28, 1908—Not to be reported.)

Street improvements—In this action to enforce a lien on property for the improvement of the carriage way of Baxter avenue from the former boundary line of Louisville to the center of Transit avenue, appellants, property owners, contend that they should not be assessed for this improvement as their property contiguous to the improvement is bounded by principal streets and lies within a square. Held—That said property is bound for the cost of the improvement as the apportionment as made is about as fair as if the charge was made against the quarter squares.

Lane & Harrison for appellants.

Wm. Furlong for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Chief Justice Burnam.

The appellee, the Barber Asphalt Paving Co., constructed the carriage way of Baxter avenue from the former city boundary line to the center line of Transit avenue under an ordinance approved on the 21st day of August, 1899, at the cost of the owners of the ground on the northeasterly side of Baxter avenue from the old city boundary line to Transit avenue, and extending back to a line midway between Baxter avenue and East Broadway, and on the southeasterly side of Baxter avenue from the former city boundary line to Transit avenue, and extending back in a line midway between Baxter avenue and Von Borries avenue. And this action was brought by them to enforce a lien on the property for the amount due for the work as shown by apportionment warrants issued by the board of public works. The appellants are property holders, against whom the cost of the improvement was adjudged by the common pleas division of the Jefferson Circuit Court. They allege in their answer that prior to the passage of the ordinance on January 1, 1899, Baxter avenue, East Broadway, Highland avenue, Transit

avenue, Von Borries avenue, Reble avenue and Hepburn avenue, were, and each has since continued to be and is now, a principal street of the city of Louisville. Their situation is shown in the diagram filed with this opinion, marked A, and which was filed with the deposition of Anton Zender. It will be seen from this diagram that Baxter avenue runs nearly east and west, and Highland and Transit avenues nearly north and south. The old city boundary line from which the improvement begins runs from a point about midway between Highland and Transit avenues through what would be the center of Hepburn avenue if it were extended to Baxter avenue. East Broadway lies about 384 feet north of Baxter avenue and parallel with it. Whilst Von Borries avenue lies south of Baxter avenue a distance of about 234 feet. Prior to the passage of the ordinance in question both Baxter and Von Borries avenues had to be paved with asphalt from Highland avenue to the old city boundary line at the expense of the abutting holders. North of Baxter avenue is a regular square, formed by Baxter, Highland and Transit avenue and East Broadway. Whilst a somewhat irregular square is formed on the south side of Baxter, by Baxter, Von Borries, Transit and Highland avenues. The ordinance directing the improvement charges that the cost should be apportioned on the north side of Baxter avenue from the old city boundary line to Transit avenue, and extend half way back to East Broadway, and on the south side from the old city boundary line to Transit avenue, extending half way back to Von Borries avenue. The only question involved on the appeal is as to the validity of this apportionment. Appellants contend that as the property contiguous to the improvement is bounded by principal streets and lies within a square, that the general council had no power to determine the depth to which the assessment for the improvement should extend on the adjacent property; that the statute in all such cases charged the cost of the improvement to the adjacent quarter square; and it must be admitted that it is the correct rule as laid down by numerous adjudications of this court. But as a matter of fact, the apportionment as made is practically against the land in the quarter squares in which the improvement was made and against the property actually receiving the benefit thereof, and the cost of the improvement could not with any propriety have been assessed against the property west of the old city boundary line, because that property had already been charged with its fair proportion of the cost of improving Baxter avenue.

Appellants have failed to show that they would have been required to pay any less sum if the cost had been assessed against the quarter square than under the method adopted. We, therefore, conclude that no sufficient ground for the reversal of the judgment complained of had been pointed out.

It is, therefore, affirmed.

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

## KENTUCKY COURT OF APPEALS.

STRONG v. SOUTH, &c.

(Filed April 23, 1903—Not to be reported.)

Title—In this controversy between appellant and appellees as to the ownership of a large tract of land it is adjudged that appellees' ancestor purchased and held a better title than appellant. The finding of the chancellor will be given some weight.

J. B. Marcum and T. T. Cope for appellant.

White & Ray, D. B. Redwine and W. W. Vaughn for appellees.

Appeal from Bræthitt Circuit Court.

Opinion of the court by Judge Hobson.

A survey was made for George T. Cotton in the year 1812 for 23,189 acres of land, known as the Pickett and Marshall tract. Both the parties to this case claim under Cotton. Appellant's title is derived in this way: On July 21, 1846, George T. Cotton and others united in a deed to George H. Ketchum for the land. On March 10, 1847, Ketchum conveyed it, with a quantity of other property, to Ulysses Turner in trust for the payment of certain debts. On September 21, 1850, Ulysses Turner, in consideration of \$500 in hand paid, sold appellant, E. C. Strong, all the right and title which he or Ketchum had in the unsold portion of this tract; but the land that had been previously sold was excepted out of this sale.

Appellee's title is derived in this way: Appellees are the heirs of J. W. South, who died in the year 1830. The land in controversy lies on Fish Trap branch, above a large white oak and runs with the top of the ridge around the headwaters of Fish Trap back to a point opposite the white oak. This land was conveyed on November 23, 1850, by A. B. Patrick and wife to J. W. South and A. P. Williams in consideration of \$1,400 in hand paid, and on January 14, 1873, Granville Smith and wife, in consideration of \$1,500 paid, conveyed to J. W. South their undivided half of the tract, this being the interest of A. P. Williams under the former deed, as we understand it. Pat-

rick got the land from James Stidham, and Stidham from Alexander Strong, on July 19, 1847. The proof for appellees shows that the Breathitt county courthouse was burned about the year 1872, and the deeds back of the two referred to are not, therefore, produced, although it is shown that they were duly recorded. Stidham testifies that after he bought out Alexander Strong and paid him \$100 for his interest in the land he finished paying George Cotton for the land and received a deed, which was recorded. This testimony is confirmed by the fact that Ketchum witnessed the transfer from Alexander Strong to Stidham. It is also confirmed by evidence showing that Stidham worked for Ketchum on boats to pay for the land; that he settled on the land, built a house and planted an orchard and lived there until he traded the land to Patrick for another tract, and made him a deed to it.

On final hearing the court gave judgment in favor of appellees. We must give the finding of the chancellor some effect. Our rule is not to disturb it where the proof is conflicting and leaves the mind in doubt as to the truth. It will be seen from the above that Strong only acquired by his purchase from Ulysses Turner the unsold land in the survey, and the land which had been previously sold was excepted out of the sale to him. The evidence of James Stidham is to the effect that the land in controversy was sold long before September 21, 1850, when appellees' purchase of Turner was made. The written receipt from Alexander Strong to Stidham bears date in July, 1847, and Stidham's testimony is confirmed by a number of witnesses testifying that he lived on the land, claiming it as his own, from about the time of his purchase from Alexander Strong. Though he lived on the land for a number of years, there seems to have been no controversy about his right at that time, and the price at which Patrick sold it to South and Williams, and at which South bought the undivided half from Smith and wife, would indicate that no doubt was entertained then of the sufficiency of this title, and this fact is entitled to some weight, as the records then of the title in the county clerk's office had not been destroyed. The proof is convincing, also from Stidham's planting out an orchard on the land and his manner of holding it, that he was not a tenant, as claimed by appellant. This proof is confirmed by a number of witnesses testifying to his working for Ketchum, building boats to pay for the land. It is also confirmed by the possession of the land by Patrick, South and South's heirs through tenants, from the time that Stidham left the land, or soon thereafter, until it was placed in the hands of the receiver. The conduct of appellant Strong, taking all the proof into consideration, seems to us to support the claim of the South heirs, and on the whole record we see no reason to disturb the chancellor's conclusion.

Judgment affirmed.

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ILLINOIS CENTRAL R. R. CO. v. BOLES.

(Filed April 28, 1903—Not to be reported.)

Railroads—Negligence—Appellant is not responsible to appellee, an old woman, who was a passenger on its train, and was injured by falling against a seat in disobedience of the caution of the conductor, and was thereby deprived of a recovery by her own contributory negligence.



W. H. Marriott, I. W. Twyman, Pirtle & Trabue and J. M. Dickenson for appellant.

Gore & Williams and G. A. Taylor for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the appellee, Martha Boles, to recover of the appellant, the Illinois Central R. R. Co., damages for injuries alleged to have been received by her while a passenger upon one of its trains, caused, as she alleged, by its gross negligence, by which she was thrown down in the car and severely hurt.

The answer of appellant put in issue the allegations of negligence in the management of its train, and by a second paragraph charged contributory negligence of the appellee. The reply properly put in issue the allegation of contributory negligence. The trial of the case resulted in a verdict and judgment for the appellee in the sum of \$600, from which appellant has appealed. The first question necessary to be decided is whether or not the lower court erred in overruling appellant's motion for a peremptory instruction, at the close of appellee's testimony. The facts are these: The appellee, who is seventy-two years of age, took passage on the train of appellant, at Hodgenville, Kentucky, for the purpose of going to Louisville. She seems to have been placed by a member of her family in charge of the conductor of the train at Hodgenville. When the train arrived at Cecilia, where it was necessary to change cars, the conductor saw her safely seated on the train bound for Louisville, and enjoined her to remain seated until the train stopped at the depot in Louisville.

It appears by appellee's own statement that when she was placed on the car at Cecilia by the conductor, Ludwick, he told her to remain seated until the train stopped still. Had she done this, no harm would have come to her, and when she disobeyed his injunction, she was guilty of negligence. It is true that she says somebody came to the door of the coach, and cried out in a loud voice, "all hands get out of here," and this was repeated in a loud voice two or three times; but she did not know, or say who this was, or whether he was an officer or employe of appellant. She further says that she could not hear well, and that her head was all bundled up. Evidently she misunderstood what was said on this occasion.

There is nothing in the record which shows that appellant fell short of the full discharge of any duty it owed to appellee as its passenger; its conductor saw her safely and comfortably seated in the car at Cecilia, where the change of cars was made, and there enjoined strictly upon her to remain in her seat until the car stopped still. There is no evidence in the case tending to show any unusual jerk or suddenness in the stopping of the train. Common experience teaches that there is always some sway in the cars when the train is stopped. Appellee, being old, somewhat deaf and timid, had been placed in the especial care of the conductor, and it was her duty, having been so placed, to obey the injunctions given for her safety. When the train neared Louisville, and the passengers commenced to get up and stand in the aisle, to put on their wraps and overcoats, as is usual on such occasions with the traveling public, appellee, forgetting, or disregarding, the injunction to

keep her seat until the train stopped still, also got up, and when the train stopped, she being somewhat infirm, was thrown against the arm of the seat, and her side injured. A careful examination of this record convinces us that the injuries which appellee received were wholly caused by her own negligence, and the jury should have been peremptorily instructed to find for the appellant.

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

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BUTTON v. GAST, &c.

(Filed April 29, 1903—Not to be reported.)

**Street improvements**—In this action to enforce a lien under an apportionment warrant on property abutting on an alley for its original construction, under an ordinance of the city of Louisville, appellant, a property owner, complains of the manner of assessment. Held—That if the method of assessment contended for by appellant be adopted it will cost him more than as now assessed. This court has adopted the rule that an apportionment of the cost of improving or constructing a street or alley will not be disturbed unless it affirmatively appears that under a different and proper method of assessment the defendant would be charged materially less, and that the apportionment made by the city would be prejudicial to his interest.

Wm. Furlong for appellant.

Lane & Harrison for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Nunn.

This is an action to enforce apportionment liens for the original construction of an alley in the city of Louisville, running from Brandeis avenue south 1,375 feet and lying between old Third street, now called Park Place, and Fourth street and Fourth street extended. The description of the property, as given in the petition and the ordinance filed with it, shows that the territory contiguous to the alley is not defined into squares by principal public streets, and the answer in the following language admits this to be true: "The defendant says that the territory contiguous to this alley and on each side thereof is not now, and never was, defined into squares."

It is shown by the record that this alleyway has been improved by original construction, by ordinance and contract approved by the city council; that the improvement had been inspected and received; that the cost had been apportioned among the respective owners of property within the limits subject to assessment, and that the notice required to be published in the newspapers had been properly given. It has been repeatedly held by this court that an apportionment of the cost of improving or constructing a street or alley will not be disturbed unless it affirmatively appears that under a different and proper method of assessment the defendant would be charged materially less, and that the apportionment, as made by the city, would be prejudicial to this interest. And it is impossible from this record to tell what effect on the defendant a change in the manner of assessment would have. The indications are that the change in manner of assessment sought

by him would very materially increase the cost to him in making the improvement.

In the case of *Baird v. Falls City Artificial Stone Co.*, 21 Ky. Law Rep., 471, this court, in discussing this question, said: "In order to raise this question appellant should have pleaded and proved the facts showing that a wrong basis of apportionment was followed, and that under the proper method they would be required to pay less than under the methods adopted." Also 99 Ky., 235, in which the court said: "It appears that the method of apportionment was based on the assumption that the contiguous property was not divided into squares by principal streets, and it is the appellant's contention that the property was in fact so divided, and that, therefore, the method applied was erroneous. While the record does not show clearly the situation of the property in this respect, the exhibits, maps, etc., seem to show no such division into squares; but if it were otherwise, it does not appear that, under a different method of apportionment, the appellant would be required to pay less than under the method adopted."

The appellant also contends that the petition fails to show that the plans and specifications of the work were filed with the board of public works before the letting of the contract. The petition does show that the newspapers advertised in three issues each that proposals or bids for the improvement of the alley according to the provisions of the ordinance and the plans and specifications for the work were on file in the office of the board of public works, and the ordinance passed by the council with reference thereto shows that the plans and specifications were on file with the board of public works at the time of the passing of the ordinance and before the letting of the contract. While these allegations are possibly not specific enough, yet this court has decided in several cases that the law presumes that the officers performed their duty in this respect. In the case of *Henning, &c. v. Stengel & Bickel*, 23 Ky. Law Rep., 1794, in discussing this subject, the court said: "The law presumes the officers did their duty, and if they failed to do it in this case, positive proof of it could have been made. The presumption of regularity is not overthrown by the evidence."

We have been unable to find any prejudicial error in the assessment of appellant's property for the improvement of this alley.

Wherefore, the judgment of the lower court is affirmed.

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CITY OF GEORGETOWN v. COMMONWEALTH.

(Filed April 29, 1903.)

Criminal law—Liability of municipal government for permitting a nuisance on private property—Appellant was indicted and convicted for permitting a nuisance to exist between the gas plant and the Big Spring branch, two points within the city. The specific acts charged are that the city permitted in an open gutter, drain and sewer all sorts of filth, excrement, vegetable and animal matter, refuse and waste from the gas plant and the ordinary sewerage of the community to flow through and along the open gutter, drain and sewer, and to remain, rotting and festering, etc. There is no pretense that the city or its officials created or caused the nuisance, or that it exists on any property belonging to or under the control of the city,

except the ordinary police control as the agent of the State. On appeal, Held—That this appeal is based upon the theory that the city is liable to punishment for the failure of its officials to abate a nuisance on private property, and to prosecute the individuals responsible therefor. Nuisances are offenses at common law, and the persons creating or permitting them are liable to indictment wherever committed, and when the State grants to a city the power to abate or pass ordinances to punish persons guilty of such offenses, this right is exercised only in aid of sovereignty in enforcement of its laws for the comfort, safety and health of the public. The city, in such a case, becomes a part of the sovereignty, and, therefore, is not liable for the acts of its officers in enforcing or the failure to enforce the criminal or penal laws of the Commonwealth or the penal ordinances of the city.

W. S. Kelly for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Nunn.

At the May term, 1902, of the Scott Circuit Court an indictment was returned against appellant, a city of the fourth class, in the usual and proper form, charging, in substance, that it did unlawfully suffer and permit in an open gutter, drain and sewer, between the gas plant and "Big Spring branch," two points within the limits of the city, all sorts of filth, excrement, vegetable and animal matter, refuse and waste from the gas plant and the ordinary sewerage of the community in, through and along the open gutter, drain and sewer to flow therein and to remain, rotting and festering and giving forth and emitting noxious and poisonous gases, charging and burdening the atmosphere with dangerous and offensive odors, and disturbing the comfort of all good people, etc.

On the plea of not guilty, the evidence showed, in substance, the following facts: That there was a natural drain running from the gas plant to "Big Spring branch," the drain passing along through the city, and into this drain the waste from the gas plant was permitted to flow, likewise the filth from privies on private property along this drain, and especially during the dry seasons of the year when water was not flowing in this drain, it became very obnoxious and offensive to the smell, and was in fact a nuisance. The gas plant was not owned or operated by the city. It was shown by the record that the city council had passed ordinances making it an offense, and fixing the penalties therefor for causing, maintaining or permitting, in the city limits, noxious or unhealthy matter in such a drain or in any place within the city.

The trial resulted in a verdict against the appellant for \$480, and the court refusing to set aside the verdict and grant a new trial, the case is here on appeal.

If the corporation, the appellant, is liable to be indicted and fined for such an offense as proven in this case, then the judgment ought to stand. The only question to be determined is whether or not it is liable. As this is an important question to the State, and all the cities and towns in the State, we have taken great pains to examine all the authorities touching the subject within our reach. This direct question, so far as we have been able to find, has never been before this court before, that is, as to whether or not a muni-

icipal corporation can be indicted and fined for its failure to cause the abatement of a nuisance, or cause the punishment of the individuals creating and suffering the same on their private property. There is no pretense that the city or its officials created or caused the nuisance, or that it exists on any property belonging to or under the control of the appellant, except the ordinary police control as the agent of the State.

In the case of *Dudley v. The City of Flemingsburg*, 24 Ky. Law Rep., part II, 1804, the court said: "There are two general principles underlying the administration of government of municipal corporations. The one is that a municipal corporation, in the preservation of peace, maintenance of good order and enforcement of the laws for the safety of the public, possesses governmental functions and represents the State. The other is where the municipal corporation exercises those powers and privileges conferred for private, local or merely corporate purposes, peculiarly for the benefit of the corporation. Under the former the city is not liable for malfeasance, misfeasance or nonfeasance of its officers. Under the latter it is." \* \* \*

This prosecution is based upon the theory that the city is liable to punishment for the failure of its officials to abate a nuisance and to prosecute the individuals responsible therefor. Nuisances are offenses at common law, and the persons creating or permitting them are liable to indictment wherever committed, and when the State grants to a city the power to abate or pass ordinances to punish persons guilty of such offenses, this right is exercised only in aid of sovereignty in the enforcement of its laws for the comfort, safety and health of the public. The city in such a case becomes a part of the sovereignty, and, therefore, is not liable to indictment. A municipal corporation is not liable for the acts of its officers in enforcing, or the failure to enforce, the criminal or penal laws of the Commonwealth or the penal ordinances of the city. In 17 Ky. Law Rep., 860, the court, in an action seeking to make the city liable for the malfeasance and misfeasance of its officers, said: "The municipal corporation in all these and the like cases represents the State or the public. The police officers are not the servants of the corporation. The principle of respondeat superior does not apply, and the corporation is not liable unless by virtue of a statute expressly creating the liability. The cases rest on the ground that municipalities represent the Commonwealth and municipal officers while engaged in duties relating to public safety, and in the maintenance of public order are the servants of the Commonwealth;" and refers to *Dillon on Municipal Corporations*, sections 974-975; *Pollock's Adm'r v. The City of Louisville*, 13 Bush, 221; *Jolly's Adm'r v. Hawesville*, 89 Ky., 279, and *Prather v. Lexington*, 13 B. M., 559.

The case of *State v. The City of Burlington*, 36 Vt., 524, was where the city was indicted for suffering and permitting a nuisance wherein, the slop and waste water from the premises of several individuals was conducted into a ditch, from which offensive and unwholesome odors arose, offensive to the inhabitants living on the street. The court, after discussing the liability of the city upon statutory questions, decided the case upon broader principles, and said: "But we are also of opinion that the removal or abatement of nuisances erected or created by private persons can not be considered as a corporate duty imposed by law upon towns. \* \* \* This can not be considered as creating a corporate duty on the town unless we can assume that

all and every duty, which by general laws is devolved upon officers elected by the town, is a corporate duty, and that the failure of every town officer to perform his official duty subjects the town to suit or indictment, if the consequence is injurious, either to any individual or to the community generally. But no such principle has ever been understood to prevail, except where the liability was created by statute. \* \* \* The general supervision of the business affairs and concerns of towns is given to select men, and in the performance of such duties they are the agent of the town, and they may bind the town by their acts and the town be liable for their acts, in much the same manner, and upon the same principles that obtain between ordinary principals and agents. But when the legislature by general laws devolve certain duties relative to the general police upon select men, they do not become corporate duties and obligations of the town any more than such duties required to be performed by constables, grand jurors or justices of the peace. If there is any liability to individuals, or to the public, growing out of their failure to perform such duties, it is upon the officers, and not upon the town."

Cities are liable for the malfeasance of their officials in matters peculiarly pertaining to their benefit and advantage, but not for their failure to enforce or for nonenforcement of the criminal and penal laws of the sovereignty. Upon this principle town of Marion was made liable to McGraw. The town imprisoned him for the failure to pay a license fee, unconstitutionally imposed, for the peddling of spectacles in the town; the court, in substance, said that the license fee was for the sole benefit of the town, and McGraw had not committed any offense against the criminal or penal laws of the State, and, therefore, the officials of the town were not in that matter acting as agents of and in aid of the State in the enforcement of her laws, but were acting as the agents for the town and solely for its pecuniary benefit. (17 Ky. Law Rep., 1255.)

Counsel cite, as sustaining the judgment of the lower court, Dillon on Municipal Cor., section 933; A. & E. Enc. of Law, volume 20, 2d edition, 1209-31; 3 Met., 494; 7 B. M., 38; 51 Me., 532; 5 Hum. (Tenn.), 154; 5 Sneed (Tenn.), 578, and 81 Ky., 377.

Dillon on Municipal Corporations, section 933, is as follows: "Neglect of duty in respect of repair of streets, etc. In Tennessee a municipal corporation is considered liable, upon the general principles of common law, to indictment for neglecting its duty to keep its streets in reasonable repair, and it is no defense that the street is little used and is in a remote part of the town. And the mayor and aldermen may also be personally indicted for like neglect of duty. So in the same State it is held, upon the general principles of the law, that if a municipal corporation has power by its charter to pass such ordinances as may be necessary 'to preserve the health of the town, and to prevent and to remove nuisances,' it is its positive duty to exercise this power, and that for a neglect of this public duty it or its officers are liable to an indictment. An indictment against the mayor and aldermen was accordingly sustained for permitting a slaughter house to be kept upon the private property of the citizen or the town, to the annoyance of the inhabitants and the endangering of the public health, the court remarking that 'an indictment against the corporation is the proper mode of redress by the

public for a grievance of this nature.' In Vermont a town is liable to an indictment as at common law for not erecting a bridge pursuant to an order from a competent tribunal. In Maine towns charged with the maintenance of public highways are by statute indicted for failing to discharge their duty in this respect; and the general principle is asserted in such cases that where the town is civilly liable in damages it may be indicted."

It will be noticed that the part of this section which refers to making municipal corporations criminally liable for the failure to abate or permitting nuisances on private property, refers solely to authorities in the State of Tennessee in support thereof. The authorities referred to are *State v. Shelbyville*, 4 Sneed, 176; *Hill v. State*, 4 Sneed, 443, and *McCrowell v. Bristol*, 5 Lea, 685.

The case of *State v. Shelbyville* was where an indictment was against the mayor and aldermen of the town for permitting a public nuisance, to wit, a slaughter house, to be kept by a private citizen in the town, alleged to be a nuisance, and for their failure to abate or suppress it.

The court said that they were liable, and the court stated in that opinion that the corporation was also liable to indictment. This was mere dictum, and the court did not cite any authority to support the statement.

In the case of *Hill v. State*, the mayor and aldermen of an incorporated town were indicted and punished individually for their failure to keep in repair the public streets of the town. The court sustained the judgment of the court below. It will be seen that this case is not in point because it has reference to the public streets of the town.

The case of *McCrowell v. Bristol* was where McCrowell sued the mayor and aldermen of the town of Bristol, alleging that they had aided in establishing a nuisance, to wit, a saloon on property adjoining his dwelling, and suffered and permitted drunken and boisterous persons to assemble, congregate and remain there, to his annoyance and damage. The court in that case said that he could not recover.

A. & E. Ency. of Law, 2d edition, volume 20, page 1209, is as follows: "A municipal corporation is liable for the creation or maintenance of a nuisance, whereby an individual sustains special injury. And a city is also liable if it licenses the creation or maintenance of a nuisance by third persons. But though cities have, as a rule, the power to abate nuisances, and it is their duty to abate them, yet there is no liability in damages for a failure to exercise the power of abatement. But a municipal corporation has been held liable to indictment for a dereliction of duty in such respect. If a city, having power to prevent and remove nuisances, invades and trespasses upon the rights of an individual in undertaking to exercise such power, it is liable in damages therefor."

The author in the use of this language, "but a municipal corporation has been held liable to indictment for a dereliction of duty in such respect," refers only to the case of *State v. Shelbyville*, 4 Sneed, *supra*, to uphold it.

Again, in same book, page 1231, this language is found: "Where duties of a public nature are imposed upon municipal corporations, such corporations are liable to indictment if they fail to discharge those duties according to law." And refers to authorities to sustain it to the Tennessee cases, above referred to. Also the case of *Richardson v. Boston*, 24 Howard (U. S.),

188; *Hammer v. Covington*, 3 Met. (Ky.), 494; *Bragg v. Bangor*, 51 Me., 582; *New Bedford Bridge v. Commonwealth*, 2 Gray, 389, and the *State v. Canterbury*, 28 N. H., 195.

We have already discussed the Tennessee cases referred to.

The case of *Richardson v. Boston* was where the plaintiff, Richardson, was the owner of two wharves, running from high to low water mark. The city owned a strip of ground 80 feet wide between the two wharves. The plaintiff sued the city for creating and maintaining a nuisance upon its property.

The statement of the case shows that it has no application to the case involved here.

- The case of *Hammer v. Covington* was where the court said that individuals, whose property was about to be destroyed by the giving away of a street of a city, had the right to a writ of mandamus against the council to compel them to have the street repaired.

The case of *Bragg v. Bangor* was where the court said "towns may be indicted and fined for allowing their highways to become unsafe and inconvenient."

The case of *New Bedford Bridge v. Commonwealth* was where the proprietors of a private corporation, called the "New Bedford Bridge," were indicted for creating and maintaining a nuisance in the manner of erection and maintenance of its bridge.

The case of *State v. Canterbury* was where the town was made liable to indictment for not building and repairing bridges as parts of the highway in which they are situated.

The case of *Commonwealth v. Trustees of Hopkinsville*, 7 B. M., 38, was where the trustees of the town were indicted for their failure to keep the streets clean.

The case of *Seifried v. Hays, &c.*, 81 Ky., 377, was where Seifried was running a slaughter-house on his own property and the appellees sought an injunction restraining him from continuing the nuisance, and the court enjoined and restrained him from keeping dead animals, or any parts of dead animals, on his premises in such manner as would cause the offensive odor and stench complained of. And in the opinion the court remarked that an indictment against the appellant would have been the proper remedy.

It will appear from the statement of all the cases referred to that they have no application to the question before us.

We have found two cases decided by the Superior Court of this State which are apparently in conflict with the views herein expressed by this court. One case is the *Commonwealth v. City of Paris*, opinion by Judge Richards, 4 Ky. Law Rep., 599. After announcing the true doctrine, he uses this language: "But whenever the ministerial powers or duties of municipal corporations are involved, they stand before the criminal law upon the same footing with all other corporations. To this class belongs the duty to abate public nuisances." He then refers to the case of *State v. Shelbyville*, 4 Sneed, 177, *supra*, as the only authority to sustain such a proposition.

The other case is *Commonwealth v. City of Paducah*, opinion by Judge Ward, 6 Ky. Law Rep. 232. We have examined the manuscript opinion in this case, and find that he refers to, as authority, only Morawetz on Corporations, section 94; Dillon on Municipal Corporations, section 933, and Angell



and Ames on Corporations, sections 394-6. We have in this opinion quoted and discussed Dillon on Corporations, section 983, and we have examined the sections referred to in Morawetz and Angell and Ames on Corporations, and find that they have reference alone to private corporations, and have no application to this case.

We have been unable to find any authority in any State sustaining the contention of the Commonwealth except the case of *State v. Shelbyville*, 4 Sneed, above referred to.

Wherefore, the case is reversed and the cause remanded for further proceedings consistent herewith.

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MUTUAL BENEFIT LIFE INSURANCE CO. v. DAVIS.

(Filed April 29, 1903.)

1. Insurance—Forfeiture of policy—This action was brought to recover \$1,000, the amount of a policy issued by appellant upon the life of appellee's husband. By the terms of the policy it was provided that after the payment of two annual premiums, the reserve to which the insured was entitled, would extend the life of the policy a certain number of years, and a like provision for extension of the insurance period for payment of each premium thereafter. Two premiums were paid when due, and when the third premium became due the insured borrowed the amount to pay same from the company, less the dividend due him. The insured failed to pay the fourth premium, and there was then due him a premium of \$7.30, which it refused to give him a credit for. Several years thereafter the insured died, and appellant relied on the defense that, according to its calculation, the term for the extension of insurance had expired. Held—That the company erred in its calculation in estimating the premium as of the age of 24 years, instead of 21 years, which was the age at which the insurance was taken out. It also erred in refusing to allow a credit for the premium earned the third year, as the payment of the premium for the following year was not a condition precedent to receiving the premium already earned. It was also error to declare the policy forfeited on account of failure to pay the loan or interest on it as such forfeiture would be in the nature of a penalty for failure to pay money, and is contrary to public policy. When the insured is given credit for the dividend earned the third year, and the premiums and reserve calculated on the proper basis, the policy was continued in force beyond the death of the insured, and a recovery of the amount of the policy was properly adjudged.

Baird & Richardson and Dodd & Dodd for appellant.

Hatchett & James for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Nunn.

Upon December 23, 1889, the appellant issued to the appellee's husband, Walter D. Davis, a policy of life insurance, by the terms of which they agreed to pay him at the end of twenty years from that date the sum of \$1,000. Should he die within the endowment period this sum, after deducting therefrom all indebtedness to the company, was to be paid to Lizzie W. Davis; and the policy contained this clause which is called "non-forfeiture provisions:" "When after two full annual premiums shall have

been paid on this policy, it shall cease or become void solely by the nonpayment of any premium when due, its entire net reserve by the American Experience Mortality and interest at four per cent., yearly, less any indebtedness to the company on this policy, shall be applied by the company as a single premium at the company's rates published and in force at this date, either, first, to the purchase of nonparticipating term insurance for the full amount insured by this policy, or, second." \* \* \*

And it was further provided in the policy that if the assured paid two full premiums and then ceased to pay further, the net reserve should extend the policy for its full amount for 8 years and 847 days; and if he paid the third premium and then ceased, the net reserve should extend the policy for the term of 15 years and 45 days. At the time the policy was issued Walter D. Davis was 21 years old. The annual premium as fixed in the policy was \$47.46. The first premium was paid to the company when the policy was issued, and the second upon December 23, 1890, the date it became due. When the third annual premium became due, on December 23, 1891, the insured was unable to meet it with a cash payment, and borrowed the amount from the company, less a dividend declared by it of \$6.98, executing for the loan a note or loan certificate. He failed to pay the fourth annual premium, which became due December 23, 1892, at which time the company held another dividend due him of \$7.80, which they failed to pay him or credit him with, claiming that the dividend was declared conditionally upon his paying of the premium. After this there was no action taken by either party until August 2, 1901, at which time the insured died, and on the 28th day of September, 1901, the appellee filed this action to recover under the nonforfeiture provisions of this policy. A trial was had, jury waived, and the court adjudged that the appellee was entitled to recover the amount of the policy, less the \$40.58 note with its interest.

The appellant asks a reversal of the case upon the ground that the extended insurance, provided for in the policy, had expired before the death of Walter D. Davis.

Appellant claims that the net reserve to the credit of the insured was \$97.53, which would have, under the contract, extended the policy for the full amount for 15 years and 45 days from the 23d day of December, 1892, but that this sum should be reduced by the amount loaned, with its interest, \$42.96, leaving, as it claims, \$54.57, which was the true net reserve according to the policy; that this sum of \$54.57 continued the policy in force, counting his age at 24 years, 7 years and 154 days, making the policy expire May 26, 1900.

Appellant also says that it should not account for the last dividend declared due the insured, amounting to \$7.80, but that if it should be chargeable therewith that it would increase the net reserve to only \$61.87, which would only extend the insurance for 8 years and 216 days, making the policy expire July 27, 1901, six days before the death of the insured.

The appellant admits that it declared a premium of \$7.80 due the insured prior to December 23d, 1892, and gave notice to the insured of that fact. But it claims that it declared provisionally upon his paying the premium due December 23, 1892. We are of the opinion that the case of *Ætna Life Ins. Co. v. Hartley*, 24 Ky. Law Rep., part 1, 61, settles this matter against appellant's contention. The court said: "The company seeks to avoid the effect

of this dividend, and the fact of it, too, so far as this policy is concerned by a proviso in the resolutions declaring the dividend, that it should go only to those policies that were continued in force thereafter. We are of the opinion that the board of directors had no authority to impose any such conditions upon their action in declaring the dividend. \* \* \* The insurer could not add the condition that the insured should renew his policy by paying the next installment to become due before it would allow him to participate in the surplus already earned by the class to which his policy belonged; nor could it have imposed a condition that this surplus would not be allowed unless the insured paid all the premiums that might accrue under the policy and the insured outlived the tontine period, therefore, we conclude the insurance company owed the insured on the 10th day of March the sum of \$5.65."

In that case this sum was the amount of the dividend, which sum extended the policy a few days beyond the death of the insured, and the court adjudged that the insurance company had the policy to pay. We can not exactly agree with the actuary's calculations. In the first place he calculates the extended insurance as of the age of 24 years, when the insured was 21 years of age at the issuance of the policy, and we have been unable to find anything in the policy to authorize such a calculation. In the next place, the calculations are made on a basis of annual premiums of \$37.16 instead of \$47.46. But even admitting the correctness of these assumptions and calculations on such a basis, it is apparent from the facts in the case that the policy was in force at the time of the death of the insured.

It is admitted that two years' premium in cash were paid, and that it was stipulated in the policy that the net reserve thereon extended the policy 8 years and 347 days, or to December 6, 1900, and it is admitted that the insured is entitled to the first dividend of \$6.93, and we have adjudged that he was entitled to the second dividend of \$7.30, these two sums amounting to \$14.23, evidently would further extend the life policy beyond the life of the insured.

In the record there appears an insurance manual for 1901, and a pamphlet issued by appellant for 1879, introduced as evidence by appellant. According to this manual the net reserve for two cash annual premiums of \$37.16 each is \$63.52. The pamphlet gives the amount of the single premium to be paid for a specified term of years for the different ages, from twenty-five to fifty years, but it does not give it for the age of twenty-one. Appellant's actuary has calculated and found that for a man twenty-four years of age, a term of nine years would cost \$64.36. We have calculated and found that for a man twenty-one years of age \$63.52 would be more than is required for a nine-year term, or that \$63.52 would extend the life policy for more than nine years, or until after December 23, 1901.

Appellant, by its actuary, made the calculation, assuming that the net reserve was \$61.87, on a man twenty-four years of age, and ascertained that it would extend the life of the policy to within six days of the death of the insured, or to July 27, 1901. We have made the same calculation upon the same basis, except we calculated the age of the person at twenty-one, the age of the insured when the policy was issued, and ascertained that it would extend the life much beyond the date of the death of the insured, to wit, August 2, 1901.

According to the appellant's contention the insured would have been in

much better condition if he had never settled the third premium. If he had paid only two premiums, as shown by the evidence of appellant's actuary and the exhibits filed by him, the insured would have had a net reserve of \$68.52, which added to his admitted dividend of \$6.93, amounts to the sum of \$75.45, admittedly sufficient to have carried the policy considerably beyond the date of his death, although calculated at the age of twenty-four instead of twenty-one years. But the appellant claims that the net reserve for three annual premiums amounted to \$97.53, which added to the last dividend of \$7.30 makes \$104.83, from which it claims that the amount borrowed from it by the insured, with 6 per cent. interest, amounting to \$42.96, should be deducted, leaving \$61.87 as the amount of the net reserve; which shows that by his borrowing from appellant he not only is required to pay the sum borrowed, together with 6 per cent. interest thereon, but by his failure to pay the sum borrowed, or the payment of his premium, he not only suffered the loss of his 6 per cent. interest which he agreed to pay for forbearance, but suffered the loss by forfeiture or penalty of several years of extended insurance on his policy previously paid for by him. This amounted to a forfeiture or penalty for the use or forbearance of money, pure and simple, and is against the policy of the laws of the State, and such a contract ought not to be enforced.

There are other reasons offered by appellee why this judgment should be affirmed, but we deem it unnecessary to discuss them.

Wherefore, the judgment is affirmed.

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PARK & CO. v. CANE.

(Filed April 23, 1908—Not to be reported.)

Street improvements—This action was instituted upon an apportionment warrant issued for the improvement of Woodbine street. The square is bounded by principal streets. The lot of appellee, which is sought to be charged, is situated near the center of the square, and the square is in an irregular shape, and he complains of the mode of assessment adopted. Held—That as the statute requires that the cost shall be apportioned according to the number of square feet, the square foot is made the unit, and as appellee should be charged with only the proper number of square feet as apportioned, he can not complain.

Burnett & Burnett for appellants.

Lane & Harrison for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Paynter.

This action is based upon an apportionment warrant issued for the improvement of Woodbine street. The square is bounded by principal streets, which are Floyd, Brook and Woodbine and Ormsby avenue. The lot against which the lien is asserted for the apportionment warrant is located almost in the center of the square. The square is not a right-angled parallelogram; it is irregular in shape. The running of a line midway between Ormsby avenue and Woodbine street would leave a greater number of square feet in one quarter square than in another. It is contended by counsel for the ap-

pellee that, although the territory within the square is defined by principal streets, the proper method for dividing the square into quarter squares is to find the central point in each boundary line of the square and to connect the center points in the opposite streets with straight lines. On the other hand, it is contended for the appellant that the general assembly was not dealing with geometrical squares, but with a parcel of land bounded by principal streets, which it designated as squares, though irregular in shape. The court below sustained the appellee's contention.

Section 2838, Kentucky Statutes, reads as follows: "When the improvement is the original construction of any street, \* \* \* such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the board of public works according to the number of square feet owned by them respectively. \* \* \* Each subdivision of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of each public way shall state the depth on both sides fronting said improvement, to be assessed for the cost of making the same according to the number of square feet owned by the parties respectively within the depth set out in the ordinance."

The authority of the general assembly to enact this statute is not, nor could it be, questioned. It defines the taxing district when the territory is bounded on all sides by principal streets. The improvement was made on Woodbine street, between Brook and Floyd streets. The owners in each fourth of a square bounding on Woodbine street were assessed for the improvement. The statute requires that the cost shall be apportioned "according to the number of square feet owned by them respectively." The square foot is made the unit, and any less than one-fourth of these units in a square would not constitute a quarter square in the meaning of the statute. In other words, a quarter square is one-fourth of the territory defined by principal streets. Unless the territory bounded by principal streets is a right-angled parallelogram, it can not be defined by midway lines without compelling the owners of lots in one quarter square to pay more than the owners of lots in the other quarter square assessed for the improvement.

It appears that the general council in 1889 passed an ordinance to improve Ormsby avenue, and at that time the territory which is now bounded by Floyd, Brook and Woodbine streets and Ormsby avenue was not bounded by principal streets. The ordinance designated the depth of the taxing district. According to the boundary thus designated a small part of the appellee's lot, which is now taxed for the improvement of Woodbine street, was taxed under the ordinance for the improvement of Ormsby avenue. It is, therefore, urged that the small part of the lot can not be taxed for the improvement of Woodbine street, it running parallel with Ormsby avenue. It is hardly necessary to enter into the discussion of the question as to whether the general council exceeded its authority in defining the taxing district for the improvement of Ormsby avenue. If it did so, the error was committed before the territory was defined by principal streets. If the owner of the lot in question submitted to an illegal apportionment, and thus paid more than was required by law, that fact would not invalidate the apportionment here

under consideration, because the effect of it would be to cast additional burden upon other owners of lots in the quarter square in which the appellee's lot is situated, the effect of which would be to make innocent persons compensate the appellee for money which had been paid under an illegal assessment, providing the general council erred in defining the taxing district. In our opinion the apportionment complained of in this case was correctly made.

The judgment is reversed for proceedings consistent with this opinion.

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EDWARDS BARNARD CO. v. PFLANZ.

(Filed April 29, 1903.)

1. Sheriff—Attachment—Bonds—Surety—Appellant brought suit and obtained an attachment against A. and B., which was served on defendants and on a garnishee. To release the garnishment defendants executed to the sheriff a bond, under section 214, Civil Code of Practice, and took the bond with several sureties. Personal judgment was rendered against defendants, and a return of no property found was had against them. Personal judgment for the debt was also had against the sureties, and a return of no property found was had against them. This action was then instituted against the sheriff to recover the amount of said debt, alleging negligence in taking said bond with insufficient surety. After answer and proof the lower court, who tried both law and fact without the intervention of a jury, rendered a judgment in favor of defendant, from which this appeal is prosecuted. Held—That the finding of the lower court will be given the same effect as the verdict of a properly-instructed jury, and will not be disturbed unless flagrantly against the evidence. The finding of the lower court will not be disturbed for several reasons. The sheriff is not responsible for taking insufficient surety if he used reasonable care and diligence to ascertain the solvency of the sureties offered, and the proof shows that he exercised reasonable diligence to ascertain their solvency. The finding of the lower court will not be disturbed for the further reason that it nowhere appears from the record that the attachment obtained by appellant has been sustained. It is not averred or admitted in any of the pleadings that it was sustained. This fact is essential to a recovery under section 214 of the Civil Code of Practice. While under section 221, which provides for the execution of a bond to satisfy the judgment, it is immaterial whether the attachment was sustained or not.

2. Appeals—A copy of the order sustaining the attachment was not permitted to be filed in the Court of Appeals because it had not been filed or considered by the lower court.

W. W. Thum and G. Garner Clark for appellant.

Kohn, Baird & Spindle for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Settle.

Appellant brought suit and obtained an attachment in the Jefferson Circuit Court, Chancery division, against Jas. H. and Caleb E. Roberts on a note of \$250 it held against them. The attachment was placed in the hands of appellee, John R. Pflanz, then sheriff of Jefferson county, for service. On the attachment was this endorsement:

W. B. Tate & Co., Golden Rule Warehouse, garnishee: The object of this

action is to attach all money, property, choses in action, or other evidence of debt in your hands belonging to Jas. H. Roberts and Caleb E. Roberts, or in which they have any interest, and to restrain you from paying the same to them, or to any one for them, until the further order of this court.

"PHELPS & THUM, Plffs. Attys."

The attachment was served by the sheriff on the defendants and the garnishee named therein. It does not appear from the record that the attachment was levied by the sheriff on any property of the defendants, Roberts; it was simply executed by delivering copies thereof to each of them, and to the garnishee.

After the execution of the attachment the defendants, Jas. H. and Caleb E. Roberts, with Ray & Co. (Robert P. Hare and Samuel Ray), as sureties, executed a bond to obtain a stay of the attachment, which bond was taken by the sheriff in words and figures as follows:

"Edwards-Barnard Co., Plaintiff.	} Forthcoming Bond.
"v.	
"J. H. Roberts, &c., Defendants.	

"Jefferson Circuit Court.

"We bind ourselves to the Edwards-Barnard Co., in the sum of \$550, that the defendants, Jas. H. Roberts and Caleb E. Roberts, shall perform the judgment of the court in this action, or that the property attached in this action, or its value, shall be forthcoming, and subject to the order of the court. January 29, 1897.

"JAS. H. ROBERTS,  
 "CALEB E. ROBERTS,  
 "RAY & CO., that is  
 "ROBERT P. HARE, and  
 "SAMUEL RAY,

"By JOHN T. BASHAW,  
 "Atty. in fact."

Personal judgment was rendered in appellant's favor against Jas. H. and Caleb E. Roberts in the attachment suit for the amount of the note sued on, and execution was issued thereon, directed to the sheriff of Henry county, where the defendants then resided, but was returned "no property found." Thereafter appellant brought suit in the Jefferson Circuit Court, Common Pleas division, against Robert P. Hare on the bond taken by the sheriff, Samuel Ray having in the meantime died intestate and insolvent. In that action judgment by default was rendered against Hare in appellant's favor for \$250, with interest and costs, upon which execution was issued directed to the sheriff of Jefferson county, by whom it was returned with the endorsement "no property found," etc. Then the appellants instituted this action in the Jefferson Circuit Court, Chancery division, against appellee, seeking to recover of him the amount of its debt and costs against Jas. H. and Caleb E. Roberts, upon the alleged ground that he had negligently, as sheriff, failed to require good security upon the bond taken by him in the matter of the attachment, and that the sureties therein, Samuel Ray and Robert P. Hare, were insolvent when they were accepted on the bond, and that their insolvency was known, or by the exercise of ordinary care could have been known, to appellee at the time.

After answer and other necessary pleadings had been filed, proof in the shape of depositions was taken by the parties upon the issues thus formed, and upon submission and trial of the case judgment was rendered by the lower court dismissing appellant's petition, and allowing appellee his costs. Of that judgment appellant complains, hence this appeal.

We will not take time to consider all of the questions raised by the appeal, deeming it necessary to notice only such as, in our opinion, are decisive of the case. It will be observed that this action is purely an ordinary, or common-law, action, and it is a well-known rule in such cases that the judgment of the chancellor will be as favorably regarded as would be the verdict of a properly-instructed jury, hence unless palpably against the evidence, it will not be disturbed. (Louisville, &c., Railway Co. v. Taylor, 96 Ky., 241.)

The rule is, however, different in equitable actions, for in such action this court will upon appeal determine the weight of the evidence. (Scott v. Mitchell, 19 Ky. Law Rep., 218.) The judgment of the chancellor in this case must, therefore, be tested by the rule first herein stated, and unless it is found to be flagrantly against the evidence, it will not be disturbed. The only issue of fact necessary to be determined by the chancellor was whether or not appellee, as sheriff, was guilty of negligence in taking the bond executed by the Roberts', with Ray and Hare as sureties. The sheriff is not the guarantor of the solvency of a surety whom he may take upon a bond. We have no statute in this State fixing the liability of the sheriff, or defining the degree of care required of him in the matter of taking bonds. The rule by which his official conduct in such cases is to be measured is thus stated in Meachem on Public Officers, section 762: "So where it is the duty of the officer to take, for the protection of the plaintiff, bonds or other securities, it is the officer's duty not only to obtain the bond, bail or other security, but to use reasonable care and diligence to see that none but competent and reasonable securities are accepted, and that the securities themselves are in proper and sufficient form. He is not the insurer of the solvency of the sureties, unless the statute makes him so, nor is he liable, though deceived, where he exercises reasonable care; but if he discharges the goods or debtor without any bond at all, or one in which the sureties names are forged, or if he accepts insufficient sureties, without making a reasonable effort to ascertain their solvency, he is liable. A fortiori is he liable where he accepts sureties who he knows are irresponsible." It must be presumed that the chancellor found from the evidence that appellee in taking the bond in controversy used reasonable care to ascertain the financial condition of the sureties, and to satisfy himself of their solvency, if he did, he can not be held responsible for a mere mistake of judgment. Of the witnesses whose depositions were taken by appellant only one had had any business connection with the sureties, and none of them claimed to have any actual knowledge of their business or affairs. What they testified to was largely hearsay, and what they professed to know was based mainly upon suspicion and conjecture.

Freese, of the Western Bank, whose deposition was taken by appellant, testified that the credit of the sureties was at the date of the bond fairly good with the bank. Hare, one of the sureties, and young Ray, who was in the employ of the firm, both say that at the time the bond was executed their



assets exceeded their liabilities by a considerable amount, and though they soon thereafter failed, it seemed in large measure to have been brought about by a destructive fire in their tobacco warehouse. Hare also testified that the firm of Ray & Hare, at the date of the execution of the bond, owned a house and lot in the village of Lewisport, Hancock county, which was unencumbered, and which was taken by them at the valuation of \$300, but was subsequently assessed at \$200. This lot was, after the execution of the bond, transferred to the bank by Ray & Hare, at a valuation of \$360, and was afterward sold by the bank at \$75. But it is more than probable that the bank did not care to retain unremunerative real estate at any price, and hence sold it at a sacrifice.

But conceding that it was only worth that sum, or but little more when the bond was executed, its value was practically equal to the amount for which appellee, if legally liable at all, could be made responsible in damage for neglect in taking the bond, for his liability could not exceed that of the sureties on the bond, and if it be true as testified by Hare, whose statements on that point are uncontradicted, that the proceeds of the sale of the tobacco in the hands of the garnishees afforded a surplus of only \$50 to \$75 after paying the factor's liens, it would seem to follow that the sureties in the bond would in no event have been liable for an amount greater than the surplus. In *Hayman v. Hallam*, 79 Ky., 389, it was held by this court that sureties in such bond as was taken by the sheriff in this case were liable only for the surplus of the property attached after the payment of existing liens antecedent in date to the attachment, and that the sureties could set up by way of defense to an action against them on the bond the amount of such liens. We do not suppose that the chancellor based his judgment alone upon the ground that as the liability of the sureties on the bond does not appear to exceed the value of the Lewisport lot, their ownership of that property of itself qualified or made them good as sureties on the bond, but that fact, with the farther facts shown by the evidence, that the sureties were then in the tobacco business in Louisville, and operating a warehouse, with some tangible property in their possession of which they were the apparent, if not the real, owners, and that considerable sums were being received by them through their business, doubtless superinduced the conviction in the mind of the chancellor that the sheriff had good reason to believe, and as a prudent man did believe, that Ray & Hare were good and sufficient sureties on the bond, and that he is not to be charged with negligence because he accepted them in that capacity. At any rate, as the decision of the chancellor upon this issue is entitled to as much weight as would be the verdict of a jury, and as it can not be said by this court to be flagrantly against the evidence upon this ground alone, the judgment might, with propriety, be affirmed.

It nowhere appears from the record that the attachment obtained by appellant has been sustained. It is certainly not averred, or admitted, in any of the pleadings that it was sustained. The bond in this case was given under section 214, Civil Code. A bond may be given under section 221, the effect of which is to discharge the attachment, for it is to perform the judgment of the court, and can be given only by the defendant, and when given it

substitutes the bond for the attached property, and shuts off all defense to the attachment, or right to contest the grounds thereof.

Where the bond is given under section 221 it is not necessary for the court to sustain or discharge the attachment, for the right of recovery on the bond follows a personal judgment against the party executing it. But the giving of the bond provided for in section 214 is wholly different in purpose and effect. The latter bond may be given by any person in possession of the property attached. It is to be taken by the sheriff, and is conditioned that the defendant shall perform the judgment in the action, or that the property or its value shall be forthcoming and subject to the order of the court. This bond does not discharge the attachment, but constitutes an obligation that the property shall be produced and delivered when the court so orders. The lien created by the attachment and the right of the court to subject it to the payment of the attachment debt continues as fully after the giving of a forthcoming bond as if no such bond had been given, and the attachment itself continues until the case is finally determined by the judgment of the court on the attachment, as well as on the merits of the case. (*Hobson v. Hall*, 13 Ky. Law Rep., 109.)

It would seem to follow, therefore, and such is our opinion, that there can be no liability on the bond in this case, which was given under section 214, Civil Code, in the absence of a judgment sustaining the attachment. It is not enough that a personal judgment was executed for the debt sued on. Some disposition of the attachment by judgment of the court was also necessary. The attachment was ancillary. The defendant may owe the debt and be willing to allow personal judgment to go against him, and yet if the grounds of attachment do not exist the attachment may be successfully resisted, and the court adjudged its discharge, or the grounds of attachment may exist, yet the property attached may not be subject to attachment. The trial of the attachment is wholly distinct from the trial of the case on its merits, and sometimes precedes, sometimes follows, the main trial. (*Kassel v. Sneed*, 21 Ky. Law Rep., 777; *Frances v. Burnett*, 84 Ky., 24; sections 263-264, Civil Code.)

If no liability rests upon the sureties in this bond, in the absence of a judgment sustaining the attachment, it necessarily follows that none rests upon the sheriff for taking insufficient sureties on the bond.

The appellant has offered to file in this court what purports to be a copy of the order of the lower court sustaining the attachment, but we do not think it should be now filed, as it was not filed, or made a part of the record, upon the trial in the lower court, and it is not proper to add to the record in this court something by way of evidence which was not used in or furnished the former court. But in any event the copy of the order now offered to show that the attachment was sustained, even if allowed to be filed, can not cure or supply the entire omission from the petition of the necessary averment that the attachment was sustained.

Finding no error in the record prejudicial to appellant's rights, the judgment of the lower court is affirmed.

## HARPER v. PAYNE, GD'N, &amp;c.

(Filed April 29, 1908—Not to be reported.)

Guardian and ward—Appellant, the father of two infants, a son aged seventeen and a daughter aged fifteen years, was their guardian for a period of eleven years, and sought to charge them with board, amounting to \$2,200. The children own a tract of land which yields a gross rental of \$320 a year. The guardian has a net income of not exceeding \$350. Held—That the father is not entitled to charge the board claimed. He should contribute \$200 a year to the support of his children, and the income of the infants should be charged with the cost of their education, clothing and medical bills. It is the duty of the father to provide for his infant children, and he is entitled to their labor, and they could evidently earn their living.

Montgomery & Lee for appellant.

V. F. Bradley for appellees.

Appeal from Scott Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 12th day of December, 1899, the appellant, W. W. Harper, made a settlement of his accounts as guardian of his infant children, Payne Harper and Sally B. Harper, with the commissioner of the Scott County Court. It appears from a former settlement made by him on the 20th of April, 1892, that there was a balance in his hands due to his wards of \$230.35, and that after that settlement he received from Mrs. Carrie Payne, executrix of his children's grandfather, \$966, and that he received from rent of his wards' land (inherited presumably from their grandfather), between the 14th of November, 1894, and the 17th of August, 1899, \$1,998.80, aggregating \$3,185.15. Deducting from this sum 5 per cent. commissions, there remained a net balance due his wards on the 30th day of January, 1900, \$3,025.90. In this settlement he claimed the following credits:

Mrs. Carrie Payne, board bill for September 1, 1888, to September 1, 1899, for Payne Harper and S. B. Harper.....	\$2,200 00
To Lewis & Coffman, Med. bill.....	35 50
To tuition college, Payne and Sallie....	37 50
Rucker & Richards, Payne Harper.....	115 00
Which credits aggregate.....	<u>\$2,387 50</u>

About this time he resigned as guardian of his children, and their aunt, Miss Lida Payne, qualified as guardian, and filed exceptions to each of these credits, upon the ground that appellant was the father of his wards, with ample income from the property owned by him to support them and himself. The exceptions were sustained, and it was adjudged by the county court that appellant, as guardian, should not be allowed any credits for money expended by him for his wards for their maintenance, support and education, and gave judgment against him for \$3,025.90. From this judgment he appealed to the Scott Circuit Court, and upon hearing in that court the judgment of the county court was affirmed, and he has appealed to this court.

It appears from the testimony in the record that appellant is thirty-eight

years of age, and in good health; that he owns a life estate in 255 acres of poor land, which yields a gross rental of about \$350 a year, and also a life estate in a house and lot in the city of Georgetown, which yields a rental of \$300 per year, paid, however, in board of himself and two children; that the annual taxes and insurance on this property is about \$160 a year. It is not definitely shown the extent of the repairs, but we think it may be safely assumed that they are not less than \$100 more, which would leave the appellant a net income of not exceeding \$350. It appears that he has no profession or trade, and is unaccustomed to manual labor, and seems thoroughly improvident. In addition to the cash in the hands of appellant belonging to his infants, it is shown that they own jointly a tract of fifty acres of land, which yields a gross rental of \$320 a year. The children have always lived in the family of their grandmother in the city of Georgetown, and seem to have rendered no services whatever to the father. The boy is seventeen years of age and the girl fifteen. The proof shows that the boy is industrious, and had earned as much as 75 cents a day by his manual labor, and both, no doubt, if it were necessary, are capable of earning their support. In the case of *Hedges v. Hedges*, ante, 2220, decided at the present term of the court, it is said: "The general rule is that the father must support his infant children. The obligation is both a natural and a legal one; if he is able to support them, he is required by law to do so, although they may have an estate of their own. It is only where he is unable to support them, in view of his obligation to other dependent members of his family, and where their estate is sufficient for the purpose, that the courts allow as an exception that the father may charge the guardian of his infant children with their support. The father is by law entitled to the labor and wages of his infant children; this is partly because he is charged with their support."

It is evident that the net income of appellant would be insufficient to support his two children and himself in the manner to which they have been accustomed. And whilst it is perhaps unfortunate, both for him and them, that he has not kept them with him upon his farm in the country, and required them to do some work for the benefit of the family, that is a matter which it is not our province to control.

It seems to us under the facts of this case that the chancellor properly refused to allow appellant the item of \$2,200 for board of his two infant children, and also for the \$115 paid to Rucker & Richards for a buggy for Payne Harper. The uncontradicted testimony of Miss Lida Harper shows that this buggy was a gift from the father to the son, and in no event was it a proper expenditure to be charged against the estate of the wards in the hands of the guardian. We think appellant should certainly contribute as much as \$200 a year towards the support and maintenance of his infant children, but in view of the very narrow income which would remain to him after he paid this sum, we are of the opinion that the income of the infants should be charged with the cost of their education, clothing, medical bills, and that moneys expended for these items for them by appellant should be allowed as a credit on the funds in his hands due to his wards.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

STEELE, JR., &c. v. NEW PARK CITY B. & L. ASSOCIATION, &c.

(Filed April 29, 1903—Not to be reported.)

Building and loan associations—Insolvency—Stock payments—In this action to settle the accounts of an insolvent building and loan association, which had been placed in the hands of a receiver, the lower court by its judgment approved a method of settlement reported by the receiver which proposed to estimate the value of the stock and the costs and expenses, and to levy an assessment of \$20 per share on borrowing and nonborrowing stockholders alike, to pay these expenses and settle with each stockholder by allowing him credit for all sums paid in, including all payments on stock. On appeal, Held—That borrowing members are not entitled to have deducted from their indebtedness to the association payments made by them as dues on stock, but must, after deducting payments of premium and interest, discharge in cash the balance remaining upon their indebtedness. Payments upon stock must stand to their credit on the books of the association until time for final adjustment, when all the stockholders, borrowers or non-borrowers, will be paid pro rata from the fund for ultimate distribution.

D. W. Steele, Jr., for appellants.

Hager & Stewart for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Settle.

The appellee association was incorporated, and began business in March, 1889, with an authorized capital of \$100,000, divided into shares of \$200 each. Its business seemed to have been confined to the city of Ashland and vicinity, and it was conducted as follows: The stockholders of the association met at its office in Ashland every two weeks and paid at every such meeting \$1 on each share of stock owned by them respectively, and if they were borrowers from the association, as many of them were, they paid or were charged in addition to the dues on their stock interest upon loans, and fines in case of the nonpayment of dues and interest. Loans were made upon mortgage security, and in some instances pledge of paid-up stock. In the manner of conducting the business of this association no dividends to the stockholders were declared or paid, the dues and interest payments being intended to constitute a fund for the redemption of shares, and when sufficient money had been paid into the association to redeem all the stock the business of the association would be at an end.

Upon the basis thus adopted for the payment of dues upon stock, viz., at the rate of \$1 per share every two weeks, it was assumed by the stockholders that one hundred and sixty-five payments of dues by each stockholder, together with the payments of interest on loans, would mature the stock, and make each share of the value of \$200, and if the plan had been carried out as contemplated such would have been the results, but as is usual with such ventures the end aimed at was not attained, and we find from the record that the association has been insolvent since July, 1895.

From the time of the organization of the association down to July, 1895, one H. A. Levi was its secretary, and in that month he defaulted and fled the State for parts unknown, indebted to the association not less than \$6,000, and perhaps as much as \$8,000, no part of which has been, or will be, recovered by the association.

This action was instituted in the Boyd Circuit Court, September 1, 1897, by appellants to wind up the affairs and settle the indebtedness of the association, and to this end its property and assets were, by the order of court, placed in the hands of John C. Hopkins, its receiver and commissioner. It appears from the record that the association loaned a good deal of money to its stockholders, much of which has not been repaid, and in addition that some of the stockholders, borrowers and nonborrowers are in arrears with their dues upon stock held by them. In view of this state of things the court, on appellants' motion, entered an order directing the receiver to collect the loans from the borrowing members, less the payments that had been made thereon by such borrowers, exclusive of the payments they had made on account of their stock, which latter payments were directed to be reserved until distribution should be made of the assets of the association. In other words, the receiver was directed to credit the borrowing stockholders with all sums paid by them on their loans, but was not to credit them with amounts paid on their stock. It, however, appears that the foregoing order was suspended by the court, and thereafter the receiver filed a report in which he attempted to present a basis for a settlement of the affairs of said association, without first requiring all borrowing and nonborrowing stockholders to pay what they owe it, that is to say, the theory presented by the receiver is to endeavor to equalize the accounts of the stockholders as between themselves, by making them all account for dues and the borrowers for interest to the one hundred and sixty-fifth meeting, and then, without collecting in full from borrowers, credit them with all dues paid, and provide for the collection of a sum sufficient to pay all liabilities of the association by assessing against each stockholder his due proportion of the loss to all. Exceptions to the report of the receiver were filed by appellants and others, but they were overruled, the report confirmed, and the receiver directed by the judgment of the lower court to proceed with the work of winding up the affairs of the association upon the basis contained in his report, and from that judgment this appeal is prosecuted.

We are of the opinion that the report of the receiver is too general and indefinite in its findings to have authorized the judgment rendered thereon by the court. It does not with reasonable certainty give the assets or approximate the indebtedness. Its conclusions on these points, as well as in regard to the probable cost of settling the affairs of the association, are upon estimates that seem to be purely speculative, indeed to follow the theory of settlement proposed by the report would, in our opinion, be but an experiment of doubtful result.

It is, however, contended that the rule stated in *Endlich on Building Associations* (section 5312, 2d edition), which was quoted with approval by this court in *Reddick, &c. v. U. S. Building and Loan Association's Ass'ee*, 20 Ky. Law Rep., 1720, will authorize the adoption of the basis of settlement proposed by the receiver in this case. The rule in question is thus stated by *Endlich*: "There can, however, ordinarily be no reason why he (the borrowing member) should be put to the inconvenience of paying down the whole amount of his debt without credit for his stock payments, and relegated to a distribution of the corporate assets in order to get back what he might, in the first instance, have been permitted to retain. In general, the only effect

of such a rule, besides the distinct hardship upon the borrower, will be to swell the amounts passing through the receiver's hands, to complicate the accounts, and the distribution, and thereby to increase the expenses of the settlement, etc. \* \* \* There can be no difficulty," continues the learned author, "in determining, or at least approximating, what receipts, profits and losses have been, what its liabilities are, and what is the value of every share of stock presently held, advanced or unadvanced, in it and how much every member must lose upon every dollar paid in by him upon his stock, making a proper allowance for the expenses of settlement."

In commenting upon this rule this court in the case *supra*, among other things, said: \* \* \* "The rule can be followed only where the extent of the losses and expenses of the settlement can be so surely estimated as to render it safe to fix an approximate value on the stock, and this must be left in a large measure to the sound judgment of the chancellor, having the whole case before him."

After stating such facts as to the indebtedness and assets of the United States Building and Loan Association as were admitted in the record, the court refused to apply the rule announced by Endlich in settling its affairs, and in that connection further said: "These assets consisted of loans to its members, and according to statements of agreed facts, secured either by mortgages upon real estate or by stock of the company. To what extent loans were secured by stock of the company we do not know. If there had been such loans their amounts and extent ought to have been shown, and it seems to us also there ought to have been some proof, in a general way at least, as to the value of these securities. The assignee expresses an unwillingness to take the responsibility of fixing a value on the stock, or allowing the credits therefor on the loans. Unless, therefore, the borrowing members are sufficiently interested to make it reasonably certain by proof that such value may be fixed, it can not be done. In view of the meager statements in the record before us, we can not say the chancellor was authorized to fix any approximate value on the stock for which credit may be given the borrower."

In the case at bar we find that the only indebtedness of the association is to its own members, and it appears also that the receiver, in stating the accounts of the association, reports, according to what he says is the best approximation possible, the liabilities at \$3,993.80, leaving what he calls a net loss of \$3,008.70, but as the net loss must manifestly be ascertained by subtracting the assets from the liabilities, the loss or deficit intended to be stated by the receiver, as shown by correct subtraction, will be \$2,993.80, instead of \$3,008.70, as reported. To this loss, he says, must be added the cost of administration, \$1,000, which would make the net sum to be realized \$3,993.80, instead of \$4,008.70 as reported. To raise this sum the receiver proposes to assess the 202 shares of stock of the association \$20 per share, to be collected from all the stockholders, borrowers and nonborrowers. The amount of assets reported seems to be made up of sums, said by the receiver, to be due from borrowers to the association, on loans secured in greater part by mortgage, after deducting \$1,000 for losses by way of set-offs and credits. The facts and figures thus reported by the receiver were taken, as he says, from the association's books.

Upon the other hand, appellants, in the exceptions filed by them, claim

that the assets of the association amount to \$9,649.05, and its liabilities to \$9,210.49, leaving an alleged surplus of \$438.56, and that if the borrowers, and those in arrears for dues on stock, are made to pay what they owe the association, the only matter that would have to be provided for by the assessment against the stockholders would be the cost of winding up the affairs of the association, which would not exceed \$5 per share.

It is further claimed by appellants that the statement of assets and liabilities presented by their exceptions was obtained from the books of the association. The books are not in the record before us, nor were they, so far as appears from the record, before the lower court when the exceptions were overruled by that court. We are likewise unable to ascertain from the record that any proof, by deposition or otherwise, was heard or considered by the court in passing upon the questions of fact raised by the receiver's report, and the numerous exceptions that were filed to same, yet the court accepted and based its judgment upon the report alone. We think this was error, for in the absence of proof, and in view of the unsatisfactory showing made by the report, "we can not say the chancellor was authorized to fix any approximate value on the stock for which credit may be given the borrowers," in advance of the payment by them of what they owe on the loans extended them by the association.

We think it more equitable that the affairs of the appellee association be administered according to the rule announced by this court in *Rogers' Receiver v. Rains*, 18 Ky. Law Rep., 768, which holds that in winding up an insolvent building and loan association borrowing members are not entitled to have deducted from their indebtedness to the association payments made by them as dues on the stock, but must, after deducting payments of premium and interest, discharge in cash the balance remaining upon their indebtedness. Payments upon stock must stand to their credit on the books of the association until time for final adjustment, when all the stockholders, borrowers or nonborrowers, will be paid pro rata from the fund for ultimate distribution.

For the reasons indicated the judgment of the lower court is reversed and cause remanded for further proceedings consistent with the opinion herein.

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McCORMICK HARVESTING MACHINE CO. v. DODKINS.

(Filed April 30, 1908—Not to be reported.)

**Contracts**—In this action the lower court refused to compel appellee to comply with his contract for the purchase of a corn shredder from appellant, which had been represented to him as in good condition and would work satisfactorily, and it was agreed that in case it failed to perform the work required, notice of same should be given to the agent of appellant, and an opportunity afforded to put same in working condition, and other conditions as to return of machine, etc., were agreed on. On appeal, Held—That the decision of the chancellor will not be disturbed as the proof shows that the appellee complied with all requirements in order to have the machine do good work, and that it failed to do it.

E. B. Drake and S. R. Crowdson for appellant.

W. P. Sandidge for appellee.



Appeal from Logan Circuit Court.

Opinion of the court by Judge Hobson.

Appellee ordered of appellant a corn shredder. By the terms of the order he was either to pay \$190 cash for the machine when received or to execute two notes, each for \$100, due January 1, 1901, and 1902, respectively. The order also contained the following: "This machine is warranted to be well made, of good material, and durable, with proper care. If upon one day's trial the machine should not work well, the purchaser should give immediate notice to said McCormick Harvesting Machine Co., or their agent, and allow time to send a person to put it in order. If it can not be made to work well, the person shall return it at once to the agent of whom he received it, and all cash and notes received in settlement will be refunded. Continuous use of the machine, or use at intervals through the harvesting season, or failure to notify the McCormick Harvesting Machine Co., or their agent, or to return the machine as agreed, shall be deemed an acceptance of the machine by the undersigned."

When the machine was delivered he did not pay cash or execute the notes, and refusing subsequently to do either, he was sued by appellant in this action in equity, praying judgment for the price of the machine, \$190, or that he be compelled to execute the notes therefor. He defended the action on the ground that the machine was not as represented, or warranted, and that he had refused to accept it. The circuit court, on final hearing, dismissed the petition.

The evidence is very conflicting, but after a careful consideration of it all, and the circumstances shown thereby, we have reached the conclusion that we ought not to disturb the chancellor's finding under the rule adopted by the court as to the effect to be given the chancellor's finding of fact in cases of this character. We deem it unnecessary to elaborate our reasons for this or to detail the conflicting evidence. The defendant brought his defense literally within the terms of the contract. It is provided in the contract, as will be seen above, that if upon one day's trial the machine should not work well the purchaser should give immediate notice to the company, or to its agent, and allow time to send a person to put it in order. The defendant showed that when the machine was set up and started by the company's agents he at once notified them that it did not work well. They then took out some parts of the machine and agreed to put on a basket to save the corn, and agreed to return the next morning and put the basket on. This they failed to do. It will also be seen from the contract that it was provided that if the machine could not be made to work well the purchaser should return it to the agent of whom he received it. The defendant testified that after giving the machine a fair trial he offered to return it to the agent of whom he received it, and the agent requested him to put it under shelter on his farm for the company. This he did. The agent had power to waive the return of the machine, and this request on his part was a waiver; for the company, after requesting the defendant to put the machine under shelter on his farm for it, can not complain that he did not do something else with it. It is insisted, however, that appellee is liable for the machine under the last clause of the contract, providing that continuous use of the machine, or use at intervals through harvesting season, or failure to notify the company, or

its agent, or to return the machine as agreed, should be deemed an acceptance of the machine by the purchaser. There is great force in this argument, if we look only to the evidence for the plaintiff. But the evidence for the defendant tended to show that the agents assured him that the machine would do better if the corn was dry, or after it was run a little while, and that they promised later to come and fix it and make it do. Under all the evidence, it would seem pretty clear that the machine did not do good work. The great weight of the evidence shows that it so wasted the corn that a farmer could not well afford to use it for the purpose for which it was purchased. And taking into consideration the assurances given appellee by the agent and all the circumstances, we are satisfied that he never intended to accept the machine unless it did the work better than it had done. The evidence is very conflicting as to the amount that he used it, but taking the testimony on his behalf to be true, we do not think that there was any such use of the machine as should be deemed an acceptance of it under the contract. The testimony for the plaintiff and the defendant is very conflicting on this point, but, on the whole case, we are unable to see that the testimony for the plaintiff outweighs the testimony for the defendant. A circumstance that has great weight with us is the fact that he executed no notes for the machine and paid nothing on it, and no demand was made on him by the company when the machine was set up, or at any time while he was using it, for the execution of the notes or the payment of the money. He had not seen the machine before ordering it. It was an experiment, and the agents of the company were interested in the experiment being a success, for its failure would have a bad local effect on the sale of other machines.

Judgment affirmed.

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MERKLEY & SON v. U. S. FIDELITY AND GUARANTY CO.

(Filed April 30, 1903—Not to be reported.)

Surety—Broker—Pleading—This action was brought by appellants on bond executed by B., with appellee as surety, to recover the value of goods alleged to have been sold B. On a former appeal this court determined that the goods were not sold to B. by appellants, but shipped to him as broker for appellants, with directions to sell and report sales, and that the liability of appellee on the bond was limited to loss due to the fraud or dishonesty of B. On the return of the case appellants amended their petition, and charged that the loss resulted from the fraud and dishonesty of B. The lower court sustained a demurrer to the petition as amended, and the petition was dismissed. Held—That the court erred in sustaining a demurrer to the petition as amended, as the amendment was not a departure from the original cause of action.

H. W. Rives for appellants.

John McChord for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hobson.

On the former appeal, after setting out the terms of the bond sued on and the facts attending the shipment and leading up to it, the court concluded

its opinion with these words: "From the above it is perfectly clear that Bass did not buy the goods from appellees, but that they were shipped to him as a broker to sell, and that they understood at the time that appellant, as his surety in the bond, was only responsible in case of fraud or dishonesty on his part. The petition does not charge that the loss sued for was due to the fraud or dishonesty of Bass, and the demurrer to it should have been sustained. The instructions of the court were erroneous in so far as they allowed the jury to find against appellant for any loss not due to the fraud or dishonesty of Bass. Judgment reversed and cause remanded for further proceedings consistent with this opinion." (U. S. Fidelity and Guaranty Co. v. Merkley & Son, 28 Ky. Law Rep., 1570.)

It was thus in effect held that the petition would be sufficient if it charged that the loss sued for was due to the fraud or dishonesty of Bass, and that instructions were proper allowing the jury to find against appellant for a loss due to his fraud or dishonesty. On the return of the case to the circuit court the petition was amended so as to charge that the loss sued for was due to the fraud or dishonesty of Bass. The court thereupon sustained the demurrer to the petition as amended, and dismissed the action.

The opinion rendered on the former appeal is the law of this case, and is equally binding on this court and the circuit court. As it was then determined that appellant was responsible for any loss due to the fraud or dishonesty of Bass, the circuit court erred in sustaining the demurrer to the petition as amended. And while it is unnecessary now to elaborate the reasons on which the former opinion was based, we will add that we see nothing in the case as now presented that was not presented in the petition for rehearing then filed. We concluded then that the goods were shipped to Bass as a broker. It was charged in the petition that they were sold to Bass. This was denied by the answer. The plaintiff regarded the transaction as a sale because a fixed price was charged to Bass when the goods were shipped to him; but independently of whether the transaction was called a sale or a delivery to an agent, we were then of opinion that appellee was responsible for any loss due to the fraud or dishonesty of Bass, as according to the proof he was to remit on every Monday night for what had been sold the previous week, and to try to dispose of the goods as fast as possible in order to do a safe business. The bond was given to secure the performance of this agreement, and was binding on appellee regardless of the name of the transaction.

In the amended petition filed upon the return of the case it was averred that under the arrangement it was the duty of Bass to safely keep the goods shipped to him by plaintiffs until they should be sold for cash, after which it was his duty to promptly remit to plaintiffs on every Monday the money so received during the previous week. This sufficiently averred that the goods were sent to Bass to sell and remit the proceeds to the plaintiffs, which would constitute him in law the plaintiffs' broker. This was not a departure from the original cause of action, but only a conforming of the allegations of the petition to the view of the laws of the case which this court had laid down.

Judgment reversed and cause remanded for further proceedings consistent herewith.

2310 NEWTON, &C. V. SO. BAPTIST THEO. SEMINARY.

NEWTON, &c. v. SOUTHERN BAPTIST THEOLOGICAL SEMINARY, &c.

(Filed April 30, 1903.)

Wills—Conditional devise—N., by his will, devised one hundred and twenty acres of land to his daughter if she should live longer than his daughter-in-law, but if the daughter-in-law is the longest liver, he desired that the land should be sold and the proceeds paid to the Baptist Male School, about to open at Owensboro under Professor Gray. The testator had but two children, the son who had died, and his daughter. The daughter survived her father, but died before the daughter-in-law. The daughter devised the land to the appellee as the Baptist Male School was never established. The heirs of the testator and appellee are contesting claimants to said property. Held—That under section 4843, Kentucky Statutes, the devise to the Baptist Male School failed and reverted to the heirs of the testator as in case of intestacy, and his daughter being his only heir had power to dispose of same by will. She could only be deprived of it by the remainder becoming effective, which was attempted to be placed in the Baptist Male School, which failed.

Birkhead & Clements for appellants.

Ellis, Sweeney & Ellis for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Paynter.

This appeal involves the construction of the fourth clause of the will of William Newton. It reads as follows: "The one hundred and twenty acres of land occupied by Mrs. Lucinda Newton, widow of my son, Slaughter Newton, I will to my daughter, Mary, if she should live longer than said Lucinda Newton; but if said Lucinda is the longest liver, then I will that at her death said land shall be sold and the proceeds paid to the Baptist Male School, about to open in Owensboro under Professor Gray."

The testator had two children, a son, Slaughter, who died before the will was made, and a daughter, Mary, who survived the testator, but who died before Mrs. Lucinda Newton, the widow of the testator's son, Slaughter. The Baptist Male School, which the testator assumed would soon open in Owensboro under Professor Gray, was not organized or opened at any time, so at the time of the death of the testator and his daughter, Mary, such an institution as the Baptist Male School did not exist at Owensboro. The daughter, Mary, assuming that she owned the one hundred and twenty acres of land referred to in the clause of the will under consideration, devised it to the appellee, Southern Baptist Theological Seminary. The controversy here is between those claiming to be the heirs at law of William Newton and the appellee, Southern Baptist Theological Seminary.

On behalf of the appellants it is contended that the daughter, Mary Newton, took a contingent remainder or a defeasible fee in the remainder; that as she died before the life tenant, Lucinda Newton, and the contingency did not happen which would have given her an absolute fee in the property, it descended to the heirs at law of William Newton, the descendants of his brothers and sisters, who are plaintiffs in this action. On the behalf of the appellees it is contended that the devise failed, and that instead of the prop-

erty going to the testator's brothers and sisters, it descended to Mary as an undevise estate.

Both under the claim made by the appellants and appellees the devise failed, and it should be treated as an undevise estate. The real issue is whether it descended to the daughter, Mary, as an heir at law of her father, or whether the devise prevented her from inheriting it from her father, and thus casting the estate upon those who would have been the testator, William Newton's, heirs at law, had he died intestate and childless. Section 4848, Kentucky Statutes, provides that "unless a contrary intention shall appear by the will, such real or personal estate, or interest therein, as shall be comprised in any devise in such will which shall fail or be void, or otherwise incapable of taking effect, shall not be included in the residuary devise contained in such will, but shall pass as in case of intestacy."

Under this statute the devise failed, no Baptist Male School ever being in existence, and of course no estate in the land devised vested in it at the death of the testator or subsequently. So the clause in the devise with reference to the Baptist Male School does not affect in any way the question as to who inherited the estate.

Where two contingent remainders are created, the one is subordinate or alternate to the other, but the second only vests when the first fails. (Leppes, &c. v. Lee, &c., 92 Ky., 16.) There was no second remainder, because the supposed institution which was designated to take such remainder did not have an existence. The estate which Mary Newton took under the will was a contingent remainder, because it was limited to take effect upon an uncertain event. The estate which she took by it might be designated as a remainder which never took effect, as the event which was to give her an absolute estate never happened. A contingent remainder may be conveyed or devised, yet if the grantor or deviser dies before it becomes effective, then the grantee or devisee takes nothing. As the daughter, Mary, died before Lucinda, the contingent remainder never became effective, and, therefore, under her father's will, she had no estate which she could devise to the Southern Baptist Theological Seminary. If she had the right to devise the estate, it was by reason of the fact that she was the only heir of her father. Of course the life tenant did not take the title to the property. As devisee the daughter, Mary, did not take the title to it, because the event did not happen which was to vest her therewith. The Baptist Male School never took it because it did not exist. As the testator never placed the title in any one, it descended to his heir at law.

"If a contingent remainder be created in conveyances by way of use, or in dispositions by will, the inheritance, in the meantime, if not otherwise disposed of, remains in the grantor or his heirs, or descends to the heirs of the testator, to remain until the contingency happens. This general and equitable principle is of acknowledged authority." (Kent's Commentaries, volume 4, page 257.)

This rule announced by Kent was recognized as correct in Coots v. Yewell, &c., 95 Ky., 367; Herbert's Gd'n v. Herbert's Ex'or, 85 Ky., 145. It is applicable to the facts of this case, because the testator did not dispose of the contingent remainder devised to his daughter, as the Baptist Male School did not exist, and the effect is exactly the same as if the testator had not

attempted to make such devise. Suppose the contingent remainder in the one hundred and twenty acres had been devised to a stranger, unquestionably the title to it would have vested in testator's daughter as his only heir at law. If the event contemplated did not happen, then she would not have been divested of the title which descended to her as the heir at law. In this case she was heir at law, and only in one way could she have been divested of that title, and that was, if the Baptist Male School had existed and could have taken the property under the will. As the daughter was the heir at law and the devisee, the title and contingent remainder was vested in one and the same person. The title did not descend on the death of the testator to the descendants of his brothers and sisters, because they were not his heirs at law. There is a technical rule which recognizes a fee in abeyance, but that state of abeyance was always odious and never admitted but from necessity. (Kent's Commentaries, volume 4, page 259.) Such necessity does not exist in this case. The title was not in abeyance, but upon the death of the testator vested in his only child, who could only have been deprived of it by remainders becoming effective which was attempted to be placed in the Baptist Male School, which failed.

The judgment is affirmed.

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REED, &c. v. BATES, &c.

(Filed April 30, 1903.)

Street improvements—Construction of statutes—The ordinance providing for the improvement of Zane street was passed while section 2835, Kentucky Statutes, was in force, which provided that the owners of corner lots should be assessed 25 per cent. more than the owners of other lots. But the contract for improvements was not made until after the amendment of March 19, 1898, was passed, which provided that the cost of such improvement should be apportioned equally against the owners in the fourth of the squares abutting on said improvement. The question involved on this appeal is, which statute fixes the basis of the charge. Held—That the rights of the property owners were fixed by the ordinance, and as this ordinance was passed while the former statute was in force the apportionment of the costs was properly made under the former statute.

Lane & Harrison for appellants.

W. W. & J. R. Watts and William Furlong for appellees.

Appeal from Jefferson Circuit Court, Chancery division, No. 1.

Opinion of the court by Judge Paynter.

The only question involved here is as to whether or not the cost of the improvement of Zane street, between Fifth and Sixth streets, by original construction of the carriage way by grading, paving and curbing the same, should be apportioned in accordance with section 2835, Kentucky Statutes, or under the act approved March 19, 1898 (Session Acts of 1898, page 96), which went into effect June 19, 1898, and which act is amendatory of the act of which the section to which reference is made is a part. Under the law before the passage of the act of 1898 the cost of curbing in the improvement by original construction of the carriage way, was to be charged only against the owners of lots in front of which the curbing was placed, except the owners

of corner lots were chargeable with the cost of curbing their sidewalk intersections; and if a corner lot had a thirty-foot front and extended back to the depth of the territory assessed, its owner was chargeable with 25 per cent. more than the owners of lots of the same size within the taxing district. By the amendment the cost of grading and curbing, when a part of the improvement by original construction of a carriage way, should be apportioned against the owners of lots in the quarter squares contiguous to the improvement, and according to the number of square feet owned by each. The owners of corner lots in quarter sections are not required to pay for the intersections, and the 25 per cent. more than other lot owners. In other words, under the amendment the curbing constitutes part of the cost of the construction of the street, not of the sidewalk. The ordinance under which the improvement was made was passed June 6, 1898, and reads as follows: "That the carriage way of Zane street, from the west line of Fifth or Pope street, to the east line of Sixth street, shall be thirty feet wide, and shall be improved by grading, curbing and paving with vitrified brick or block pavement, with corner stones at the intersections of the streets and alleys, and footway crossings across all intersections, streets and alleys, in accordance with the plans and specification on file in the office of the board of public works. Said work shall be done at the cost of the owners of ground as provided by law, and all ordinances in conflict herewith be, and the same are hereby, repealed."

It will be observed that it was passed after the enactment of the amendment, but before it took effect. So the section to which we have referred was in force when the ordinance was passed. The city did not enter into the contract for the improvement of the street until after the amendment took effect. The court below held that the apportionment should be made under the statute as it stood at the time the ordinance was adopted. For the appellant it is insisted that as the contract was not made for the improvement until the amendment took effect, the cost should have been apportioned under the statute as amended.

The ordinance was passed with reference to the statute then in force. It did not provide how the cost of the improvement should be apportioned, but simply provided that it should be done in the manner fixed by the statute. It is not the province of the general council, by ordinance or otherwise, to further prescribe the method for the apportioning the cost of the improvement. When it ordered the improvement the statute prescribed the method of apportionment. The ordinance was the basis for the contract for the improvement, the execution of it and the apportionment of the cost. The ordinance and statute then in force fixed the liability on the owners of lots fronting on the improvement and the method of apportioning the cost of it. Whilst it might have been immaterial to the contractor as to which method was employed in the apportionment, because he would probably have received his money in any event, it, however, is a matter of great importance to some of the owners of lots chargeable with the cost of improvement to have the liability enforced only as fixed by law at the time the ordinance was passed. The exact question here was under consideration in *Cincinnati v. Seasongood*, 46 Ohio, 296. It was held in that case, as a municipal corporation by its proper boards and officers passed a resolution and ordinance,

the assessment of the cost should be governed by the law in force at the time of their passage; that a subsequent change in the law could not affect the question of apportionment of the cost. The court took the view that the ordinance was passed with reference to existing rights and liabilities. In considering a similar question, Elliott on Roads and Streets, section 553, says: "Rights acquired in such a case by contract and by proper ordinance should not be impaired by subsequent legislation." There is no clause in the amendment indicating that the general assembly intended the amendment should act retrospectively. It is urged that the general assembly had the right to repeal the ordinance in question. It is a sufficient answer to say it manifested no purpose to do so. Besides, section 465, Kentucky Statute, provides that "no new law shall be construed to repeal a former law \* \* \* as to any act done \* \* \* or any right accrued or any claim arising under former law." \* \* \* The passage of the ordinance was an act done, and when done the rights of the lot owners as to the cost of the improvement were fixed, hence the rule for the construction of statutes prescribed by the general assembly shows that it was not intended to affect any rights which had been fixed by ordinance and statutes then in force.

The judgment is affirmed.

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MEYER v. ROSENHEIM & CO.

(Filed April 30, 1903.)

**Bills and notes—Liability for collecting money on forged endorsement of checks—**A bookkeeper for appellees forged their names on checks belonging to them and transferred the checks to appellant, who received the money thereon from the banks. Appellees brought this suit against appellant to recover said money as converted by him to his use. Held—That the bookkeeper had no authority to endorse the name of his employers on the checks, and appellant is liable to appellee for unlawful conversion of their money.

J. K. Hendrick for appellant.

Kohn, Baird & Spindle and Quigley & Quigley for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hobson.

Appellees are wholesale merchants in Louisville; they had in their employ a bookkeeper named Altman, who forged their name on the back of checks belonging to them, and then delivered the checks to appellant, who paid him the money on them, or sold him jewelry therefor. Appellant then collected the checks from the banks on whom they were drawn. Appellees, on discovering the forgery and the misappropriation of their property, brought this action against appellant to recover of him the amount he had collected on these checks belonging to them under the forged endorsement of their name by Altman. The checks amounted to \$227.92. On final hearing the court gave judgment in favor of the plaintiffs.

There is no plea of estoppel, and we see nothing in the evidence to warrant an estoppel if pleaded. Appellees were not required to anticipate a forgery. The bookkeeper had no authority as such to sign the firm's name, and had nothing to do with the checks. He obtained them in fact surreptitiously



and without the line of his authority. Appellant appears to have been equally innocent, and so the precise question is on which of two equally innocent persons the loss should fall. In *Moss on Banking*, section 248, it is said: "If a negotiable instrument having a forged endorsement comes to the hands of a bank and is collected by it the proceeds are held for the rightful owners of the paper, and may be recovered by them, although the bank gave value for the paper and has paid over the proceeds to the party depositing the instrument for collection."

See to same effect 3 *Randolph on Commercial Paper*, section 1460, 1789, 1777. The case of *Farmer v. Peoples Bank*, decided by the Supreme Court of Tennessee, 47 S. W., 294, is much like this case. There Head, who had possession of a check payable to Farmer, endorsed Farmer's name upon it without his knowledge or consent and delivered it to the Peoples Bank, who collected the proceeds and permitted Head to check out the money. After this Farmer demanded the money of the Peoples Bank, and it refusing to pay him, sued to recover the amount collected by it on the check. The court held that the logic of the rule, to the effect that a check payable to a certain person can only be properly paid upon his genuine endorsement or to him, necessarily was that one coming into possession of such paper under a forged endorsement of his name could not successfully resist the title of the true owner, or if it had been converted into money, a demand for its proceeds. A number of decisions from other States are collected in that opinion. The rule is that a forged endorsement is a nullity.

Appellant's position then in law is the same as if he had taken appellee's checks and collected the money on them without any endorsement of them at all. The collection of the checks by him was a conversion of them, and he who converts the personal property of another is always liable to the owner thereof. Appellant has collected appellee's money. He had no right in law to the money, and he can not retain it against them. The action is not based upon the writings, but upon the idea that appellant has converted the property of another, and that he can not retain as against the true owner the proceeds of the property. (*Bramlette v. Caldwell*, 20 Ky. Law Rep., 1123.)

Judgment affirmed.

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LOUISVILLE & NASHVILLE R. R. CO. v. WHITEHEAD'S ADM'R.

(Filed April 30, 1908—Not to be reported.)

**Railroads—Negligence—Cross appeals—Evidence—**A judgment for \$1,750 was rendered in the lower court as damages for the death of W., who was a brakeman on appellant's train and was killed by coal cars being kicked down a track against the train on which deceased was engaged in repairing a hose between cars, causing a collision of such force as to run a car over him, causing his death. Appellant prosecutes an appeal and appellee prosecutes a cross appeal. Held—That the cross appeal can not be considered as appellee did not move for a new trial, and there can be no reversal in an ordinary action without a motion for a new trial, and grounds filed specifying the errors complained of. Appellant urges a reversal on the ground that the court erred to its prejudice in refusing to give a peremptory instruction

for appellant. Held—That the judgment is affirmed as the bill of exceptions discloses the fact that three depositions read on the trial are not in the record, and, therefore, none of the evidence will be considered.

Fairleigh, Straus & Eagles for appellant.

S. M. Payton for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Hobson.

Appellee's intestate was a brakeman in the service of appellant, and was killed at Lebanon Junction by reason of a collision of some heavily-loaded coal cars with the rear cars of his train. On the trial in the circuit court a verdict was rendered in favor of the plaintiff for \$1,750, on which judgment was entered. The defendant moved for a new trial which was refused. It then prayed an appeal to this court. After the case reached this court the appellant waived all errors complained of, except the one objection that the court failed to instruct the jury peremptorily to find for the defendant; but the appellee in this court has sued out a cross appeal.

The cross appeal can not be considered as the appellee did not move for a new trial in the circuit court, and there can be no reversal in an ordinary action without a motion for a new trial and grounds filed, specifying the errors complained of. On the original appeal the question is made that the proof for the plaintiff only showing that he was found injured after the collision between the coal cars and his train, and not showing what he was doing, or how he came to be caught, the peremptory instruction to find for the defendant should have been given. The proof shows that when the intestate's train reached Lebanon Junction it was cut in two, the hinder part being left north of the station and the rear part pulled down south of it, for the purpose of putting into the train the five coal cars referred to. The proof also shows that while they were standing there in this way at night, waiting for the five coal cars to be set in, these cars were pulled upon the main track some distance north of them by another engine, and then kicked down on their train with nobody on them, and with no engine attached to them, colliding with it with great force, as it was a down grade, and after this the intestate was found injured in such a way that he died. It is insisted for appellee that this proof made out for the plaintiff simply the case of a brakeman being injured in a collision, and that a prima facie case was made out. The proof for the defendant tended to show that the intestate had gone in between the cars to fix a hose that was leaking, or help to fix it, and it is urged that he was grossly negligent in putting himself in this place of danger when he knew the coal cars were to be set in. The counsel for appellee, however, urges with force that there would have been no danger in this if the coal cars had been set in properly, as the intestate had a right to expect, and not turned loose to run down on the train; and that, although the intestate was imprudent, still, as the men handling the coal cars had reason to know the crew was on this train and would be endangered by a collision such as took place, the company is liable, notwithstanding the intestate's imprudence, the injury might have been avoided by proper care on their part. (L. & N. R. R. Co. v. Adams, Adm'r, 106 Ky., 859.)

It is unnecessary for us to pass on these questions as the record is insufficient to present them for determination. The bill of exceptions shows that three depositions were read on the trial. None of these depositions are incorporated in the bill of exceptions or made a part of it. There are a number of depositions copied in the transcript, but we can not consider any of them, and as the evidence heard in the circuit court is not before this court, we can not disturb the judgment. (Young v. L., C. & L. R. R. Co., 7 Ky. Law Rep., 165; L. & N. R. R. Co. v. Finley, 86 Ky., 294; New York Life Ins. Co. v. Brown's Adm'r, 28 Ky. Law Rep., 2070.)

Judgment affirmed.

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HALL'S ADM'R v. HALL'S ADM'X, &c.

(Filed April 30, 1903—Not to be reported.)

**Conveyances—Mortgages—Liens**—A. sold and conveyed to B. a lot of ground for which he executed a deed, reserving a lien for two notes of \$100 each, but B. never had this deed recorded. Subsequent to the making of this deed B. executed a mortgage to appellee, a building and loan association, on this land, which mortgage was properly admitted to record. Suit was brought to enforce the lien to secure these notes, and this appeal involves the priority of liens between the two claimants. The lot had formerly belonged to B., but was sold at a decretal sale and A. purchased same at a commissioner's sale, and a conveyance was executed to him for same. Held—That as the legal title was vested in A. at the time B. executed the mortgage this was sufficient notice to the loan association as to the ownership of the property, and A. is entitled to the prior lien on the property.

W. D. Jackson and A. T. Wood for appellant.

D. L. Pendleton for appellee, Blue Grass Building and Loan Association.

Appeal from Powell Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, James H. Hall, as administrator of T. B. Hall, brought this suit on two notes for \$100 each, dated on the 6th day of March, 1880, and due respectively on the 1st of September, 1883 and 1884. The first of these two notes is credited with \$60, paid on the 24th day of June, 1886, and the last by \$100 on September 19, 1892. Plaintiff alleged that both notes were executed by G. V. Hall to T. B. Hall as part of the purchase money of a house and certain lots situated in Stanton, Powell county, Kentucky, known in the town plat as lots Nos. 10 and 11; that intestate conveyed the property to G. V. Hall by deed and retained a lien therein, which G. V. Hall failed to put on record; and that he had a lien thereon to secure the payment of the notes sued on, which he asked should be enforced by a sale of the house and lot. By an amended petition he alleges that on the 16th day of September, 1893, Green V. Hall and his wife gave a mortgage upon this lot to the Blue Grass Building and Loan Association, to secure the payment of a note of that date for \$400, and made them defendants, but alleged that the mortgage lien of the building and loan association was inferior to his lien as a vendor. The building and loan association in their answer allege that when they made their loan to G. V. Hall and took a mortgage to secure its pay-

ment on the lot sought to be subjected there was no deed of record from T. B. Hall to G. V. Hall therefor; and that they had no notice of any claim of T. B. Hall against the lot; that G. V. Hall was in possession of the property, claiming it as his own and had been for more than fifteen years, and asked that they be adjudged a prior lien to that of plaintiff. They also deny that plaintiff's intestate ever owned the lots sought to be subjected, or that the notes sued on were given by G. V. Hall as part of the purchase money therefor. The plaintiffs filed a certified copy of a deed made to T. B. Hall on the 30th day of March, 1870, by W. H. Holt, commissioner, which recites that a judgment was rendered in the Powell Circuit Court in the case of George C. Everett v. Green V. Hall, decreeing the sale of two lots in Stanton, Ky., which were numbered on the plat of said town as lots 10 and 11, and bounded on the north by the lot of James H. Scholl, on the east by Main street, on the south by an alley and on the west by the land of James Turley; that pursuant to this decree the lots were sold on the 7th of June, 1869, and purchased by T. B. Hall at the price of \$232.25; that this sale was duly confirmed and the undersigned commissioner appointed to make a deed to the purchaser to the premises. This deed was duly certified to the county court for record, and the certificate of the clerk of the county court shows that it was duly recorded. It is conclusively shown that after his purchase Thomas B. Hall took possession of the house and lot and rented it out until about the date of the obligations sued on, when G. V. Hall took possession thereof. There is no record of any conveyance of the title of this property by T. B. Hall. When G. V. Hall was endeavoring to procure a loan upon this property from the building and loan association he made an affidavit on the 21st day of April, 1892, in which he says that he purchased that property from J. F. Clark, commissioner, in May, 1862, and that he paid the consideration thereon, and that the deed was in his possession, but was not recorded in the office of the Powell County Court clerk for the reason that the records of that office were destroyed by fire in 1864, and claimed that he had been in the actual, peaceable and continuous possession of the land from the date of his purchase.

The trial court on this proof adjudged the Blue Grass Building and Loan Association a prior lien upon the property, presumably upon the authority of *Holton & Co. v. Alley, &c.*, 15 Ky. Law Rep., 531, where it was held that where the records of a county clerk's office in which an alleged mortgage was recorded had been destroyed by fire, that it was the duty of the mortgagee to take steps to have the lost record supplied as provided by statute; and that when the mortgagee allowed five years to elapse after such fire, and then instituted suit on the mortgage without having supplied the lost record, one who had in the meantime, without notice of the alleged mortgage and for value, bought the land covered by the mortgage, would be protected as an innocent purchaser for value without notice. But the facts in this case do not bring it within the principle controlling the decision in that case. At the time the building association made its loan to G. V. Hall the records showed the legal title to the property to have been in T. B. Hall, and of which they were bound to take notice. And there is no allegation or proof that T. B. Hall ever owned or sold to G. V. Hall any other lots. Undoubtedly appellee was deceived in this transaction by the report made to them by

their attorney, who examined the record and who failed to discover or report the conveyance of T. B. Hall. Appellant has clearly the older and better equity, and should have been given a prior lien in the judgment of sale.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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GRAY TIE AND LUMBER CO. v. FARMERS BANK OF SMITH'S GROVE, KY.

(Filed April 30, 1903—Not to be reported.)

**Bills and notes—Contracts—Verdict flagrantly against evidence—**Appellant was engaged in the purchase of cross ties, with its principal headquarters at Evansville, Ind., but N. was its agent to purchase ties in Edmonson county. Appellant contends that as agent he agreed to purchase from seventeen thousand to twenty-one thousand ties from F., who represented that he had that number in the woods ready for delivery, and that in part pay for same the agent executed to F. a sight draft for \$1,500, which appellant failed to pay when presented. F. sold the draft to appellant, and it brought this action on same. On a former appeal this court decided that for want of proper endorsement this note was not put on the footing of a foreign bill of exchange but that the same defenses could be made against the assignee as against the assignor. On the return of the case the petition was amended so as to allege that prior to the execution and delivery of the draft appellant had entered into a contract with F., by which it agreed and undertook to advance to him the sum of \$1,500, to enable him to get out cross ties for it, and that in pursuance of this contract the draft was drawn by the agent, he being fully authorized to do so. The second trial resulted in a verdict and judgment for the full amount of the draft, from which this appeal is prosecuted. Held—That there is no competent evidence in the record to prove the allegations of the amended petition, and the verdict is flagrantly against the evidence. The proof shows that instead of F. having from seventeen thousand to twenty one thousand cross ties for sale, as he represented, he had only six thousand and eighty-one, and the verdict should have been for the value of this number only at the agreed price and not of the amount of the draft.

M. M. Logan and E. W. Hines for appellant.

John M. Wilkins and Wm. Cromwell for appellee.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Barker.

The appellant, the Gray Tie and Lumber Co., is a corporation engaged in purchasing railroad ties, with its principal place of business at Evansville, Ind. In the prosecution of its business it had in its employ one C. W. Neal, to purchase cross ties for it.

This agent, on the 21st day of May, 1898, drew a sight draft on his principal for the sum of \$1,500, payable to the order of J. H. Flora. This draft was for a valuable consideration assigned by Flora to the appellee, the Farmers Bank of Smith's Grove, Ky., and was by it forwarded in the regular channels of commerce to the place of business of appellant, where its acceptance and payment being refused, appellee instituted this action in the Edmonson Circuit Court.

A trial resulted in a verdict and judgment against appellant for the sum of \$1,500, the amount of the draft. From that judgment the case was appealed to this court, and reversed, the opinion being in 28 Ky. Law Rep., 383, to which reference is had for a full statement of the facts, and for the principles of law enunciated by the court.

Upon return of the case to the lower court the petition was amended so as to allege that, prior to the execution and delivery of the draft, appellant had entered into a contract with J. H. Flora, by which it agreed and undertook to advance to him the sum of \$1,500, to enable him to get out cross ties for it, and that in pursuance of this contract the draft was drawn by C. W. Neal, the agent of appellant, he being fully authorized to do so. This court in its former opinion held that J. H. Flora having failed to properly indorse the draft sued on to the appellee, instead of the instrument being a foreign bill of exchange, that was not subject to defenses in the hands of an innocent holder for value, it was only in effect a promissory note, subject to any and all defenses which would have been available to appellant as against J. H. Flora.

The second trial of the case resulted as before, in a judgment for the appellee against the appellant for the full value of the draft, and from that verdict and judgment the case has been appealed to this court. All of the questions of law decided upon the former appeal are now *res adjudicata*, and it, therefore, only remains to decide what would have been J. H. Flora's right of recovery had he been plaintiff in this action. There is no competent evidence in the record tending to prove the allegations of the amended petition, that appellant agreed to advance Flora any money for the purpose of enabling him to get out the cross ties for it. In his deposition, he does say that Neal, the agent, told him that appellant had agreed to do this, but this being hearsay merely, had no potency to establish the alleged contract as a fact, and Neal in his testimony utterly repudiates it; and the contract in writing which Neal delivered into Flora's hands, and which he filed as an exhibit with his deposition, refutes his contention in regard to the advancement.

Neal states that Flora represented to him that he had from seventeen thousand to twenty-one thousand cross ties upon various tracts of land, which were named, which he desired to sell to him for appellant, before they were hauled and delivered on the bank of the river, as was the usual custom; that in order to obtain permission to purchase these ties he made a trip to Evansville, and there stated the proposition to his principal, and obtained from it authority to purchase the ties where they were at 12 cents a piece; to effectuate this purchase appellant drew up a contract in duplicate in regard thereto, one copy of which it retained and the other was delivered to Flora; that when he returned from Evansville, under the influence of Flora's persuasion and his representations that he had from seventeen thousand to twenty-one thousand ties in the woods ready for hauling, he drew the draft in question before going into the woods for the purpose of taking the ties up and branding them; that shortly after the delivery of the draft he and Flora went upon the lands where the ties were supposed to be, and there found in all six thousand and eighty-one ties, which he took up and branded. Flora, himself, makes no pretense to having delivered over to

Neal any greater number of ties than six thousand and eighty-one, so that, upon the second trial, the uncontradicted facts showed in the execution of the contract of purchase from Flora by appellant of the cross ties in the woods he delivered to its agent six thousand and eighty-one ties. The aggregate value of these cross ties, at the contract price, constitutes the sum which Flora would have been entitled to recover of appellant, and as appellee, under the former ruling of this court, occupied his shoes with reference to the draft, that was the sum that it was entitled to recover.

The fact that afterwards, when appellee refused to deliver up the draft for \$1,500 in return for the draft for \$750, which was drawn in payment of the ties found in the woods by Neal, appellant allowed Flora to retake and dispose of these ties to other parties, did not in any way alter appellee's rights in regard thereto; it knew at the time that appellee was the owner of the \$1,500 draft, and it could not diminish the real consideration therefor by any subsequent act in reference to the ties. We are of opinion that under the principles of law settled by this court in the former adjudication of this case, and the uncontradicted facts adduced on the second trial, appellee was entitled to a judgment for the value of the six thousand and eighty-one cross ties at the contract price of 12 cents apiece.

It was immaterial whether Flora's representations as to his having from seventeen thousand to twenty-one thousand ties in the woods were fraudulent, or a mere mistake on his part; as a matter of fact he only had six thousand and eighty-one, and these were taken up and purchased by Neal, and to that extent, and no more, appellant was indebted to him on the contract made by Neal. Nor was it immaterial as to whether or not appellee agreed to surrender the \$1,500 draft upon the delivery to him of the draft for \$750. Appellant owed it for the six thousand and eighty-one ties, and for that sum it was entitled to recover without any conditions whatever.

The verdict, to the extent that it exceeded the contract price for the six thousand and eighty-one ties, is palpably against the evidence, and for this reason the case is reversed for proceedings consistent with this opinion.

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ROSE, &c. v. WARE.

(Filed April 30, 1903.)

1. Bills and notes—Fraud—Husband and wife—Statute of limitation—Appellant instituted this action to recover judgment on a note for \$9,000, executed by appellant. In defense appellant claims that said note was executed pending a negotiation for the purchase of a farm owned by appellee, and that appellant should be liable only on condition that appellee could convey a good title, and that appellee fraudulently represented that he had a fee-simple title, when in fact his title was defective in several particulars, and that the contract was never executed. The parties alleged to own interests in the land were made parties to the action, and appellee by reply denied the allegations of the answer and pleaded that he was the owner of a fee-simple title to the land, and he and his vendors had been in the continuous, adverse possession of it for more than thirty years last past. Held—That appellant had the burden of proving that the sale was conditional, and the chancellor having decided that the contract was completed and was not brought about by the fraudulent representations of appellee, will not be disturbed. One of

the defects of title relied on is that the heirs of D. own an undivided one-fourth interest in said land. Her husband purchased a three-fourths interest in said farm, his wife owning the other fourth interest, and thereafter, in 1858, her husband made an absolute sale of the entire farm to T. and placed him in possession of same, which he and his heirs and vendees have held continuously since. Held—That no disability whatever will prevent the running of the thirty-year statute of limitation if a right of action would have existed but for the disability.

2. Joint tenants—It is contended that T. was a joint tenant with the wife of W., and that he did not hold adversely to her. Held—That the evidence is sufficient to prove that T. had ousted W. of the entire possession.

3. Dower—Another objection urged to the title is that a woman has an inchoate right of dower in the land. Held—That said right may never accrue, and if it does appellant can look for indemnity to appellee's covenant of warranty.

W. L. Reeves, W. P. Sandidge and Hazelrigg & Chenault for Billie Rose.

Petrie & Standard for Mary E. Winston, &c.

Perkins & Trimble and W. S. Pryor for appellee.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Barker.

Appellee, E. J. Ware, instituted this action to recover a judgment on a note of appellant, Billie Rose, dated May 9, 1899, and due one day thereafter, for the sum of \$9,000.

Appellant in her answer admits signing and delivering the note, but sets up as a defense that it was executed and delivered pending a negotiation between her and appellee, looking to the purchase by her of a farm owned by him, that the terms of the sale had been agreed upon, subject to the condition that appellee's title was found to be valid and was approved by appellant's agent; that appellee's title was found to be defective by her agent, and was rejected by him; that the defects in the title were, first, that he had only a possessory title, at best, to any of the land; and, second, the heirs at law of Parmelia M. Winston, the wife of a remote vendor, owned one-fourth of it; third, that Mary E. Duffy, the wife of another remote vendor, had an inchoate right of dower in the whole tract; fourth, that Wiley Taylor, still another remote vendor, had some interest, or so claimed; that appellee, knowing his title to be defective, fraudulently concealed that fact from her, falsely representing that he had an indefeasible title to the land; that by these fraudulent representations, and the assurance that the note would not bind her for its payment unless the sale was finally consummated, induced her to deliver it to him; wherefore, she prayed for a surrender up, and cancellation of the note sued on.

Upon the filing of this answer the case was transferred to equity upon the motion of appellant. By an amended answer Mary E. Winston, T. M. Powell, Mary Powell and Eliza Powell, the heirs at law of Parmelia Winston, were made parties, and called upon to assert any claim they might have to the land. Appellee, by reply, denied all of the material allegations of the answer, and pleaded affirmatively that he was possessed of an indefeasible title to the land, and that he and his grantors had been in the con-



tinuous, adverse possession of it for more than thirty years last past. By a rejoinder the allegations of the reply were controverted.

It is not necessary to set out the allegations of the various pleadings in this case at greater length or detail; for all practical purposes the issues were made up along the lines thus indicated. Afterwards the heirs at law of Parmelia M. Winston filed their answer, which they made a cross petition against appellee, claiming through their ancestor, Parmelia M. Winston, to own one-fourth of the land involved in this litigation. By an agreement, entered of record, it was stipulated that the same issues, made between E. J. Ware and Billie Rose, should be considered to exist between appellee and the cross petitioners, and that all the evidence taken in the case should be read on these agreed issues.

The first question to be decided is whether the transaction which took place between appellant and appellee on the 9th day of May, 1899, was or not, an executed contract. The negotiations for the sale of the farm had been carried forward fitfully for eight months or a year prior thereto. In these negotiations appellant had taken little or no part personally; her interest seems to have been looked after by her mother, Mrs. M. I. Donnelly, who was anxious that the purchase should be made, and who was fully authorized to speak for her daughter in the negotiations between her and appellee. There is a complete failure on the evidence to show any fraud, or overreaching, upon the part of appellee, or to put him in the attitude of being unduly anxious to make the trade; nor is there any foundation, in the record for the charge that he knew or suspected there was any defect in his title.

Appellant's mother, by writing signed by her, offered to purchase the farm from appellee at the price of \$60 per acre. Both appellant and her mother state that while they knew this was a high price, they were willing to pay it. On May 9, 1899, appellee called at the house of appellant, where he and Mrs. Donnelly and the appellant consummated the pending negotiations, by his executing and delivering to appellant a deed for the land, and her executing and delivering to him the note sued on. The evidence upon this branch of the case is reduced to the testimony of appellee on the one hand, and Mrs. Donnelly, the agent of appellant, who negotiated the trade, on the other. Appellee testifies that it was absolute and unconditional; Mrs. Donnelly testifies that it was conditioned upon the approval of appellant's agent. The burden of establishing, by a preponderance of the evidence, that the sale was conditional, was upon appellant. Upon this issue of fact the chancellor decided adversely to her, and we are not able to say, from all the evidence in the record, that he erred in so doing. We come now to a consideration of the question of defects in appellee's title.

In the year 1847, Parmelia A. Duffy, the wife of Col. Francis Duffy, died, owning a body of about 920 acres of land, of which the farm involved in this litigation was a part. She left surviving her a husband and four children, F. M. Duffy, Michael E. Duffy, P. O. Duffy and Parmelia M. Duffy. After the death of his wife Col. Francis Duffy remained in possession of her real property as tenant by curtesy until his death in 1858.

On the 24th day of May, 1852, Dr. Thomas L. Winston intermarried with Parmelia M. Duffy, one of the four heirs at law of Parmelia A. Duffy, de-

ceased, and in 1858, immediately after the death of his father-in-law, purchased the undivided interest of his three brothers-in-law in the real estate left by their mother, and he and his wife became the owners of the whole, he owning three fourths and she owning one-fourth thereof. In the same year he sold the whole tract of 920 acres to one Wiley Taylor, for the sum of \$44,000, \$11,000 of which was paid cash, and the balance to be paid at stated intervals thereafter. For the land thus sold he executed and delivered to his grantee a bond for title, conditioned, upon the final payment of all the purchase money, to convey the land by deed of general warranty. Upon the sale thus made to him Wiley Taylor entered and took possession, and he and his descendants and vendees, near and remote, have held and occupied the land from the time of sale until the institution of this action.

It can not be questioned that Dr. Thomas L. Winston undertook to sell all of the land owned by himself and wife as tenants in common, or that the vendee took possession of it and held it as his own, believing that when he paid the purchase money he would receive a valid deed of conveyance therefor. After thus taking possession Wiley Taylor sold 100 acres of the land to one Dr. Grady, and a small tract of it to the Louisville & Nashville R. R. Co. In 1860 he died intestate, and the land descended to his children, of whom he had several. In 1862 it was partitioned among his children, who took possession of their respective portions. After his death his son, W. H. Taylor, administered his estate, and paid off the balance due of the purchase price, the last of the notes being taken up in January, 1868.

In 1865 Parmella M. Winston died, leaving two daughters, Mary E. Winston and Bettie Winston. The latter having married one Powell, afterwards died, leaving three children, T. M. Powell, Mary Powell and Eliza Powell, who, together with their aunt, Mary E. Winston, constitute the cross petitioners in this action. In 1895 Dr. Thomas L. Winston died. On the part of appellants it is claimed that the possession of Wiley Taylor was not adverse but amicable to Parmella M. Winston, and as the sale by her husband to him did not pass her title, at her death she was in possession and her husband became entitled to a life estate by curtesy, which at once vested in his vendee by virtue of the sale in 1858, and, therefore, no cause of action ever accrued to Parmella M. Winston, or her heirs at law, until the death of Dr. Thomas L. Winston in 1895, they being remaindermen during that period.

There would be much force in this contention had the sale by Winston to Taylor taken place prior to the act of 1846; for before the enactment of that statute the husband had a vendible interest in his wife's land, which he could sell and which could be sold for his indebtedness, and, therefore, when he alone undertook to sell his wife's land his life estate passed to his grantee, and neither his wife, nor her heirs at law after her death, had a right of action until the termination of the life estate by the death of the husband. But even then, when the wife joined the husband in the sale, whether her act was valid or invalid, the vendee who took possession under the deed was construed to hold adversely to the wife, and the thirty-year statute at once commenced to run against her, and continued to run against her heirs after her death, without regard to the question of disability. This principle is established by the cases of *Medlock v. Suter*, 80 Ky., 101; *Mantle v. Beal*, 82 Ky., 122; *Bradley v. Burgess*, 87 Ky., 648.

Since the act of 1846 a husband has had no vendible interest in his wife's land, and if he undertakes to sell it in fee simple, with or without her joining in the sale, and the purchaser takes possession thereunder, then the wife's right of action immediately accrues to her, and the thirty-year statute of limitation commences to run against her, and continues, in case of her death, to run against her heirs at law, without reference to any disability, and when the statutory period has expired, bars all right of recovery.

In the case of *Bankston v. The Crabtree Coal Mining Co.*, 16 Ky. Law Rep., 15, it is said: "It is evident that the entry of Woodruff was hostile to the title of the female appellant, and his holding adverse to her; but for her disability she could have asserted her cause of action immediately upon his entry. This is true because she did not join in the grant, and as to her the deed of her husband was of no effect. That deed did not convey any right to the vendee. Since the statute of 1846, the husband has had no vendible interest in his wife's land, and as the deed of 1871 must be regarded as his deed alone, the wife's right of action accrued at once."

In the case cited the thirty year statute of limitation was not involved. The opinion is quoted from as establishing the principle that, since the enactment of the statute of 1846, a vendee taking possession of the wife's land, under a sale by the husband, holds adversely to her, and she has, at once, a right of action against him.

In the case of *Johnson v. Sweat*, 81 Ky., 394, it was held that where, since the act of 1846, the husband alone sold the wife's land, she had at once a cause of action against the vendee who took possession under the sale, and the thirty-year statute commenced to run. In this case the thirty years not having expired, the claim of the wife was held not to be barred. The principle above stated was fully determined.

In the case of the *Louisville & Nashville R. R. Co. v. Thompson*, 20 Ky. Law Rep., 1110, the husband, D. B. Thompson, in the year 1856, by a writing, without the consent or permission of his wife, gave the Louisville & Nashville R. R. Co. the right to build its Knoxville branch road through the center of the wife's land. In 1897 the husband died, after which time the wife instituted an action for compensation. The answer, among other things, pleaded the thirty-year statute of limitation. In considering the validity of this plea the court reviewed and discussed nearly all of its former decisions relative to it, and said: "In the case at bar it is claimed in the answer, and not denied in the reply, that appellant held and claimed adversely to the appellee for more than forty years before the institution of this suit; and, besides, the proof conduces to establish the same fact. It, therefore, follows that there had been an actual, adverse possession, and it seems clear from the statute, as well as the decisions of this court, that appellee's right to recover was absolutely barred by limitation.

The court further said, in commenting on the cases bearing on this point: "The question decided in the last-named case (*Gregory's Heirs v. Ford*, 5 B. M., 471) was under the law as it existed prior to the act of 1846, and is not at all applicable to the case at bar."

The case of *Bransom v. Thompson*, 81 Ky., 387, must not be understood as conflicting with *Johnson v. Sweat*, 81 Ky., 392, decided three days later, for there no question of limitation arose, as thirty years had not elapsed, and

the only question before the court was whether the husband was entitled to curtesy on the facts shown under the construction of the statute previously made in *Carr v. Givens*, 9 Bush, 679.

It is urged by appellants that Dr. T. L. Winston and his wife were residents of the State of Tennessee, which State, from 1861 to 1865, was a part of the Confederate States, and at war with the United States, and that during this period no right of action existed in Mrs. Winston, and that she having died in 1865, pending the war, no right of action had accrued to her up to the time of her death, and for this reason the statute did not apply to her.

In the case of *Stillwell v. Leavy*, 84 Ky., 879, this court said: "No disability of coverture of infancy, or by reason of the existence of war between the claimant's country and that of the defendant, or any other 'disability whatever,' can save the right to bring an action for the recovery of real property adversely held for a longer period than thirty years from the time the right of action first accrued to them."

From these cases we deduce the rule that no disability whatever will prevent the running of the thirty-year statute of limitation if a right of action would have existed in the claimant but for the disability. It is also contended by appellant that inasmuch as Dr. T. L. Winston and his wife were tenants in common, the husband's vendee, Wiley Taylor, was also a tenant in common with the wife, and, therefore, his occupancy of the land thus held must be construed as amicable, and not adverse. It is true that the general rule is that the holding of one tenant in common is never construed to be adverse to his co-tenant, alone, from the fact that he is the sole occupant of the land; but it is also true that a tenant in common may so act with reference to his co-tenant as to amount to an ouster; and when this happens, his holding will thereafter be adverse, and not amicable, with reference to his co-tenant.

In the case of *Gillaspie v. Osborn*, 3 A. K. Marsh., 77 (13 Am. Decisions, 136), it is said: "The relations between tenants in common, or even between joint tenants, is not such as to estop one co-tenant from acquiring and holding the possession adverse to another. It is true where one tenant in common, or joint tenant, enters generally, it will be presumed to be for the purpose of acquiring and holding possession for the benefit of his co-tenant as well as himself; but this is a presumption of fact which may be repelled by other evidence."

In the case of *Larman v. Hughie's Heirs*, 13 B. Monroe, 437, it is said: "That one tenant in common may thus acquire an adverse possession is decided in the case of *Gillaspie v. Osborn*, 3 A. K. Marsh., 77, and follows, from the concessions made in numerous cases, that even a lessee or actual tenant, though taking possession under his landlord, may convert this friendly into an adverse possession."

In the case of *Call, &c. v. Phelps' Adm'r*, 20 Ky. Law Rep., 510, it is said: "It can not be disputed as a principle of law that the possession of one of several joint tenants is the possession of all, and that the statute, therefore, does not run in favor of one against the others, unless there be an adverse holding; but one tenant may so enter and hold as to render the entry and possession adverse, and amount to an ouster of his cotenants, and if one is in the possession of, and claiming the entire property by deed, then the

holding is adverse and the limitation begins to run when he so takes possession." (*Greenhill v. Biggs*, 85 Ky., 155; *Riggs v. Dooley*, 7 B. M., 236; *Russell v. Marks*, 3 Met., 38; *Gossum v. Donaldson*, 18 B. M., 280.)

In the case of *Chambers, &c. v. Pleak*, 6 Dana, 426, the court says: "But it has been determined in the case of *Doe v. Prosser*, Cowper, 217, and other cases collected in Cruise's Digest, \* \* \* that the possession for a long period, as thirty-six years or more, by one co-tenant in common, or joint tenant, without any account, or demand made, or claim set up, by his co-tenant, was a sufficient ground for the jury to presume an actual ouster."

The question of ouster is always a question of fact, to be determined by the jury, and it may be inferred from the facts proved. The entry of a person under a conveyance which purports to convey the whole property, is equivalent to an express determination upon the part of the grantee that he enters claiming the whole to himself. The receipt, for a long period of time, of all the rents and profits of a tract of land is a fact which may properly be admitted in evidence before the jury to assist them in determining whether there has been an ouster. That one tenant in common has been in possession for a great number of years, without any accounting to his fellow commoners, is proper evidence from which the jury may infer an adverse possession. In some instances such possession has been regarded as raising a presumption of law which the jury are not at liberty to resist.

An exclusive possession under a claim of title for forty years, while the other tenants resided in the same county and failed to assert any claim to their property, warrants the assumption of an actual ouster. (*Freeman on Co-tenancy and Partition*, sections 224 to 232, inclusive; *Buswell on Limitation and Adverse Possession*, sections 296 to 302, inclusive, and note in *Gillaspie v. Osborn*, 13 Am. Decisions, 186.)

Considering Wiley Taylor and Mrs. Winston, the wife of his vendor, as tenants in common, we think the evidence in this case clearly shows an ouster of her by him, and, therefore, a right of action in her against him for this wrong. The bond for title shows that he purchased, or at least attempted to purchase, the land in fee simple. He paid \$50 per acre for it in 1858; appellants claim it is not worth over \$35 per acre now, although it is in close proximity to a thriving town which has grown up since 1858. After getting possession he immediately sold off parts of it, to the exclusion of the rights of his co-tenant; he in no manner recognized her rights, or accounted to her for rents or profits. After his death his children took possession of it as a part of his estate, and partitioned it among themselves. The deposition of W. H. Taylor, who was the son, and administrator of the estate of Wiley Taylor, shows, and he is not contradicted, that the possession by his father of the land was notorious, open and continuously adverse from 1858 until his death in 1860; that he claimed to be the exclusive owner, and acted as such in every particular, exercising absolute dominion over it, and accounting to no one for any rents or profits; that this state of affairs continued, with reference to the land, after his death, by his children and their vendees, near and remote, until the institution of this action—more than forty years; that during all this time he had never heard of the claim of the cross petitioners or that of their mother.

We can not conceive of any act which would constitute an ouster by one

co tenant of another, short of physical violence, which has not been shown to have been done by Wiley Taylor, his descendants and vendees, with reference to the land in question; and we are clearly of opinion that Parmelia M. Winston had a cause of action against Wiley Taylor, and against his descendants and vendees in her lifetime, for the recovery of her interest in the land involved in this litigation, and that, therefore, the thirty-year statute commenced to run against her despite the disability of coverture, or the existence of the war between the States, and continued to run against her descendants, after her death, until their right was barred by the expiration of thirty years.

In regard to the inchoate right of dower of the wife of Francis Duffy it may be said that it may never accrue, and if it does, appellant can look for indemnity to appellee's covenant of warranty. No claim of title to the land in question has ever been asserted by Wiley Taylor, the grandson of the original purchaser from Dr. T. L. Winston; on the contrary, he has disclaimed all right or title to it, and executed and tendered a quit-claim deed to the appellant.

As the judgment rendered by the chancellor carries into practical effect the conclusions herein reached, the case is affirmed.

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EADES v. OWENS.

(Filed May 1, 1903—Not to be reported.)

Conveyances—Fraud—Appellant, after repeated interviews with appellee, succeeded in making a purchase of a tract of land, a store and a stock of goods, for the aggregate value of \$3,341.57. After conducting the store a short time appellant became dissatisfied and finally induced appellee to repurchase the property for the sum of \$2,000. Shortly thereafter appellant was adjudged a lunatic, and confined in the asylum. His committee instituted this action to set aside the contract of sale made by appellant to appellee, or to recover the \$1,341.57, which was the difference between what appellant purchased the property for and the price he sold it for, on the ground that previous to the making of the last trade, and at the time of making same, appellant was of unsound mind, and appellee knowing this fact, fraudulently took advantage of his condition and made said trade, which was unfair and unconscionable. Appellant remained in the asylum but a short time until he was adjudged cured and released. He thereupon was made a party to the litigation, and took charge of it. After much proof was taken the court dismissed the petition. On appeal, Held—That the finding of the chancellor will not be disturbed as he was more familiar with the parties and witnesses than this court, and his finding was apparently supported by the facts.

Joe Bertram for appellant.

S. C. Hardin for appellee.

Appeal from Wayne Circuit Court.

Opinion of the court by Judge Settle.

About January 1, 1901, appellant sold his farm in Wayne county, and at once began looking around for another. Appellee owned a small farm of forty-three acres in the same county at a place called "Alex." He also

owned and operated a small country store on his farm in which was kept the postoffice.

Appellant desiring to buy this farm and store from appellee, inspected them several times, having in the meantime opened negotiations with appellee looking to a trade for the property. After two or three weeks of dicker-ing between them the farm and store were purchased by appellant upon the following terms, which were reduced to writing and signed by the parties: Appellant, by the terms of the written contract, was to pay appellee \$1,500 for the farm, including the storehouse, and for the goods in the latter he was to pay cost, after deducting a certain amount for such damaged goods as might be found in the stock. The goods were to be invoiced March 1, 1901, at which time appellee was to turn over to appellant the possession of the farm and stock of goods, make him a deed to the farm, and the agreed considera-tion was then to be paid for both by appellant.

The goods were invoiced, by which it was ascertained that they were of the value of \$1,841.57. This amount, together with the \$1,500 for the land, was thereupon paid by appellant to appellee, and the latter made appellant the deed, and gave him possession of the land and goods. Appellant continued in possession of the farm and store, and conducted the business of the store until March 13, when he became dissatisfied, and at once began to make overtures to appellee to sell the farm and stock of goods back to him. Ap-pellee declined at first to buy back the property, as he had sold all of his effects and closed up his business preparatory to his removal to another State, but after repeated propositions from appellant he did finally buy and receive back the farm and store at the price of \$2,000 cash, and appellant then re-conveyed him the property. Some two or three months thereafter it was claimed by appellant's family that he had become insane, and so upon an inquisition he was found by the jury to be of unsound mind, and sent to the asylum, where he remained but a short time, and was discharged by the au-thorities as restored to soundness of mind, after which he returned to his home in Wayne county. In the meantime, and while he was an inmate of the asylum, his father, who had been appointed committee for him, insti-tuted this equitable action in the Wayne Circuit Court against appellee for the purpose of recovering \$1,341.57, which sum represents the difference be-tween the entire consideration paid appellee by appellant for the farm and stock of goods and the sum received by appellant upon the resale of the same. The petition set out the alleged unsoundness of appellant's mind, and averred that such was the condition of his mind at the time of the last trade with appellee; and further, that appellee taking advantage of appel-lant's alleged want of mental capacity, overreached and defrauded him in the transaction of buying back the property to the extent of \$341.57, and asked judgment against appellee for that sum. After appellant's return from the asylum he had himself made a party plaintiff in the action, and was substituted to the place of the committee, who thereupon withdrew from the case, and has had no further connection with the same.

Appellee filed answer, traversing the averments of the petition, and after numerous depositions had been taken by both parties on the issues involved, the case was submitted to and tried by the chancellor, with the result that judgment was rendered dismissing appellant's petition, and allowing appel-

lee his costs, and this appeal was prayed, and is being prosecuted by appellant to reverse that judgment. The record furnishes a great number of depositions and a mass of contradictory evidence. A number of witnesses, mainly members of appellant's immediate family, testified to his unsoundness of mind, which they say began with the death of his wife several months before the trade with appellee was made; that he nursed his wife through a long illness and lost much sleep, and that her death seemed to greatly distress him. Two of his brothers testified to conduct and conversations, in which he manifested, as they thought, hallucinations and fancies, altogether unusual with him. They also testified to his having a fit in a field, and that he was several days regaining consciousness. One witness testified that about the time of the trade with appellee, appellant came to him and asked him to see a young lady in the neighborhood and obtain her permission for him to visit her, which request the witness reluctantly complied with, and when he again saw appellant he told him the lady had given him permission to visit her, whereat appellant said to him: "Ain't you lying to me," and upon being assured by the witness that he was not, appellant shrugged his shoulders and laughed in a silly manner.

One or two witnesses testified to his giving a due bill for barter at the store while he was in charge, without signing his name to it, and his son testified that he was unable to make up the mail on one occasion in the store. Two or three other witnesses ventured the opinion that his sale of the farm and store back to appellee at a sacrifice showed him to be of unsound mind. Upon the other hand, a good many witnesses who are well acquainted with appellant, but not related to him, testified that he was never of unsound mind, but was a man of average mind and considerable skill and shrewdness.

It appears that he sold his farm at a good price, and would not buy appellee's until he had repeatedly inspected it, and his purchase of the stock of goods from appellee was attended with great circumspection, for he required it to be invoiced and had his brother present at the time. During his possession of the store he bought bills of goods from two drummers, both of whom testified that he was apparently thoroughly at himself; seemed to understand what and how much was needed to replenish his stock, and what it was worth, and his purchases were made with caution and at the lowest prices to be had. Quite a number who saw him, and had every opportunity to know his mental condition during the period of his supposed mental trouble, testified to his sanity, and to his acts and conduct, indicating that his mind was sound and his judgment good.

One physician testified to seeing and talking with him about his trade with appellee at, or about, the time it was made, and he neither saw, nor suspected, any unsoundness of mind, or want of mental capacity. There is no proof tending to show that he was urged, or even requested, to make either of the trades with appellee. Upon the contrary, it does appear that appellee was reluctant to abandon the idea of a removal to another State, and indisposed to buy back the farm and store. No witness has testified that appellee said or did anything to induce appellant to make either of the trades with him, or that he in any way employed any sorcery or secrecy in any transaction with him. It appears that appellant was not present when the



inquisition of lunacy in his case was held, and it also appears that he only staid a short time in the asylum, and that since his release from that institution he has been entirely sane, has attended to business, and to his own affairs in all respects as other men. Appellant makes no complaint, nor did his committee while he was a party to the suit, of the first contract he made with appellee. His only complaint is as to the second contract, the resale.

The case is a difficult one to decide. The loss sustained by appellant in the resale of the farm and store to appellee was considerable, but if it was the voluntary act of a sane mind, and no fraud was practiced upon him by appellee in the transaction, he is without remedy. It appears that appellee is a man of excellent character, and as already intimated, there is nothing in the record that tends to establish fraud or intentional wrongdoing on his part. Appellant's eagerness to rid himself of the property which he had purchased of appellee may be accounted for upon the hypothesis that he found the mercantile business unprofitable and disappointing. It was doubtless one with which he was unfamiliar, and it is not unlikely that he, as has been the case with many others similarly situated, grew so sick of his purchase, and discouraged over the outlook, that he made up his mind to sell out and quit the business at any sacrifice. Upon the other hand, appellee insists that he has been put to great trouble and loss by his sale to appellant and repurchase of the property, as he sold out his personal effects at a sacrifice with the view of removing to Kansas, and he further claims that there were several other stores in a radius of one or two miles of his store, and that after the sale of the store to appellant, and during the latter's control of it, many of his best customers opened trade with the other stores, under the belief that he had quit business, and those customers have never returned to him. Altogether, and from the causes mentioned, he claims that he sustained a loss of at least \$1,000. After a careful consideration of the case, and realizing that it has been fully considered by a just and humane chancellor, whose acquaintance with the parties and witnesses, and familiarity with the record, doubtless gave him a full understanding of the case, and being unable to say that his judgment is against the weight of the evidence, we have come to the conclusion that it should not be disturbed, and it is consequently affirmed.

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TOWN OF FREDONIA v. RICE, &c.

(Filed May 1, 1903.)

Municipal government—Annexation of territory—The citizens of appellant, a town of the sixth class, by a subscription of about \$8,000 or \$10,000 and donation of land, induced a railroad company to locate its road and station within 800 yards of the center of the town, which was done, and the station was named Fredonia, according to agreement. The corporate limits of the town did not extend to the depot by almost a quarter of a mile. The owner of the land lying near the depot plotted it off into lots and streets, and designated it as Cassidy & Co.'s addition to Fredonia. This territory was improved by the erection of some buildings, and the town of Fredonia adopted an ordinance providing for the annexation of this territory, including the railroad depot, to the town. More than 75 per cent. of the freeholders of this territory interposed an objection. Held—That the lower court should

have adjudged the annexation of the territory, as the best interest of all could thereby be secured.

P. H. Darby and James & James for appellant.

Wm. Marble for appellees.

Appeal from Caldwell Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant is a classified town of the sixth class with a population of between 240 and 250. It is an old town, situated in a fertile section. About 1886 the Ohio Valley Ry. Co. in projecting their line of road were about to pass several miles from this town. The citizens interested themselves in an effort to procure its location near the town. As a result they subscribed and procured others to subscribe, for about \$8,000 to \$10,000 of the capital stock of the company upon condition that the road was located within one thousand yards of the center of the town, and that the station to be there established should always bear the name of the town.

This subscription is alleged to have amounted to, and likely enough was in the nature of, a donation to the railway company. The owner of the land near the town over which the road passed in its changed route conveyed a right of way to the company, including a depot site, upon the express condition that the company should locate and maintain a station at that point, to bear the name of the town Fredonia, until the name of the town should be changed, and then bear such changed name. In other words, the station should always be called by the same name as was borne by the then municipality of Fredonia. The railway company accepted the subscriptions, donations and conveyances upon these conditions, and has erected its station within 800 yards of the center of the town of Fredonia. The station is called Fredonia. However, the corporate limits of the town did not extend out to the depot by a quarter of a mile or more. In the course of time since the building of the railroad a number of buildings, residences, stores, shops, churches, etc., have been erected outside of the corporate limits of the town, in the vicinity of the railroad depot. The owner of the land lying near the depot platted it into streets and lots, designating it in numerous deeds as "Cassidy & Co.'s addition to Fredonia." The population of this unincorporated village is about 140. The board of trustees of Fredonia, by ordinance duly passed, proposed to extend its corporate limits so as to embrace the territory described, including the railroad station. The citizens of the territory proposed to be annexed—more than 75 per cent. of the freeholders—interposed an objection, in the form of this suit, under section 3665, Kentucky Statutes. At the same time they began proceedings to be incorporated as a town of the sixth class under the name of "Kelsey."

In our opinion it would be destructive of the proper government of that community to have it maintained two independent municipalities, where now its population is scarcely able to maintain even one efficient one. The matter of police protection, street improvements, and all the affairs of such a local government, can best be conserved by uniting their efforts, taxes and interests. There is no sound reason why two municipalities, so situated as these are, should be maintained. The arguments in support of it are of that

character of selfishness that would retard, if not destroy, any town's chances of growth. "In union there is strength."

The judgment of the circuit court sustaining the objections of the citizens of the territory proposed to be annexed is reversed and the cause is remanded, with directions to enter a judgment of annexation in conformity to the ordinance passed by the board of trustees of appellant town.

Judge Nunn not sitting.

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SPARKS v. DEPOSIT BANK OF PARIS, &c.

(Filed May 1, 1908.)

**Mortgages—Description of personal property—Evidence—**Appellee sued D. on a note for \$715, secured by a mortgage of same date on "thirty-six head of yearling cattle" on the farm of Leonard Drane, said farm being now occupied by said D. near Lair Station, in Harrison county, Ky." The mortgage was properly acknowledged and recorded. Appellant was made a defendant and answered, claiming to be the owner of eighteen head of said cattle by purchase from D. without notice of the mortgage lien. The priority of these claims are involved on this appeal. Held—That appellant had constructive notice from the record of the mortgage of appellee's prior lien. The description of the cattle was sufficient to identify them. Parol evidence is admissible to identify personal property described in the mortgage.

McMillan & Talbott and Lafferty & King for appellant.

T. E. Ashbrook and J. I. Blanton for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Settle.

Appellee sued James Dundon in the Harrison Circuit Court on a note of \$715, of date October 8, 1900, due twelve months after date, and bearing 7 per cent. interest from date until paid. The note was secured by a mortgage of the same date on "thirty-six head of yearling cattle on the farm of Leonard Drane, said farm being now occupied by said Dundon near Lair Station, Harrison county, Ky." The mortgage was properly acknowledged by Dundon, and soon thereafter duly recorded in the office of the clerk of the Harrison County Court.

In the action appellee sought a personal judgment against Dundon for the amount of the note, and interest, and asked for the enforcement of its lien upon the cattle described in the mortgage. The appellant, Edward Sparks, was made a defendant in the action because he had purchased of Dundon, and claimed to own eighteen of the thirty-six cattle embraced by the mortgage, the eighteen cattle were, however, taken from his possession under a specific attachment issued at appellant's instance, and upon the grounds allowed by section 249, Civil Code, which grounds were appropriately set forth in its petition. By agreement of parties the cattle taken under the attachment were, by order of court, sold by the sheriff, and purchased by appellant, who gave bond for the purchase price, \$558, payable to the sheriff for the use of whomsoever the court might direct.

The answer filed by appellant set up the defense that he was a bona fide purchaser of the eighteen cattle without actual notice of appellee's mortgage,

and denied that the cattle thus purchased by him were included in appellee's mortgage. Upon the trial the decision of the chancellor was in favor of appellee, and judgment was accordingly entered sustaining the attachment enforcing appellee's mortgage lien, and directing the payment to it of the sum received by the sheriff upon the sale of the cattle, less the costs of the sale, and of feeding the cattle while held under attachment. Appellant complains of that judgment, and seeks its reversal by this appeal. The only question necessary to be determined is whether or not the description of the cattle contained in the mortgage was sufficient to give appellant constructive notice of appellee's lien thereon.

The mortgage was executed October 8, 1900, and the cattle were bought by appellant at public auction in Paris, Ky., September 1, 1901. It is conclusively shown by the evidence that appellee furnished the money to Dundon with which to pay for the thirty six cattle on or about October 1, 1900, with the agreement between them that it was to be secured by the execution of the mortgage as soon as the purchase of all the cattle was completed, which was done on the 8th of the same month. It is equally clear from the proof that the thirty-six head of cattle ranged in age from six months to eleven months, or, to be more specific, they were, according to the proof, purchased from the following persons, and as of the ages opposite the names of such persons, respectively: Of Phelps, two head, age eight months; of Worthington, five head, age six months; of Bently, one head, age six months; of Garnett, thirteen head, age eleven months; of Smith, eleven head, age nine months; of Leach, four head, age nine months. Total, thirty-six head.

These cattle at the date of the mortgage were what are called by some of the witnesses "short yearlings," but at the date of the sale from Dundon to appellant, September 1, 1901, a little less than eleven months after the execution of the mortgage, they were what is known among stockmen as "long yearlings." In other words, in stockmen's parlance, cattle about, or approximately near, one year of age, are called "short yearlings;" after entering the second year, and before completing it, they are called "long yearlings." So there was nothing misleading in these cattle being denominated "yearling" cattle in the mortgage, for though six of them appear to have been six months old, the others were from nine to eleven months old. The appellant had constructive notice of the existence of the mortgage lien when he purchased eighteen of the cattle of Dundon, for the mortgage was then, and had for months been, a matter of record, and in law he must be regarded as having knowledge of that fact. Suppose he had gone to the clerk's office of Harrison county and examined the mortgage as there recorded. It would have informed him that it embraced "thirty-six head of yearling cattle" that Dundon owned, and had on the Leonard Drane farm in Harrison county at the date of the mortgage, viz, October 8, 1900. This description was enough to put him upon inquiry, which if pursued would have resulted in his being advised of the fact that the eighteen head of cattle he was about to purchase were a part of those covered by the mortgage, and the recital in the mortgage was sufficient of itself to inform him that the "long yearlings" that Dundon was offering for sale might have been, and in fact were, "short yearlings" in October, 1900, when included in the mortgage. In Jones on Chattel Mortgages, section 53, it is said: "It is not necessary

that the property should be so described as to be capable of being identified by the written recital, or by the name used to designate it in the mortgage. Parol evidence is admissible to show that a particular article is included within the general words of a description. Thus under a mortgage of all the stock, tools and property belonging to the mortgagor in and about a wheelwright's shop occupied by him, parol evidence is admissible to show what articles were in and about the shop when the mortgage was made. \* \* \* Resort must generally be had to parol evidence to identify the property mortgaged, although it be enumerated and described with the utmost minuteness. \* \* \* A mortgage of a certain number of horses in the mortgagor's possession requires evidence dehors the instrument to identify the property; but such evidence would be equally necessary had the horses been more particularly described, as, for instance, had they been described as long-tailed gray horses."

Continuing, the author further says, in section 54: "The description need not be such as would enable a stranger to select the property, a description which will aid third persons, aided by inquiries which the instrument itself suggests, to identify the property, is sufficient. \* \* \* Descriptions do not identify of themselves; they only furnish the means of identification."

Again, in section 64, the same author says: "With the aid of evidence aliunde to identify the property, the following descriptions in mortgages have been held sufficient: 'Eight horses now in a certain stable, although at the time the mortgage was executed, and for some time before and afterwards, other horses not belonging to the mortgagor were boarded in the same stable'—'ten horses in the mortgagor's possession'—'five freight wagons, and twenty-five yoke of cattle, being the train now in my possession.'"

The rule announced by Jones in the foregoing quotations was in effect recognized by this court in *Pearce v. Hall*, 12 Bush, 209. The doctrine relied on by counsel for appellant, that "a mortgage of a specific number of articles out of a larger number is void for uncertainty, unless the particular articles intended to be conveyed are separated and designated in some way so that they can be separated from others of the same kind," does not, in our opinion, apply in this case. The mortgage in controversy does not embrace thirty-six out of forty head, but all the yearlings owned by Dundon on the Drane farm when the mortgage was made. It is shown by the evidence that Dundon bought four cattle at Dr. Conner's sale about the time this mortgage was given, but it is not clear from the evidence that these four cattle were taken to the Drane farm before the execution of the mortgage. On the contrary, it does appear, with reasonable certainty, that they were not on the farm when the mortgage was taken. In fact the evidence conduces to prove that the only other cattle besides the thirty-six yearlings that were on the Drane farm at the time of the mortgage were two milch cows, neither of which can come under the description given in the mortgage.

Dundon's conduct in selling and disposing of the mortgaged property to appellant does not present him in an enviable light, but his testimony as to material facts is corroborated in the main by other witnesses, who seem to be both intelligent and trustworthy. Though willing to admit that the conclusion arrived at by the chancellor in this case is not free from doubt, we are unable to say that it is against the weight of the evidence.

It, therefore, follows that the mortgage made by Dundon to appellee contained a sufficient description of the cattle intended to be included thereby; that the description was such as to give appellant, at the time of his purchase of eighteen of these cattle from Dundon, constructive notice of appellee's lien thereon; and further, that the cattle purchased by appellant were reasonably identified by the proof as being of the thirty-six included in the mortgage, hence the judgment of the lower court is affirmed.

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SPARKS, &c. v. ROBINSON, &c.

(Filed May 1, 1908.)

County levy—Parties to actions—Constitutional law—Appellant, as a taxpayer of Mason county, for himself and other taxpayers of the county, brought this action to recover of the sheriff a certain tax collected for the year 1902, alleged to have been levied by the court of claims without legal authority. It is conceded in the petition that the whole levy of 62 cents is valid except 3 cents, and that the suit is brought to recover the amount raised by this illegal levy of 3 cents, viz., \$2,914.86. On appeal he contends that the levy of 15 cents was illegal, as unauthorized by the Constitution. Appellant owned property for assessment for that year valued for assessment at \$20. His share, or interest, on his own showing in the fund involved, is not exceeding 3 cents in any event. Held—That while section 25, Civil Code of Practice, authorizes one taxpayer to maintain an action for the common interest of all, the one assaying to act for all must be a fair representative of the class, and this he must show to be entitled to claim the right. His interest is not large enough for the law to take notice of, and he should not be permitted to maintain this action. The demurrer to the petition was properly sustained for another reason. The allegation attacking the levy of 15 cents as unconstitutional is insufficient. Section 157 of the Constitution limits the amount of the tax levy of the county to 50 cents unless to pay an indebtedness created prior to the adoption of the Constitution or for school purposes. The legislature, by an act of April 29, 1890, authorized Mason county to levy a special tax for school purposes not exceeding 25 cents. Appellant insists that said act was repealed by the Constitution. Held—That the petition is defective, as it does not state whether Mason county had incurred an indebtedness under the act of 1890, which had not been discharged.

Winfield Buckler and W. S. Pryor for appellants.

Thos. R. Phister, Frank P. O'Donnell and C. D. Newell for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, as a taxpayer of Mason county, brought this suit against appellee to recover, on his own behalf and on behalf of all the taxpayers of the county, a certain tax collected by appellee, as sheriff of Mason county, for the year 1902.

At the April term, 1902, the fiscal court of Mason county laid the county levy at 62 cents on the \$100, in the aggregate, apportioned as to objects as follows:

Maysville & Big Sandy R. R. fund.....	9 cents.
School fund.....	15 cents.
Free turnpike fund.....	25 cents.
Infirmity fund.....	6 cents.
General claim fund.....	7 cents.
Total.....	<u>62 cents.</u>

It is conceded that the debt on account of the Maysville & Big Sandy R. R. was incurred prior to the present Constitution, and that all the items embraced in the budget, except that of 15 cents for school purposes, are legal. The property assessed for taxation in the county for that year was \$9,716,217. It seems to be conceded in the petition that all of the levy of 62 cents, except 3 cents thereof, was legal, on the theory that the fiscal court had the right to levy a tax not exceeding 50 cents for county governmental purposes, aside from providing a sinking fund to meet the railroad debt. Thus, it was presented, 50 cents for general county purposes, and 9 cents for the railroad debt, produced 59 cents of valid taxation. It was then claimed in the suit that the excess of 3 cents was invalid because being in excess of the maximum rate allowed by section 157 of the Constitution, viz.: "The tax rate of cities, towns, counties, taxing districts and other municipalities, for other than school purposes, shall not exceed the following rates upon the value of the taxable property, viz., \* \* \* and for counties and taxing districts 50 cents on the \$100, unless it should be necessary to enable such city, town, county or taxing district to pay the interest on, and provide a sinking fund for, the extinction of indebtedness contracted before the adoption of this Constitution."

It was alleged that the 3 cents of excessive levy above named produced, and there was collected from the taxpayers of the county by appellee by reason of it, the sum of \$2,914.96. It was to recover this sum, because of the facts stated, that this suit was brought. A general demurrer to the petition was sustained. On the appeal appellant has taken a materially different position in argument. He now contends that the whole of the 15 cents levy for school purposes was invalid, and was in violation of the Constitution. Thus it will be seen that appellant, single-handed, attacks the validity of a tax levy, made and collected, to be applied, and possibly already applied, in aid of the common school system of the county, the total sum involved for that year being not less than \$14,574.32. Appellant says that he for that year owned property valued for assessment at \$20. His share of, or interest on his own showing in, the fund involved is not exceeding 3 cents in any event.

The right of one taxpayer to sue for all others similarly situated to redress a grievance common to the class to which he is a member is clearly recognized. (Section 25, Civil Code; *Hendrix v. Money*, 1 Bush, 306; *L. & O. T. R. Co. v. Ballard*, 2 Met., 165; *Whaley v. Commonwealth*, 28 Ky. Law Rep., 1202; *Robinson v. Robinson*, 11 Bush, 174; *McCann v. City of Louisville*, 28 Ky. Law Rep., 558.)

But the one assaying to act for all must be a fair representative of the class, and this he must show to be entitled to claim the right. It was not enough that he should belong to the class whose alleged grievances or property rights he presumes to involve in litigation, but he must show such an

interest that the court may see that his motive and financial concern are probably in harmony with at least the average of the body. It will be observed that the Code (section 25) makes this right permissive, which we understand to be in respect of the above rule, and to involve the exercise of the sound judicial discretion of the chancellor. If this were not so, then one with but slight interest in fact, but actuated by some other motive not common to nor in keeping with the welfare of those he would represent, could involve their property in a litigation to be conducted by such skill and labor as he would feel warranted to engage in his own small affair. This should not be allowed. Or, e. g., appellant, with an interest of 3 cents only, volunteers to litigate for property holders whose possessions are over \$9,000,000, and whose direct pecuniary concern is nearly \$15,000; he proposes to choose for them their lawyer, set the guage of their litigation, control in a large measure the conduct of this to be enormous suit, and have charged to them the whole of the costs (for appellant's proportion of the costs could not be measured in any denomination of money to the law). This is a case to which certainly the maxim "the law does not notice trifling matters" (*de minimis non curat lex*) applies. His interest is not large enough for the law to take notice of. One so situated will not be allowed to pester the courts and people by raising vexatious litigations over supposed constitutional infractions, for acedemical exploitation at other people's expense. But there is at least one other reason, appearing on the face of the petition and independent of the merits of the case, why the demurrer was properly sustained.

Under section 157 of the Constitution the tax rate of a county can not exceed 50 cents on the \$100 of the taxable property therein, except for two purposes: First, if it shall be necessary to exceed that sum in order to pay an indebtedness contracted before the Constitution was adopted; or, second, unless it be for school purposes. As to these two objects there is no constitutional limitation. But appellant contends there was not authority granted by general law for a county to make provision by taxation in aid of the common schools therein, and, therefore, the fiscal court had not the power to levy any tax for that purpose.

By an act approved April 29, 1890 (volume 2, Acts 1889-1890, page 1545), the people of Mason county were authorized to provide, by a majority vote at an election to be held for that purpose, for the levying annually of not exceeding 25 cents on the \$100 of the taxable property in the county in aid of their common schools. Section 6 of the act is: "The taxes hereinbefore provided for shall be levied at the same time, and collected and accounted for in the same manner and by the same officers as the county levy is now made and collected by law."

The provisions of the act were duly adopted by the necessary vote. It is asserted in argument by appellant that the local act of April 29, 1890, was repealed by the adoption of the Constitution, September 28, 1891. The petition does not state whether Mason county had incurred an indebtedness under the act of 1890 which had not been discharged. Upon that point the petition is silent. In *Campbell Co., Use, &c. v. N. C. Bridge Co.*, 23 Ky. Law Rep., 2056, concerning the repeal of a local taxing act by the adoption of the Constitution and the general laws thereunder on the subject of revenue



and taxation, this court held that if there existed obligations of indebtedness by the local taxing district, the local act would continue in full force till they were discharged. In the case of *Richardson v. Boske, Sheriff*, 28 Ky. Law Rep., 1209 (at page 1214), it was also held: "We do not, however, decide that the enactment of the general statute relative to public roads and pass-ways, which constituted chapter 110 of the Kentucky Statutes, in anywise affects the liability of district and separate portions of the county for the building and construction of roads under special acts."

The failure of the petition to negative the existence of obligations of indebtedness contracted under the act renders it bad on demurrer. The other questions presented are not decided.

The judgment sustaining the demurrer and dismissing the petition is affirmed.

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LOUISVILLE & NASHVILLE R. R. CO. v. CRADY.

(Filed May 1, 1903—Not to be reported.)

**Railroads—Negligence—Instructions—Appellee and T. were fellow workmen engaged in taking down the structure of a false bridge, when T. let loose one end prematurely and it fell upon appellant's thumb and crushed it off. This action was brought to recover damages of appellant, the petition alleging that T. acted under the direct command of the foreman. A trial was had and instructions were given, in which it did not confine the jury to compensatory damages and a verdict resulted in favor of appellee. On appeal, Held—That the instructions fixing the liability of appellant was proper, but the instruction as to the measure of damages was erroneous; but as the finding of damages was small, it was not prejudicial.**

Fairleigh, Straus & Eagles, E. W. Hines and B. D. Warfield for appellant.

Chapeze & Halstead for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee and one Thomas were fellow workmen in the same line of employment upon a bridge for appellant. They were engaged in taking down the structure of a false bridge. The foreman of the crew of workmen to which these two laborers belonged was present, and it is charged was directing the manner of the execution of the work. Thomas cast loose one end of a heavy beam of timber prematurely, and it fell upon appellee's thumb and crushed it off.

The negligence complained of is that Thomas, in casting loose the beam at the time that he did, acted under the direct order and express command of the superior, the foreman. For appellant it is claimed that Thomas, being in the same line of employment with appellee, was his fellow servant, and that the negligence resulting in the accident, if any one was negligent besides appellee, was that of Thomas, and that, therefore, there can be no recovery. There was proof to support the claim of appellee that Thomas acted under the direct command of the superior, and, therefore, that his act was the same as if the superior had in person done the thing. In other words, the act was not the result of Thomas' judgment, or lack of judgment, or of his

care, or lack of care. The controlling mind in the transaction was that of the foreman. Thomas was no more responsible than if he had been a piece of machinery operated by the foreman.

Although there is evidence to support this theory, there is as much, or possibly more, to support appellee's theory. However, the matter was submitted to the jury under appropriate instructions, telling them that they could not find for appellee except they believed from the evidence that the negligence resulting in appellee's injury was the gross negligence of the foreman, but that if it was the negligence only of the fellow workman, Thomas, or if it was caused by the contributory negligence of appellee, but for which the accident would not have occurred, he could not recover. In addition to the above facts it was proven that the foreman was standing within a few feet, and in clear view of appellee, and knew, or might by the exercise of slight care have known, of appellee's danger; also that the foreman was rushing his men at the time, and was drunk. If the jury believed appellee's version and testimony, they were clearly warranted in finding the verdict they did. Upon the matter of the credibility of witnesses, and the weight to be given their testimony, where the conflicting evidence is as nearly poised as in this case, it would be unwarranted in this court to interfere with the jury's verdict. A complaint is made of the instruction defining the measure of damages. It is not accurate, it is true, in that it did not confine the jury to compensatory damages for the injury done. However, the verdict is small, very small, and is scarcely enough to compensate appellee under any definition of that term. It does not appear to us to be possible that the form of that instruction could have prejudiced the substantial rights of appellant.

The judgment is affirmed, with damages.

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DIECKMAN v. WEIRICH.

(Filed May 1, 1903—Not to be reported.)

Damages—Forcible detainer—Landlord and tenant—Agents—Appellant brought this action for damages against appellee, alleging that he had a writ of restitution issued in an action of forcible detainer, which was placed in the hands of a constable, and that in executing same the illness of appellant's wife was increased and finally resulted in her death. A verdict in favor of appellant for \$2,000 was returned and the court granted a new trial, on which the court gave to the jury a peremptory instruction to find for the defendant. An appeal is prosecuted from the order granting a new trial; also from the last judgment. Appellant contends that the constable fully executed the writ the first time, and that a second writ placed in the hands of the constable did not protect either the appellee or the officer. He also insists that after the first attempt to execute the writ appellee accepted payment of rent and made a new lease, and thereby waived his right to the possession of the property. Held—That the first attempt was not a full execution of the writ, but appellee had the right to take out an additional writ and have complete execution of it. The proof shows that some rent was paid to an agent of appellee after the attempt to execute the first writ, and the agent made an agreement to continue the lease. Appellee denied that the agent had any authority to continue the lease, and there is no proof to show authority except the declaration of the agent. Held—That proof that an

agent has authority to collect rent does not imply that he has authority to make a lease, and the declaration of the agent alone is not sufficient to prove the authority of the agent. The peremptory instruction was properly given.

L. J. Crawford and Harvey Myers for appellant.

George Washington and Ramsey Washington for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was plaintiff below. His action was grounded upon an alleged expulsion of himself and family, under color of a writ of restitution in the hands of a constable, from a house of appellee, which was occupied by appellant as a tenant from month to month. He says that his wife was ill at the time; that her illness was increased, and that he was obliged to, and did, employ medical assistance, at great expense; that she thereafter died as the result of said alleged wrongs, and that he was deprived of her assistance and company, and was prevented from attending to his usual vocation, to his damage \$5,000.

The defense was that appellee, as landlord, had procured the writ of restitution to issue by the justice of the peace in an action of forcible detainer had before him by appellee against appellant; that the constable executing the first writ issued upon the verdict and judgment, had failed to execute it fully because of the ill-health of appellant's wife, and of the then inclemency of the weather; that appellee thereafter caused an alias writ to issue, under which the eviction complained of was made. Appellant claimed that after the first attempt of the constable to execute the writ he again contracted with appellee, and paid him in part thereon, thus creating anew the relation of landlord and tenant. On the issue joined the jury returned a verdict for appellant in the sum of \$2,000. Of this amount the plaintiff offered to abate the sum of \$1,500, tacitly admitting its gross excessiveness, but the defendant objected, and the circuit judge, after consideration, set aside the verdict and granted a new trial. Upon the second trial there was a peremptory instruction for the defendant, and the case is now here, both upon the action of the circuit judge in granting the new trial and upon the peremptory instruction at the second trial.

Whether the action of the court in granting a new trial after the first verdict was based upon his honor's belief that the verdict was not fully warranted by evidence, or that he concluded that in his instructions to the jury he had committed errors of law prejudicial to the defendant, the record does not show. If upon the former ground, in view of the state of this record (a bill of exceptions and evidence on that trial having been brought up), we could not feel justified in interfering with his action. Not only was the evidence conflicting, but slightly preponderates, in our opinion, for appellee. The trial judge in such cases has a large discretion, which, unless manifestly abused, this court will not venture to interfere with the exercise of. (*Louisville v. Johnson*, 24 Ky. Law Rep., 685; *Richards v. L. & N. R. R. Co.*, 20 Ky. Law Rep., 1478.)

But on the second ground we are fully satisfied that the trial judge properly awarded the new trial. Among other errors, the following are deemed sufficient for notice. In fixing the criterion of damages the court told the

jury if they found for the plaintiff to "fix his damages that he may have sustained in any sum in their discretion, governed by the proof, not to exceed in all the sum of \$5,000."

The court instructed the jury furthermore that if the constable had partially executed the writ, and that its further execution was stayed by appellee, "for any other reason, humane or otherwise, nevertheless the action of said constable was a complete execution of same, and his act destroyed all right to have any other or additional writ issue on same at any further time."

The court must have based his action in granting the new trial partly on the error involved in this instruction. The object of the writ is to restore to him adjudged the right of possession, that which he can not otherwise gain; it takes the place of the plaintiff's natural right to repossess himself of his own by his own force. Until it is executed, and fully executed, the judgment is unsatisfied, and the office of the writ is unperformed. (Murfree on Sheriffs, sections 1020, &c.; Freeman on Executions, sections 474-475; Gresham v. Thum, 3 Met., 287.)

On the second trial the evidence for appellant (plaintiff) was materially weaker than on the first. But the evidence that the writ had never been executed in full till the occasion which is the basis of this suit is clearly shown. To obviate its effect appellant had pleaded that after the judgment of eviction, and before the final execution of the writ, he had again rented the premises of his landlord, through one Matti, as his agent. Matti's agency was put in issue by the pleadings. The only proof to sustain it was appellant's testimony of Matti's declarations, not made in appellee's presence, and that Matti had collected two or three installments of rent. Merely showing that one was authorized to collect rent for the landlord, is not evidence of authority to make contracts for renting respecting the landlord's property. It is so well settled that it may be taken as elemental that the fact of agency must be proven otherwise than by the declarations of the one charged as being the agent. There was a total failure in this case to show the fact of such agency. Besides, appellant seems to admit in his testimony that the alleged contract of the second renting was agreed to be submitted to appellee for approval, and none is shown.

The peremptory instruction was proper and the judgments are affirmed.

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HARPER, BY, &c. v. KOPP.

(Filed May 1, 1903—Not to be reported.)

1. Damages—Negligence—This action was brought against appellee for damages received by appellant, a child six years of age, falling from a pile of lumber and suffering injuries when the lumber was unlawfully placed in the street and left unguarded. The court should have instructed the jury that appellee's liability rests not upon his negligence in the manner of stacking his lumber in the street, but upon the fact that he stacked it there at all, where its unguarded situation became an attractive and accessible object of danger to very young children.

2. Contributory negligence—The court should not give to the jury an instruction on contributory negligence of the child unless it was shown that

the precocity of the child gave to it such understanding as to enable it to exercise a reasonable degree of care for its protection under the circumstances, and such proof was not made in this case.

Wallace & Miller for appellants.

Kohn, Baird & Spindle and S. E. Sloss for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge O'Rear.

Appellant, an infant aged about six years, received an injury by falling from a stack of lumber piled by appellee in a street dedicated and used as a thoroughfare in the city of Louisville.

The recovery was sought upon the idea that appellee was guilty of an actionable wrong by placing his lumber upon a public street without authority from the municipality, and in a vicinity where children were in the habit of congregating in the pursuit of childish sport, in that it was an attractive and dangerous situation to such child; that appellee was aware alike of the danger and of its attractiveness, and of the fact that the children constantly resorted to it to play. The jury was instructed that appellant should not recover unless the lumber was piled so negligently that by reason thereof plaintiff was injured, and not then unless the jury should believe that plaintiff's negligence did not contribute to the injury. The court is of opinion that this instruction in two particulars was erroneous. In the first place, it does not excuse appellee for placing a pile of lumber in a public street and leaving it there without necessity or license, where small children are in the habit of congregating for sport, and where the nature of the thing is dangerous to such children; that the lumber was not negligently stacked. Appellee's liability rests not upon his negligence in the manner of stacking his lumber in the street under the circumstances stated, but upon the fact that he stacked it there at all, where its unguarded situation became an attractive and accessible object of danger to very young children. It was actionable negligence to leave unguarded such an object of danger to very young children, situated as that one was.

The instruction was further more objectionable in that it submitted at all the question of appellant's contributory negligence to the jury, as well as that it was erroneous in form, for it is not enough to constitute contributory negligence that the plaintiff's negligence may have contributed to his injury, but it must be such that the injury would not have occurred but for his own negligence. Children of tender years are presumed to be civilly irresponsible for their acts, and are, therefore, presumed to be incapable of negligence, for before one can be negligent he must have judgment to appreciate the danger of the situation, and to know how to avoid it. This presumption, however, is not always an irrebuttable one; but before the plea of contributory negligence will be allowed as against a child of apparently tender years, it must be shown that the precocity of the child gave to it such understanding as to enable it to exercise a reasonable degree of care for its protection under the circumstances. (*East Tenn. Coal Co. v. Harshaw*, 16 Ky. Law Rep., 526; *South Covington, &c., Railway Co. v. Herklotz*, 104 Ky., 405.) This was not shown in this case.

The judgment is reversed and cause remanded, with directions to award appellant a new trial under proceedings not inconsistent herewith.

## SULLIVAN v. LOUISVILLE &amp; NASHVILLE R. R. CO.

(Filed May 1, 1903.)

Railroads—Negligence—The foreman of a switching crew in appellee's yard found a torpedo and as a prank placed same in front of one of the driving wheels of the locomotive which passed over it, exploding it, a fragment striking appellee on the leg, inflicting an injury for which an action for damages was instituted against appellant. The court gave a peremptory instruction to find for defendant, from which this appeal is prosecuted. Held—That the court properly gave a peremptory instruction as the appellee company was not responsible for the act of the foreman, as he was not acting for the master in the act he committed, but on his own account and for his own pleasure

Matt O'Doherty for appellant.

Helm, Bruce & Helm and E. W. Hines for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge O'Rear.

The foreman of a switching crew in appellee's yard at Louisville found a torpedo among some rubbish in a tool box on the switch engine. As a prank he placed it on the rail in front of one of the driving wheels of the locomotive, which passing over the torpedo exploded it, a fragment striking appellant, a member of the crew, and injuring his leg. It is conceded that the switching crew had no occasion to use torpedoes in their work, and that the use of the one causing the injury named was entirely without the line of the foreman's duty. In this suit by the injured switchman to recover of the master (appellee) damages for the injury the circuit court peremptorily instructed the jury to find for appellee.

The reason the master is liable for the act of his servant at all is because the servant is acting in that matter in the master's stead and for him. Obviously if the servant is not acting for the master, he can not be said to be his representative in that act. So if the servant who is charged by the master with the authority to act in his stead in a given matter, the servant's action, or his failure to act, as the case may be, is imputed to the master as if it were his own. This general doctrine must be too well known to require now the citation of authority to support it. But where the servant steps aside from his employment, and assumes to act, and does act, solely on his own account, in a matter which the master has no more connection with than if he were the most complete stranger, it would not be logical or fair to make the master vicariously suffer for it, for in doing that act, the servant, so called, was absolutely his own master. (*Cousins v. Hannibal, &c.*, R. R. Co., 66 Mo., 572.) Or, as it was expressed by Mitchell, J., in *Morier v. St. Paul, &c.*, R. R. Co., 31 Minn., 351, quoted with approval in *Davis v. Houghtellin*, 33 Neb., 582: "In determining whether a particular act is done in the course of the servant's employment, it is proper to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was at the time the injury was inflicted acting for himself, and as his own master pro tempore, the master is not liable. If the servant step aside from his mas-

ter's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended."

In *Smith v. N. Y. & C. R. Co.*, 78 Hun. (N. Y.), 524, the master was held not liable for the act of its station agent in placing a torpedo upon its railway track by the agent for his own amusement, and not for the purpose of signaling a train, whereby a third person was injured. (*Marion v. Chicago, & C. R. R. Co.*, 13 N. W. Rep., 415; *Craft v. Allison*, 4 B. & Ald., 590.)

This court in *Smith v. L. & N. R. R. Co.*, 95 Ky., 111, held that where the servant acts for his master, and in furtherance of his master's business entrusted to him, the master is liable for his excessive act, or tort; but that if the servant in the act was acting for himself, to gratify some personal purpose, and independent of any duty to or business of his master, the latter would not be liable. A distinction is made where the person injured is a passenger, under the peculiar and high obligation of the carrier to transport him in safety.

In argument it is rather admitted that the foreman in placing the torpedo on the track was acting outside of his employment, and for that act appellee was not responsible; but it is argued for the failure of the foreman to remove the torpedo, which he knew was on the track and almost certain to explode, and possibly do injury, the master is liable. While the argument is specious, its application is not practical. The act of the foreman in placing and leaving the torpedo on the track was one continuing act, having in view but one object, namely, the explosion of the torpedo, that its noise might frighten the engineer or fireman. It is not possible to segregate this one continuous act so that it could be said that in part of it the servant was acting for himself, and in another part he was acting for his master. In truth it was conceived, set in motion and consummated in furtherance alone of the servant's own purpose, entirely disconnected from any duty whatever imposed by his employment.

The case of *Ry. Co. v. Shields*, 47 Ohio St., 387, is relied on. In that case some trainmen placed a torpedo on the track in front of a portion of their train, intending to frighten some ladies by its explosion when the cars passed over it. However, it failed to explode. The trainmen negligently left it there, exposed at a place where small children were in the habit of passing. Later, a child found it, was attracted by its appearance, and exploded it, to his injury. The railway company was held liable, because it was said that the servant (the conductor of the train) was charged with safely keeping the dangerous implements of the master committed to his care in the discharge of the master's business. This doctrine, carried to its full logical result, would mean that any injury done by a servant with the master's property in the servant's care would bind the master. As, for example, a brakeman on a railroad train who would assault a stranger with a coupling pin in use about his train; or, if the fireman on an engine should purposely and maliciously throw a lump of coal at some one, a stranger standing beside the roadway, and injure him; or, if in the case at bar, the foreman had for fun thrown the torpedo at appellant and injured him. The best considered and most numerous authorities do not draw the line at whether the servant is using his master's property when inflicting the injury in question, but

whether he is then representing the master in the act and in the scope of his employment.

The judgment of the circuit court is affirmed.

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SCHUSTER v. BARBER ASPHALT PAVING CO.

(Filed May 5, 1903—Not to be reported.)

Street improvements—This is an appeal from a judgment enforcing a lien under apportionment warrants issued against appellant's property for the improvement of Baxter avenue, under contracts made by direction of the council. Appellant's property lies on both sides of Baxter avenue, and the ordinance directs that the lien be enforced on property 192 feet back from said avenue. Appellant complains that the apportionment of cost was made on the wrong basis. Held—That the basis of apportionment proposed by appellant would impose greater cost on her than the basis already adopted, and, therefore, the assessment will not be disturbed as appellant has failed to show that a material benefit would result to her from a reapportionment under a different and correct method.

Lane & Harrison for appellant.

Wm. Furlong for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Settle.

It appears from the record in this case that appellant owns land on Baxter avenue in the city of Louisville. Baxter avenue was formerly the Bardstown turnpike road, the territory on either side of and contiguous to it having been annexed to the city in 1894, and the turnpike company having conveyed the road to the city, its importance as a thoroughfare necessitated its being converted into a street, which was accordingly done in 1900, by grading, curbing and paving it with asphalt.

The work of constructing the street in front of appellant's property seems to have been done under two separate contracts. The first from Beechwood avenue to Midland avenue, which goes to about the center of appellant's land, and the second from Midland avenue to Farmdale avenue. The entire work appears to have been done under ordinance duly enacted and approved, by contracts made in pursuance thereof, and by proper apportionment of the cost of the improvement. In other words, the petition and exhibits appear to make out a prima facie case entitling appellee, as the contractor in the work of constructing the street in front of appellant's land, to enforce the lien existing on the same for the amount due it on the work as shown by apportionment warrants duly issued by the board of public works. At any rate, such was the opinion of the lower court, and consequently the judgment appealed from was rendered in this action allowing appellee the lien, and adjudging its enforcement by a sale of appellant's land, or enough thereof to pay the sum contained in the apportionment warrant, and the costs of the action. Appellant objects to the manner in which the cost of the improvement was apportioned, and it is contended by her counsel that because a part of the property along the line of the improved street was defined into squares the ordinance for that reason was void, or at any rate,



that the apportionment is excessive and erroneous. This court has repeatedly announced that such an ordinance is not void, and that a reappointment may be made by the court in the event of error on the part of the council as to the manner of the apportionment adopted by it. We find from the record that Baxter avenue was improved from Beechwood avenue to Midland avenue; north of Baxter avenue the next principal street running parallel with it is East Broadway, 884 feet distant from Baxter avenue. One-half of this distance is 192 feet. On the south side of Baxter avenue the property is not throughout its entire length divided into squares, part of the distance embracing appellant's land nearly 300 feet back. There is no intervening street between Baxter avenue and Von Borries avenue.

The ordinance adopted by the general council for the improvement fixed the depth of the assessment at 192 feet on each side of Baxter avenue. On the north side of Baxter avenue 192 feet is one-half the distance to East Broadway. Appellant owns entirely through from Baxter avenue to Von Borries avenue, a distance of 1,100 feet. To go back, therefore, half the distance to Von Borries avenue, the full length of the improvement, would, it appears, include for assessment over 550 feet in depth of appellant's land instead of the 192 feet in depth with which she has been assessed. If under the apportionment as fixed she would pay for the improvement of the street at \$1 per front foot, by the other method suggested she would be charged \$2.50 per front foot. But the assessment, as made, is the same on each side of the street, viz., 192 feet in depth.

The square which appellant claims to exist is bounded on the southerly side by Von Borries avenue. If so, it would seem that it should be treated as a public way in appellant's block, that is, between Rosewood and Edenside avenues, which would constitute a block from Baxter avenue to Von Borries avenue 1,100 feet deep, through the whole of which appellant's lot would extent. It appears, however, from the record, that the general council of the city of Louisville had not accepted the dedication of Von Borries avenue as a public street at the time of the passage of the ordinance for the improvement of Baxter avenue, or at the date of making the assessment for that improvement, and it could not have become a public street without such acceptance. (Acts 1902, page 172.) We are of opinion that the cost to appellant under the appointment made is less than it would have been under the plan contended for by her.

This court has repeatedly held that it will not disturb an assessment made by apportionment for the construction of a street unless it is shown that a material benefit would result to the property owner from a reapportionment under a different and correct method. (*Barret v. Falls City Art. Stone Co.*, 21 Ky. Law Rep., 670; *Levi v. Coyne*, 23 Ky. Law Rep., 492.) But the most recent declarations from this court of this doctrine may be found in *Barber Asphalt Paving Co. v. Gaar, &c.*, ante, 2227, opinion delivered April 22, 1903, and *Zender, &c. v. Barber Asphalt Co.*, ante, 2229, opinion of April 28, 1903.

Other matters of resistance to the apportionment in this case, besides those herein discussed, are urged in the brief of counsel for appellant, but as they seem to have been expressly waived of record, they will not be considered.

We regard the grounds urged as insufficient to authorize a reversal, and the judgment of the lower court is affirmed.

## SNYDER, &amp;c. v. BARBER ASPHALT PAVING CO.

(Filed May 5, 1903—Not to be reported.)

Street improvement—This is an action against appellants to enforce a lien against their property under an apportionment warrant for street improvement. The defense is made that the territory contiguous to the property was defined by streets and squares, and that the assessment was unequal and unfair. Held—That the rule has been adopted by this court to the effect that it is incumbent on persons complaining of such assessment to show that the method they propose would have lessened the cost to him, or would have been beneficial to him in any respect. Appellants have not shown a better method of assessment than was adopted.

Lane & Harrison for appellants.

William Furlong for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Nunn.

On the 6th day of March, 1901, the appellee filed its petition in the Jefferson Circuit Court, Chancery division, against appellants, seeking to enforce liens on appellants' property, situated on and adjacent to Baxter avenue, in the city of Louisville, Ky. Appellee claimed the liens existed for the payment to it of certain sums wanted for the original construction and improvement of the avenue, by grading, curbing, and paving with asphalt; that the work was performed under contract with the city, and after the council had duly passed an ordinance, directing the improvement to be made and alleging in detail the steps taken by the board of public works, the city council, and all other matters pertaining to the letting of the contract, and the apportionment of the cost to the owners of the property along the avenue. The appellants by their answer controverted appellee's petition, but it will not be necessary to notice any defense made by them, except the one made in the third paragraph of their answer, for the reason that the parties made an agreement, which is copied in the record, as follows: "On this appeal the defendants, H. R. Snyder and Tom Zehender, rely solely on the defense set up in the third paragraph of the answer of H. R. Snyder, filed May 11, 1901, and all other defenses are expressly waived."

In the petition it was also alleged that the improvement was the original construction of the avenue; that the territory contiguous to the avenue, where the improvement was made, was not defined into squares by principal streets; that the ordinance fixed the depth, 199 feet, on both sides fronting the improvement, to be assessed for the cost of making the same, according to the number of square feet owned by the parties, respectively, within the depth fixed by the ordinance. The appellants by the third paragraph of their answer denied these allegations, and averred that the territory contiguous to Baxter avenue, and upon each side thereof, and throughout the entire length of the way improved, was defined into squares by principal streets, and that the apportionment of the costs of the improvement as fixed by the ordinance was void, and that the costs should have been apportioned to the owners of the lots in each fourth of a square, according to the number of feet owned by them respectively, and also alleged that by reason of this error in assessment their part of the cost was increased by at least 40 per

cent. This was controverted by appellee, and proof was taken and a trial was had, and the court adjudged that the amounts as apportioned and assessed were a lien on the property of appellants, from which judgment they have appealed.

Upon examination of the record we find it to be a doubtful question as to whether or not the territory contiguous to Baxter avenue, in the meaning of the statute, was defined into squares by principal streets, but if it was so defined the appellants failed to prove that an assessment and apportionment on this basis would have lessened the cost to them, or either of them, or would have been beneficial to them in any respect, and under repeated decisions of this court this failure is fatal to their cause. In the case of *McHenry v. Salvage, &c.*, 99 Ky., 235, the court in discussing this question said: "While the record does not show clearly the situation of the property in this respect, the exhibits, maps, etc., seem to show no such division into squares; but if it were otherwise, it does not appear that, under a different method of apportionment, the appellant would be requested to pay less than under the method adopted."

In case of *Barrett v. Artificial Stone Co.*, 21 Ky. Law Rep., 671, the court said: "It is well settled that a reversal will not be had for this reason unless it affirmatively appears that appellant was in fact prejudiced by the apportionment."

In the same book, page 1770, the court said: "The rule is well settled that in order to entitle the party complaining of an apportionment to relief in cases of this character he must show that, under the proper method of apportionment, he would be required to pay less than under the method adopted."

This rule has been followed by this court in several recent cases, and in the case of *Schuster v. Barber Asphalt Paving Co.*, ante, 2346, this day decided, the same opinion is expressed.

Wherefore, the judgment of the lower court is affirmed.

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WHITE v. COMMONWEALTH.

(Filed May 5, 1908.)

Criminal law—Sodomy—This appeal is prosecuted from a conviction under an indictment for sodomy, and appellant complains, first, because the testimony did not establish the guilt of the accused; and, second, because the court erred in not pointing out and advising the jury as to the specific acts that constitute the offense. Held—That the instructions given follow the language of the indictment, and are sufficiently specific. Every person of ordinary intelligence understands what is meant by a charge of sodomy, and there was sufficient evidence to sustain the conviction. It was not error in the court failing to give an instruction covering the offense of assault and battery as no such offense is charged in the indictment, except as a part of his assault to commit the crime of sodomy.

M. Barnett for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Chief Justice Burnam.

The appellant was convicted of the crime of sodomy, and his punishment fixed at two years' confinement in the penitentiary. We are asked upon this appeal to reverse the judgment rendered pursuant thereto on two grounds: First, because the testimony did not establish the guilt of the accused; and, second, because the court erred in not pointing out and advising the jury as to the specific acts that constitute the offense.

Every person of ordinary intelligence understands what is meant by a charge of sodomy, and the instructions given in this case follow the language of the indictment, and are, we think, sufficiently specific. It is also insisted that the court erred in failing to give instructions covering the law of assault and battery. No assault and battery is charged against the defendant except as a part of his assault to commit the crime of sodomy. This is the offense sought to be punished, and we think the court did not err in failing to instruct the jury for any other offense. It is also insisted that emission is necessary to the consummation of the offense of sodomy, and that as the proof [wholly failed on this point, the jury should have been directed to find the defendant not guilty. The decisions on this point have not been uniform, but the drift of the latter decisions, in both the English and American courts, is to hold that nothing more than re's in re, without regard to the extent of the penetration or emission, is all that is required. (Bishop's New Criminal Law, volume 2, section 1127.)

Finding no error in the record the judgment is affirmed.

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CHINN'S ADM'X v. CHESAPEAKE & OHIO RY. CO., &c.

(Filed May 5, 1903—Not to be reported.)

**Railroads—Contributory negligence**—In this action to recover damages for injuries to a trespasser in the yards of appellee the court properly gave to the jury a peremptory instruction to find for defendant as the injury resulted from the contributory negligence of deceased in stepping in the way of the engine.

W. T. Cole and A. E. Cole & Son for appellant.

W. H. Wadsworth and E. L. Worthington for appellees.

Appeal from Greenup Circuit Court.

Opinion of the court by Chief Justice Burnam.

Appellant, as plaintiff in the court below, sought in this action to recover damages of the defendant for the death of her husband, which she charges was due to the negligence of defendant's employes in running an engine against him in their switch yard near the village of Russell, in Greenup county. The lower court at the conclusion of plaintiff's evidence instructed the jury to find for the defendant, which was done. The only question presented on this appeal is whether there was evidence conducing to show any legal liability on the part of appellees for the injury complained of.

The testimony conduces to show that the defendant railway company maintained a switch yard outside of the corporate limits of the town of Russell, which runs parallel with a public road for about a mile, and which

is separated from it by a wire fence; that frequently when the county road is very muddy persons travel through the switch yard between the main railroad track and this fence. It also appears that unauthorized persons frequently passed through and across the switch yard. On the morning of October 20, 1901, just prior to the accident, plaintiff's intestate, Thos. W. Chinn, was standing between two of the tracks in the yard, which were eight feet seven inches apart, with a wheel barrow, which he had taken into the yard without permission from the railroad authorities for the purpose of picking up coal which had fallen off of cars loaded with coal. A freight train, composed of about forty cars, was moving slowly to the west on the track north of him, and he appeared to be looking at the wheels of the cars as they passed. Just before the last of this train passed him, a yard engine, with eight or ten loaded coal cars, going east on the track south of him, approached. This engine was ringing her bell, and had blown her whistle about seventy yards before it got opposite to the point where decedent was standing. J. H. Stephens, the fireman on this locomotive, who was introduced as a witness, for the plaintiff, testified "that the decedent was standing with his wheelbarrow about middle ways between the two tracks, with his back to the track on which the switch engine was moving; and that he saw that he was not noticing the approach of the switch engine, and that he thought he might step backwards, and that as they were within four or five feet of him he called to him to look out; that just at that moment he stepped backward against the side of the passing locomotive and was struck by it and knocked down."

There is substantially no variation from this testimony as to how the accident occurred. The engineer operating the locomotive, who was also introduced as a witness by the plaintiff, testified that he saw the deceased and others standing between the tracks for about one hundred yards before he was struck, but that he was in no danger if he had remained in this position; that the locomotive was going at the rate of six or seven miles an hour, and that it was impossible to have stopped the train after the fireman called to the decedent to look out. It seems to us that there can be no room for a difference of judicial opinion under this state of fact as to the cause of the accident, or that it was due to the contributory negligence of the decedent. A railroad company is entitled to the unobstructed use of their private switch yards, and is under no obligations in moving its engines and trains to take special precautions or give special warning to avoid injuring any unauthorized person who may, for his own purpose or convenience, go therein, until the presence of such person in a situation of danger has been discovered. (Thompson on Negligence, 2d edition, section 1760; McDermott, By, &c. v. Central R. R. Co., 16 Ky. Law Rep., 432; Ky. Central R. R. Co. v. Castino's Adm'r, 83 Ky., 182; Brown's Adm'r v. L. & N. R. R. Co., 17 Ky. Law Rep., 145.)

After a careful consideration of the testimony in this case, and the able brief filed by counsel for appellant, we have reached the conclusion that the trial court did not err in directing the jury to find a verdict for the defendant.

Judgment affirmed.

## COMMONWEALTH v. BARNEY.

(Filed May 5, 1903.)

Criminal law—Fraudulent disposition of property—Constitutional law—Appellee was indicted under the act of March 21, 1903, for fraudulently disposing of the property of another, and a demurrer was sustained to the indictment and the indictment dismissed. The constitutionality of that statute is involved on this appeal. It is contended that said act violates section 51 of the Constitution, which requires that an act shall relate to but one subject, and that shall be expressed in its title. The title of the act is an act to make it unlawful for a person to fraudulently dispose of the property of another and to provide a punishment therefor. The body of the act does not contain the word "fraudulently," but provides a penalty against all persons who shall sell, dispose of or convert to their own use, or the use of another, property without the consent of the owner. The proper rule of construction is that the constitutionality of the act must be sustained if possible, and, therefore, in cases of doubtful terms or meaning, that construction will be applied which upholds the act if such can be done without doing violence to the manifest legislative purpose. The title is now an essential part of the act, and is, therefore, not only useful in affording a fair index of the legislative intent in case of ambiguity in the context, but it must be read in connection with the remainder of the act as a part of it in determining what is the law. If the enacting clause goes beyond the title, only that part that is in harmony with it, and that is fairly embraced by it, can stand. The legislature intended to include in the acts inhibited those only that were intentionally fraudulent, and the act is not in violation of section 51 of the Constitution. It was the purpose of the legislature in the enactment of this statute to include in the statutes against embezzlements that class of persons in possession of another's property by reason of some fiducial relation hitherto held to be not embraced by the existing laws. The indictment was defective. It should have shown the relation in which the accused stood to the person whose property he is charged with having fraudulently converted.

C. J. Pratt and M. R. Todd for appellant.

Kohn, Baird & Spindle and Bingham & Davis for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge O'Rear.

This appeal involves the constitutionality of the act of March 21, 1902, fixing a penalty for one's fraudulently converting or disposing of the property of another without the owner's consent. It also involves the sufficiency of an indictment drawn under the act.

The proposition is argued that there is a variance between the title and the body of the act; that the title does not express the subject of the statute, and is, therefore, violative of section 51 of the Constitution, which provides that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title."

The act under consideration is as follows: "An act to make it unlawful for a person to fraudulently dispose of the property of another, and to provide a punishment therefor.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Section 1. That any person who shall sell, dispose of or convert to his or her own use, or the use of another, any money, property or other thing of value without the consent of the owner thereof, shall be punished by confinement in the penitentiary for not less than one nor more than five years, if the money, property, or other thing of value so sold, disposed of or converted to his or her own use be of the value of \$20 or more; or be confined in the county jail for not less than one nor more than twelve months if the value be less than \$20."

It will be observed that the word "fraudulently" is used in the title, but nowhere in the enacting clause of the bill is reference made to intent or purpose of the wrongdoer. From this it is argued by appellee that the legislature has attempted to create the offense and fix a penalty for one's disposing of another's property, or converting it, without the owner's consent; that such an act is far beyond the scope of the title, which restricts within much narrower bounds the class of acts prescribed by the bill. The title and the body of the statute not being in accord, it is argued that the act is, therefore, unconstitutional. The contention of the attorney-general is that the body of the act alone controls; that it is fairly stated in the title, and that it was within the power of the legislature to make the simple transfer or conversion of another's property by one not the owner, without the latter's consent, an unlawful act, and to provide a penalty.

Formerly the titles of legislative acts were not regarded as any part of them. (*Attorney-General v. Weymouth*, 1 Amb., 20; *Hadden v. The Collector*, 5 Wall., 107.) At that time acts of parliament were given their title by the speaker, or by the clerk. The courts then disregarded the title, as affording no index of the intention of the law-making body, for the very good reason that that body had nothing to do with the selection of the title. To prevent certain abuses of legislation by the use of misleading titles many of the States now have constitutional provisions identical, or quite similar, to ours. Section 51). So that the matter of selecting an expressive and accurate title is committed directly to the legislature, and its being fairly expressive of the context of the bill is an imperative condition to the validity of the act. It is essentially a part of the act, not only because it has been selected and adopted by the legislature as one of the tests of their meaning as expressed in the bill, but because the Constitution has made it a part, and the controlling part, of the law to which it applies. It is, therefore, not only useful in affording a fair index of the legislative intent, in case of ambiguity in the context, but it must be read in connection with the remainder of the act, as a part of it, in determining what is the law. If the enacting clause of the act goes beyond the title, only that part that is in harmony with it, and that is fairly embraced by it, can stand. (*Cooley's Constitutional Limitations*, 170-181; *Endlich Interpretation of Statutes*, section 59; *Southerland Statutory Constructions*, section 210.)

The constitutionality of the act must be sustained, if possible, and, therefore, in cases of doubtful terms or meaning, that construction will be applied which upholds the act, if such can be done without doing violence to the manifest legislative purpose. This is an additional reason why the language, and the whole of it, must be read in connection, including the title of the bill.

That the enacting clause of this statute meant to deal only with fraudulent or wicked conversions of another's property without his consent we find abundant grounds to sustain, even outside of the expression in the title. To apply the terms of the act literally would be so far-reaching that quite frequent injustice and absurdity would result. This compels the rejection of that construction. It is argued for the Commonwealth that motive or intent, not being provided for in the act, are not essential; that many acts are made unlawful by legislative enactment, without regard to the actor's intent. But that statement must be considered subject to its qualifications. (Bishop's New Criminal Law, section 291b.)

While in civil actions the *quo animo* with which a thing is done may sometimes be immaterial, we apprehend that generally in legal, as always in moral, contemplation crime proceeds alone from a wicked mind. For this reason acts of lunatics, idiots and young children, and of those acting under duress, or under mistake of fact, are held to be not criminal. (Bishop's New Crim. Law, sections 287-290.)

Although some acts are made unlawful apparently without regard to the intent of the perpetrator, a construction that would make a man guilty regardless of the question of intent is not to be preferred. (Bradley v. People, 8 Col., 599.)

A few illustrations taken from every day occurrences will serve to further prove that the legislature had in mind a fraudulent act as the one constituting the evil to be remedied by the statute under examination. A sheriff or tax collector who distrains the goods of a delinquent debtor or taxpayer "disposes of the goods of another without the consent of the owner," in fact. One who carelessly, and without criminal intent, commingles the property of another with his own and then sells it, would be converting or disposing of the property of another without his consent, and would be civilly liable to the owner therefor. (Reed v. King, 11 Ky. Law Rep., 96, 616.)

A common carrier who wrongfully withholds goods delivered to him for transportation is liable to the owner as for a conversion, without regard to his good faith in acting upon the grounds of his belief. (L. & N. R. R. Co. v. Lawson, 88 Ky., 496.)

The plaintiff in directing the service of an execution or attachment, or the officer handling it, who levies the writ upon the goods of a stranger to the writ, or levies upon an excessive quantity, however honest in belief is their mistake, are liable to the true owner as for a conversion. (Hall v. Ames, 2 Mon., 143; Hill v. Ragland, 24 Ky. Law Rep., 1053; Arnold v. Fowler, 94 Md., 497, 89 Am. St. Rep., 444.)

Without further multiplying instances, we may add that any conversion that would support an action of trover, or detinue, would, under the strict construction contended for, make a crime of many an act innocent enough maybe in intent; for, says Biglow in *Leading Cases on Tort*, 428: "It may be laid down, as a general principle, that the assertion of a title to, or an act of dominion over, personal property, inconsistent with the right of the owner, is a conversion."

We, therefore, conclude that the legislature intended to include in the acts inhibited those only that were intentionally fraudulent. It then follows that the act thus read is not violative of section 51 of the Constitution.



The draughtsman of the indictment in this case proceeded upon the theory above outlined and sustained. The indictment reads: "The grand jurors of the county of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, accuse Charles Barney of the crime of unlawfully, fraudulently and feloniously converting to his own use money of value, the property of another, without the consent of the owner thereof, committed in manner and form as follows, to wit: The said Charles Barney, in the said county of Jefferson, on the — day of July, 1902, and before the finding of this indictment, unlawfully, fraudulently, feloniously, and without the consent of Emma Black, did convert to his own use \$42 in good and lawful money of the United States, of the value of \$42, a further description of which is to the grand jurors unknown the personal property of said Emma Black, with the fraudulent and felonious intent then and there to permanently deprive the said Emma Black of her property therein, contrary to the form of the statute, etc."

The circuit court sustained a demurrer to the indictment, and the Commonwealth, by the attorney-general, has appealed, to procure a construction by this court of the statute. Even as read in entire harmony with its title, the terms of this statute are very general, and if liberally construed and literally applied would be most comprehensive and far-reaching.

It is true that which is plain needs no interpretation. At first reading this statute may appear plain enough. But it must be studied, because practically it must be applied in connection with other statutes of this State. All criminal laws are necessarily enacted to remedy some evil existing or anticipated. Such was the situation which the legislature had in mind, that it must be deemed to have taken a comprehensive survey not alone of the hurtful thing to be corrected, but of the laws already in force tending to, but which had not fully served, that end. The fraudulent conversion or disposal of the property of another without his consent goes over a wide range of criminal and civil law. In venturing a partial definition of fraud, Wharton's Crim. Law, section 124, says: "The task often pronounced to be impossible, of exhaustively defining fraud, will not be here attempted. It is enough to say that fraud, in a general sense, is the deceitful, unlawful appropriation of the property of another, and a fraudulent intent is the intent to effect such appropriation."

The statutes against robbery, larceny in its two grades, horse stealing and hog stealing, and the statute against obtaining property under false pretense, and other similar statutes, seem to amply cover the range of one's converting the property of another without the consent of the owner, where the wrongdoer is not in the lawful possession of the property. But it was early held that clerks, servants, bailees generally, and particularly officers and servants of corporations, who were in the rightful possession of their master's or bailor's property, were held not liable criminally for its conversion. To remedy this defect in the statutory and common law there was enacted in England, and in most of the States of this country, the statutes against embezzlement, an offense unknown to the common law. In Kentucky the legislation covering this subject has been enacted in piecemeal, and has fallen short of the general policy elsewhere prevailing. For example, we have the statute known as the embezzlement statute (section 1202,

Kentucky Statutes), against the fraudulent misappropriation by officers agents, or clerks of banks and incorporated companies, of the goods or funds of the bank, or the corporation placed in their charge, or the property of another in their possession for such master. Section 1203 provides a penalty against fraudulent misappropriation by porters and other servants of common carriers; section 1205 is against the custodian of public bonds, etc., belonging to the State, or any county or other municipality therein; and section 2177 is applicable to innkeepers for similar offenses against the property of their guests.

But until the enactment of the statute now being considered clerks and servants of individuals not bankers, and not incorporated, and bailees, and others who had come into possession of property rightfully, and by reason of some confidence or trust reposed in them by the owner, and who subsequently fraudulently converted it, were held in this State to be guilty only of breaches of trust—not punishable criminally. (*Shelburn v. Commonwealth*, 85 Ky., 173; *Clark v. Commonwealth*, 16 Ky. Law Rep., 703; *Commonwealth v. Bull*, 5 Ky. Law Rep., 605; *Snapp v. Commonwealth*, 82 Ky., 173; *Fairleigh v. Commonwealth*, 5 Ky. Law Rep., 854; *Lee v. Commonwealth*, 8 Ky. Law Rep., 53; *Barclay v. Breckinridge*, 4 Met., 375.)

This was a patent defect in the criminal laws of the State. The legislature must have had it in mind most prominently, if not exclusively, in passing this bill. If the construction be given to the statute that it included all fraudulent conversions, whether or not done by those in some relation of trust to the owner, it would be made to embrace not only those classes already adequately provided for by the sections above alluded to, in which, in several instances, penalties different from those imposed by this statute are provided, but it would include a class of cases which we are slow to believe was within the legislative purpose. Numerous instances of this class may readily occur to the mind. The term "fraud" is so elastic and comprehensive, so difficult of being even defined by the most capable authors and jurists; may be so subtle as to be recognized only with great difficulty, and only by technical rules; may exist in some degree, more or less pronounced, in so many instances in dealing with such varied classes of property, that a practical application of this construction of the statute, as a criminal remedy, would be attended with such manifest uncertainties that we doubt if the legislature contemplated including this indefinite, if not indefinable, class of fraudulent acts as crimes. It would be more reasonable to suppose that it was intended that these be left to the remedial effect found in the results of civil actions. Nor could the legislature have purposed to deliberately provide two penalties, entirely different, and dependent alone on the whim or wish of the attorney drafting the indictment, for the one act. There is not a reason to suppose that a mitigation of punishment for these offenses was contemplated, either.

It must have been, then, to meet the "breach of trust" cases above alluded to that the statute was provided, thereby making a complete, consistent system of treatment of the subject in hand. It is argued for appellee that the very vagueness and uncertainty of the true legislative intent to be gathered from this act warrant its rejection by the court, to the end, at least, that the legislature may provide more clearly what it meant to prohibit. But such is not the rule of construction, and can not be. It is for

the legislature to choose its subjects, and its own mode of expression. It is for the court to interpret the language employed so as to carry into effect the legislative purpose, so far as it may not be unquestionably at variance with the Constitution.

It may be said that the work of interpretation must be confined to the construction of the words of the act. But that manifestly falls short of the true office of the courts. The legislature has used certain language to express its purpose. It is the purpose, then, that must be sought for. It will be presumed, at the beginning of such an inquiry, that the language used will probably best show that purpose. But if it undoubtedly does not, then to stop further inquiry is to probably misapply the legislative will, falling short of its purpose, and, maybe, work a positive and unthought of public evil. The courts, with due regard to the prerogatives of a co-ordinate branch of government, approach this duty with caution, and with a proper appreciation of the distribution of the powers of the government. But statutes of doubtful meaning must be interpreted, or be subject to final interpretation, in event of controversy as to their true meaning, by the courts established by the organic law for that purpose. The evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject, are all properly considered by the courts in arriving at the legislative intention, because the legislature must have resorted to the same means to arrive at its purpose. As in construing a contract, its context is considered from the standpoint and surroundings of the parties when they made it, so in construing an ambiguous act of the legislature the court will, so far as possible, consider the matters in hand as if situated with respect thereto as that body was. This may result sometimes in the words used in a statute being transposed, or in some of them being omitted or ignored, or in an interpolation of others where necessary to effect the manifest legislative purpose. Says Endlich *Interpretation of Statutes*, 319: "The authorities would seem rather to establish that the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language does not really express the intention." (See cases cited, section 293, *Ibid.*)

In Massachusetts the statute against embezzlement carefully enumerated certain classes of persons as intended to be embraced by it. A subsequent statute, somewhat similar to the one here being considered, was enacted. The question whether one, though embraced by its terms literally construed, was guilty was under consideration in *Commonwealth v. Thomas Hays*, 14 Gray (Mass.), 62. The court held that the latter act was probably designed to meet a deficiency in the former act, as shown by a recent decision of the court, and that it should be construed in that light. It was, therefore, held that to sustain a conviction under it there must exist "the element of a trust or confidence reposed in a person by reason of the delivery of property to him, which he voluntarily takes for safe keeping, and which trust or confidence he has violated by the wrongful conversion of the property. Beyond that the statute was not intended to go."

We conclude that it was the purpose of the legislature in the enactment of this statute to include in the statutes against embezzlements that class of persons in possession of another's property by reason of some fiducial relation, hitherto held to be not embraced by the existing laws. As embezzlement is that sort of statutory larceny committed by servants and other like persons where there is a trust reposed, and, therefore, where there is no trespass, the main ingredient of which is the fraudulent motive of the fiduciary in depriving one who trusted him of his, the owner's, property without his consent, it is not material that the word "embezzle" should be used in the statute. When the act is sufficiently described it will be classified not by its designation, but by its constituent elements.

The indictment in this case should have shown, therefore, the relation in which the accused stood to the person whose property he is charged with having fraudulently converted. If it had been shown that he obtained the money from the owner because of any special confidence or trust reposed in him by her, as being her servant, agent or the like, the applicability of the statute would be beyond question. Generally an indictment for a statutory offense is sufficient if it follows the words of the statute. But this is so only where the words used in the statute are sufficient to describe every fact essential to constitute the offense; otherwise it is not. (*Commonwealth v. McCrary*, 8 Ky. Law Rep., 241; *Commonwealth v. Stout*, 7 B. Mon., 242; *Commonwealth v. Shearer*, 4 Ky. Law Rep., 348.) The indictment in this case not containing all essential averments, failed to state an offense, and the demurrer was, therefore, properly sustained.

Judgment affirmed.

Whole court sitting.

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EAST TENNESSEE TELEPHONE CO., &c. v. ANDERSON COUNTY  
TELEPHONE CO.

(Filed May 5, 1903.)

Injunctions—Damages on bonds—Illegal acts—Constitutional law—Appellee was about to construct a line of telephone through the city of Lawrenceburg when appellant company, claiming the exclusive right to construct and operate a telephone line in said city under contract with the council, sued out an injunction against appellee to restrain it from constructing its line. Appellee urged as a defense the invalidity of the ordinance granting the exclusive privilege on account of its defective illegal passage. The court dismissed appellant's petition. Appellee then brought suit on the injunction bond and obtained judgment for \$2,000 damages, from which this appeal is prosecuted. It is contended that appellee can not maintain the action as it had no legal right to construct and maintain a telephone line in said city on account of the council never having granted it permission to construct such line, as required by section 163 of the Constitution. Held—That this section of the Constitution is mandatory, and the construction of a telephone line through the streets of a city or town, without the privilege having been previously granted by the council, was in violation of the Constitution. The rights of appellee were not passed upon in the former suit. In this action it can only recover upon the ground that it was prevented by an injunction sued out by appellant from exercising a lawful right to occupy the streets of the city with its plant. As it is conclusively shown that they had no such legal right, but were trespassers, they have no right to maintain the action.

F. R. Feland and Humphrey, Burnett & Humphrey for appellants.

Willis & Willis and L. C. Carter for appellee.

Appeal from Anderson Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 10th day of August, 1899, the East Tennessee Telephone Co. sued out an injunction against the Anderson County Telephone Co., and enjoined them from "erecting poles, posts and other apparatus, preparatory to or necessary to be used in the operation of a telephone exchange, along, over, under or across the public streets, alleys or public ways of Lawrenceburg," upon the ground that by the contract with the city of Lawrenceburg they had an exclusive franchise to establish and operate a telephone system therein. The Anderson County Co. defended this suit upon the ground that the ordinance adopted by the city council, granting the franchise to the plaintiff, did not lie over five days as required by section 3636 of the Kentucky Statutes, and was, therefore, void. This contention was sustained and the East Tennessee Telephone Co.'s petition dismissed. (*East Tennessee Tel. Co. v. Anderson Tel. Co.*, 22 Ky. Law Rep., 418.) Thereupon the Anderson County Co. brought this suit for damages on the injunction bond executed by the East Tennessee Telephone Co. at the institution of their suit. In the first paragraph of their petition they allege "that they had authority to construct and operate a telephone line and exchange in the city of Lawrenceburg." This allegation is specifically denied in the answer, and the defendants plead affirmatively that the plaintiff did not, before proceeding to erect their poles in the public streets and alleys of the city for the purpose of conducting a telephone business, obtain and procure any consent of the city authorities to do so. A motion by the plaintiff to strike this allegation from the answer was overruled, and in their reply they admit this averment to be true; but allege that the city authorities made no objection to their doing so, and aver that this was no concern of the defendant, and that it had no right to rely upon the absence of such authority.

The defendant moved to strike out so much of the reply as plead that they could not rely upon plaintiff's want of authority. This motion was also overruled, and the issues were made by controverting the affirmative averments of the reply. The trial resulted in a judgment in favor of the plaintiff for \$2,000, and the defendant has appealed.

Section 163 of the Constitution is as follows: "No telephone company shall be permitted or authorized to construct its tracks, lay its pipes, or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town without the consent of the proper legislative bodies or boards of such city or town being first obtained, but when charters have been heretofore granted conferring such rights, and work had in good faith been begun thereunder, the provisions of this section shall not apply."

This section of the Constitution is mandatory and highly important, and as the Anderson Telephone Co. failed to comply with its provisions, or the statute passed pursuant thereto, it is clear that they had no right to use the streets or highways of the city of Lawrenceburg for the conduct of their business. The question then arises, whether they can recover damages

against the East Tennessee Telephone Co., because that company, by injunction, prevented them from doing an unlawful thing. The gist of the plaintiff's complaint is that they were prevented by an injunction sued out by defendant from exercising a lawful right. If they were violating the law in erecting their poles and wires upon the streets of Lawrenceburg without authority of the city authorities, the presumption is that they would have been stopped by these authorities in due course. The question raised by the defense is a new one in this State, although manifestly sound and logical on principal, and we have been cited by counsel for appellant to a number of cases which fully sustain their contention.

In Bangor, &c., R. R. Co. v. Smith, 77 Am. Dec., 246, the railroad company undertook to construct a branch track of their railroad over a public highway in Oldtown. The defendant, with others, denied the right of the plaintiffs to construct the branch track as claimed by them, and interfered and prevented it. After this interference the railroad company brought suit, setting forth their right to construct such track, and that by the acts of the defendant they were prevented from constructing it. When this case was brought to the Supreme Court of Maine it was held that plaintiffs did not have legal authority to construct their track in the way and manner proposed by them. The court then said: "Undertaking what by law they were not authorized to do, and what, if done, would have been the proper subject of an indictment, they were prevented by the defendant from executing their unlawful purpose. The action, then, is one in which the plaintiffs claim damages because they were prevented from doing an illegal act, and for which, if done, those engaged in its commission would have been criminally punishable. It is difficult to perceive how the prevention of an offense constitutes a valid cause of action on the part of the would-be offender, who is interfered with in the commission of his intended offense. It is still more difficult to understand how any damages can have been sustained by reason of such interference. \* \* \* The right to lay the branch track was asserted by the plaintiffs and denied by the defendant. It was the only question at issue between these parties. The plaintiffs attempted what they were not authorized to do, and the defendant resisted, and the court affirmed the propriety of that resistance. If the defendant entered wrongfully on the land of Gen. Veazie, and they were prevented the further prosecution of the plaintiff's undertakings, it may be a trespass for which he would be liable to the owner of the soil, but such is not the subject of this suit, nor is this an action of trespass. If the defendant violently interfered with the laborers in the plaintiff's employ before the branch track they were laying had reached the public highway, he may be liable to them, severally, for any assault he may have committed, but the declaration in this case discloses no such cause of action. The prevention of the doing of an unlawful and unauthorized act does not per se constitute a good cause of action on the part of the would-be incipient wrongdoer, and that is the whole of the plaintiff's case. Plaintiffs nonsuit."

In Macey v. Titcombe, 27 Ind., 137, plaintiffs brought suit to enjoin certain contractors from executing a contract with the city, and obtained an injunction which was dissolved. Thereupon suit was brought against them on the bond. The court held that to constitute a cause of action on the

bond the plaintiff must show that he had a lawful contract for the improvement of the street with the city. The complainant alleged that the improvement had been ordered by the city council, and that a contract had been entered into with him for making it; but it failed to show that there had been advertisement for bids, and without such advertisement the contract was void. The court said: "The plaintiff in a suit on an injunction bond must show a legal contract to have been enjoined."

In *Hibbs v. Western Land Co.*, 81 Iowa, 285, the petition in an action for damages on an injunction bond alleged that the defendant caused an injunction to be issued restraining plaintiff from trespassing on certain real estate, and that he was put to great trouble and expense defending the wrongful issuance of such injunction and in obtaining its dissolution, but did not set up what ground the injunction was issued on, nor upon what ground it was dissolved, nor that the plaintiff was thereby prevented from the exercise and enjoyment of some legal right to which he was entitled. It was held bad on demurrer, the court saying: "In order to recover damages on an injunction bond it is necessary that it should appear that the plaintiff was prevented by the injunction from exercising or enjoying some right or privilege which he desired to exercise, and which he was entitled to enjoy. If the injunction in this case deprived the plaintiff herein of any right, or restrained him from taking possession of land to the possession of which he had a right, and the possession was of some value, we think he might maintain an action on the bond. The condition of the injunction bond is that the obligors will pay the damages sustained by reason of the injunction. The gist of the action is damages sustained by being deprived of some right. The petition does not contain an averment that such damages were sustained, and we think the district court correctly sustained the demurrer."

In *Turnpike Co. v. Kelley*, 41 Ohio State Rep., 144, the company incorporated under the Ohio laws in 1857, and constructed a turnpike from the city of Cincinnati to the village of Warsaw, and established a tollgate at a point more than eighty rods from the city limits. In December, 1869, the city limits were legally extended so as to include the tollgate, but the company continued to collect tolls, when in 1875 Kelley sued out an injunction, forbidding the further taking of toll at said gate, and gave bond, with sureties, conditioned as required by the statute. The final judgment found "the equity of the case to be with the defendant," and dismissed the action. The company sued on the bond. The answer denied that the injunction prevented the collection of any lawful tolls. It was held that notwithstanding the judgment in the injunction suit the company could not recover as damages tolls that it could not lawfully have collected if the injunction had not been granted under the statute.

A suggestion by counsel, we think, admirably illustrates the soundness of the rule: Suppose, says he, that an administrator of an estate finding some person about to commit waste by cutting down and carrying off valuable timber trees, were to procure an injunction and give bond to answer in damages, which should be dissolved on the ground that an administrator had nothing to do with the real estate of his decedent. Can it be claimed that the defendant in such case could bring a suit against the administrator and

his surety on the injunction bond, showing that if he had not been enjoined he could have cut down and carried off \$2,000 worth of trees?

In the former suit it was decided that appellant could not enjoin appellee from erecting its plant in Lawrenceburg upon the sole ground that its contract with the city for an exclusive franchise was void for failure on the part of the city to comply with the statute in the passage of the ordinance granting the right. The rights of the Anderson County Telephone Co. were not passed upon at all. In this action they can only recover upon the ground that they were prevented by an injunction sued out by appellant from exercising a lawful right to occupy the streets of the city with their plant, as it is conclusively shown they had no such legal right, but were mere trespassers, they have no standing in court. For reasons indicated the trial court should have peremptorily instructed the jury to find a verdict for the defendant.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

Whole court sitting.

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HALL, &c. v. ROBERTS.

(Filed May 5, 1903—Not to be reported.)

1. Title—Possession—In this action instituted by appellee against appellants as trespassers the lower court properly adjudged that appellee was vested with title, acquired by adverse possession of land for more than fifteen years.

2. Pleading—The petition was not defective in failing to use the word "actual" in describing "possession," but it alleged that plaintiff had "occupied" the land for more than fifteen years. The use of the word "occupied" was tantamount to the word "actual."

3. Judgment—The lower court having tried both law and fact, its judgment will be treated as the verdict of a properly instructed jury, and will not be disturbed, as it is not flagrantly against the evidence.

S. R. Stamper and John C. Eversole for appellants.

W. S. Pryor for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Settle.

In this action appellee was, by judgment of the Lee Circuit Court, declared to be the owner by more than fifteen years' actual, adverse possession of the small tract of land in controversy, described in the petition: upon which the appellants committed a trespass by cutting therefrom timber of value, for which the judgment of the lower court awarded her damages in the sum of \$15.

It is disclosed by the record that appellee is the owner, by title as well as by possession, of a tract of land situated in Lee county, which was patented to Jackson Brandenburgh, Joel Brandenburgh and James Brandenburgh in 1876, from whom and their vendees, immediate and remote, the title of this land, as well as its actual possession, became vested in appellee, who, together with her vendors, has had and held the actual, adverse possession of the same



for more than fifteen years before the institution of this action. It appears, however, that included in the boundary of the patent mentioned is another, and smaller, tract, which was patented to Samuel Brandenburg and Henry Brandenburg in 1861. Henry Brandenburg, one of the last-named patentees, died unmarried and childless. There is some evidence furnished by the depositions in the record tending to show that Samuel Brandenburg, after Jackson, Joel and James Brandenburg had procured their patent, sold to Jackson Brandenburg the land included in the smaller, or older, patent, or exchanged it with him for another piece of land in the neighborhood, but it does not appear that this sale, or exchange, was ever reduced to writing. At any rate it seemed to be pretty well known in the community that such a trade had been made, and it appears that Samuel Brandenburg ceased to assert any claim to the land until just before the institution of this action, and the proof shows that Jackson tried to sell it in the year 1900. If such a sale or exchange was made, whatever right or title Jackson acquired thereby went to, and was ultimately vested, in appellee, his remote vendee.

It further appears that after the interval of many years Samuel Brandenburg, about the time of the institution of this action, again set up claim to the land covered by the elder patent, and he sold the timber on it to his co-appellants, which precipitated this suit. About this time, too, Samuel Brandenburg let it be understood in the neighborhood that he and Jackson had entered into a "true bargain," whereby the land in controversy was claimed to have been restored to him. It is alleged in the petition and reply of appellee that this arrangement between Jackson and Samuel Brandenburg was the result of a fraudulent collusion between them to enable the former to set up claim to the land and timber for the benefit of Jackson, and to enable him to sell the timber, he (Jackson) knowing full well that as a remote vendor of appellee he could not set up title to the land or timber as against her. Be that as it may, there was some evidence tending to show such a fraudulent collusion. But waiving the question as to whether the alleged trade between Samuel and Jackson passed title because not in writing, and, therefore, within the statute of frauds, we are not prepared to say that the judgment of the lower court should be disturbed, for the reason that there was some evidence to the effect that appellee and those under whom she claims have for more than fifteen years before the institution of this action continuously had and held the actual possession, adverse to appellants and all others, of a part of the land in controversy, embraced by the elder patent issued to Samuel and Henry Brandenburg in 1861. This is denied by appellants, and attempted to be disproved by several of their witnesses, but it will be borne in mind that it is shown by the record that the elder and smaller patents are both included in the boundary of the land to which appellee holds the legal title. It also appears from the record that Samuel Brandenburg did not know the lines or boundary of his patent, as it was never marked, and while it calls to begin near the corner of one Crump, the only other objects called for are stakes which have, of course, long ago been removed or lost.

Samuel Brandenburg never had the patent surveyed until about the time he was sued by appellee, and according to the statements of some of her witnesses her stable is situated on the interference, or lap, of the elder and

junior patents, but whether the stable is so situated or not, the evidence further shows that in the year of her removal to her present residence, which was seventeen years previous to the institution of this suit, her then husband, C. A. Jones, in addition to the building of the stable on the east side of the branch, cleared and fenced a long strip of land running from above the house down to the falls of the branch, which has been in cultivation ever since, and continuously in the actual possession of appellee. This strip, in part, at least, is in the interference of the patent.

It is contended, however, that the petition is fatally defective because it does not allege that appellee's possession is actual. The language of the petition is that "plaintiff and those under whom she claims have owned, held, claimed, occupied, used and controlled said land to well-marked, defined and natural boundaries, for more than fifteen years, more than twenty, and more than twenty-six years next before the commencement of this suit; that said owning, holding, claiming, occupying, using and controlling was continuous, notorious, open and adverse to all the world, especially these defendants."

While this court in *Newcome, &c. v. Crews*, 98 Ky., 842, and in other cases, declared that a possessory title to be good must be acquired by actual possession of the land in controversy, and that the omission from the petition of the word actual in defining the possession renders it fatally defective, it also said in the case *supra* that actual possession exists in the "immediate occupancy" of the party. It will be observed that the petition in this case in defining the character of appellee's possession uses the word "occupied" for actual. "Occupy," "occupying" and "occupation," as defined by Webster, is "to hold or keep for use," "to possess," "to cover or fill," so to say that one occupies, or has occupied, land continuously is tantamount to saying that he has, or has had, actual possession of the same, and we, therefore, think that the petition is good and sufficient in its present form without the use of the words "actual possession." But if this conclusion were untenable, while the answer does not cure the omission of the words actual possession from the petition, issue was joined on that point by the parties in the proof introduced on the trial, which, with the judgment rendered, should, we think, have the effect to cure the supposed defect in the petition.

Though the evidence was conflicting, the lower court thought it sufficient to justify the judgment rendered, and as the action was in reality a common law action, though tried without the intervention of a jury, the judgment of the chancellor is entitled to as much weight as the verdict of a properly-instructed jury, and it not being flagrantly against the evidence, no valid reason can be urged for its reversal.

The judgment is, therefore, affirmed.

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FLOYD V. PADUCAH RAILWAY AND LIGHT CO.

(Filed May 5, 1903—Not to be reported.)

Railroads—Negligence—Instructions—New Trial—In this action by appellant to recover damages for injuries received on the track of appellee, from being struck by a motor car while he was going in the same direction as the car, the evidence shows that appellant was deaf and that the motorman

discovered his presence on the track when within 75 or 150 yards of him, and sounded his whistle and gong, to which appellant paid no attention, nor did the motorman make any effort to prevent the injury until too late to avoid striking him. A trial resulted in a verdict for appellee. A verdict in favor of appellant was previously rendered, but was set aside. Appellant prosecutes this appeal, and complains of the error of the court in granting a new trial; also of the verdict rendered on the last trial. Held—That this court is less disposed to reverse the action of the lower court in granting a new trial than in refusing it. It will not reverse for granting a new trial, although it would have affirmed the judgment if the circuit court had refused a new trial. The court erred in giving an instruction which prevented a recovery by appellant if he was guilty of contributory negligence, and but for such negligence the injury would not have occurred. The jury should have been instructed that if they should believe from the evidence that the motorman did discover plaintiff's danger in time to have prevented the injury to him, but failed to exercise such care as was necessary and was at his command to have prevented the injury, then the jury should find for the plaintiff without regard to plaintiff's contributory negligence.

L. K. Taylor for appellant.

Reed & Berry for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge O'Rear.

This is the second appeal of this case. The first opinion states the facts showing the nature of the injury to appellant, and its causes. (23 Ky. Law Rep., 1077.)

On the return of the case a retrial was had, where substantially the same facts appeared as were shown in the opinion alluded to, except that the witness, Martin Rudolph, did not testify at that trial. The jury returned a verdict in favor of appellant for \$1,000. This was set aside by the court and a new trial granted upon application of appellee, upon numerous grounds filed, among others that the verdict was not sustained by the evidence, and that it was contrary to the weight of the evidence. At a later term another trial was had, resulting in a verdict and judgment for appellee.

Appellant asks a reversal of this last-named judgment, and that the circuit court be directed to enter a judgment upon the first verdict. This court is slow to disturb the action of the circuit court in granting or refusing new trials where the grounds are in discretion of the court. This is especially so where the circuit court grants a new trial, as it retains control of the case, and presumably the truth will avail the party complaining on a subsequent trial. This court will not reverse for granting a new trial, although it would have affirmed the judgment if the circuit court had refused a new trial. We are of opinion, however, that the rulings of the circuit court in instructing the jury were erroneous in several particulars. It will be remembered that appellant, who was deaf, was a trespasser upon appellee's right of way, walking on its track, going in the same direction as was the car that struck and injured him. He failed to look back and was, therefore, unaware of the approach of the car, and being deaf did not hear the gong and whistle of the motorman. The evidence is pretty clear that the motorman saw appellant for a distance of from 75 to 150 feet before striking him.

The car was traveling about six or seven miles an hour. The repeated warnings not having attracted the attention of appellant, that fact was sufficient, it seems, to have called the attention of the motorman to appellant's danger, and to the fact that the car should be stopped if necessary to prevent its striking him. Instead of doing this, he continued, with but slightly abated speed, until within ten or twelve feet of appellant, when it was too late to check the momentum of the car sufficiently to keep it from knocking appellant down and injuring him.

Upon this state of case the court instructed the jury that appellant was a trespasser on appellee's track, and that appellee was required to exercise "only ordinary care to avoid injury" to appellant, but that as to appellant it was "the undoubted duty of plaintiff to have used all the care and means reasonably in his power to have avoided any injury from the street car, knowing his own infirmities of speech and hearing."

In addition the court seems to have made it impossible for plaintiff to have recovered because of the form of his instructions on the subject of appellant's contributory negligence, because the court instructed the jury that they should not find for appellant in any event, however negligent appellee may have been, if they should believe from the evidence that appellant was guilty of negligence on his part, which contributed to the cause of the injury, and that but for his own negligence he would not have been injured. The court then told the jury that appellant's walking upon the track without looking back was such contributory negligence. We are of opinion that the instructions were objectionable both in form and substance. Without quoting them at length, or pointing out the defects in other particulars, we will say that the court should have said to the jury that if they believed from the evidence that plaintiff's injury was caused by the negligence of defendant's motorman in the operation of his car, by the failure of such motorman to exercise ordinary care to know of appellant's presence on the track and of his danger, then they should find for the plaintiff unless they should believe that the motorman did not discover appellant's presence in time to have avoided injuring him, and that plaintiff, by his own negligence, so contributed to cause his injury as that but for his own negligence it would not have happened. But if the jury should believe from the evidence that the motorman did discover plaintiff's danger in time to have prevented the injury to him, but failed to exercise such care as was necessary and was at his command to have prevented the injury, then the jury should find for the plaintiff, without regard to plaintiff's contributory negligence. The measure of damages was correctly given. The definition of ordinary care was correctly given. After defining ordinary care the court should have defined negligence as being the absence of such care.

For the errors indicated the judgment is reversed and cause remanded, with directions to award appellant a new trial under proceedings not inconsistent herewith.

## LEWIS v. SCOTT.

(Filed May 5, 1903—Not to be reported.)

Damages for unlawful detention of real property—Rents—Homestead—Appellant brought this action to recover damages for deprivation of his farm, water mill and power for two or three years under a writ of possession issued under an erroneous judgment. A verdict was rendered for defendant under a peremptory instruction. On appeal, Held—That the court erred in giving said peremptory instruction, and should have given instructions embracing the measure of damages set forth in the opinion, to which appellant was entitled. As the land was appellant's homestead he was entitled to its use regardless of his debts, and appellee should be allowed taxes paid, if any, and the value of such reasonable and necessary repairs as were of a lasting nature, if any, put on the premises by him.

Noggle & Graham for appellant.

Henry Woodward for appellee.

Appeal from Green Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee, under a writ of possession obtained, upon an erroneous judgment, deprived appellant of his farm of sixty-eight acres, and his water mill and power, for a period of between two and three years. After the reversal of that judgment appellee restored the premises. This suit was to recover the damages sustained by appellant for the wrongful eviction and detention. Proof was heard, and much of it tended to support appellant's claims. However, the trial court, at the close of all the evidence, instructed the jury peremptorily to find for appellee, which was error. Upon what theory that instruction was based we are not informed, nor can we determine.

One who deprives another of the rightful possession of the latter's property, under an erroneous judgment, is liable to the owner for all the damages caused by the wrongful act. These damages are, as applicable to this case:

1st. The reasonable rent of the land for the time appellant was kept out by appellee.

2d. The reasonable rental value of the grist mill for the same period.

3d. The reasonable value of the water power connected with the mill, and used by appellant for propelling his carding machinery, of which power appellant was wrongfully deprived by appellee during the same time.

4th. Appellant's necessary expenses in moving from and back to his premises.

5th. The deterioration of the property while held by appellee, caused by its neglect, or improper use, if any, by appellee.

That the land in question was appellant's homestead appears with reasonable certainty. In that event he was entitled to its use without regard to his debts. (*Collett v. Jones*, 7 B. Mon., 586.) So much, then, of the matters pleaded as set-off as are involved in certain judgments in appellee's favor against appellant should be ignored, except the value of growing crop taken by appellant when he was restored to possession, which appellee had planted on the land and had practically matured. Appellee should be

allowed taxes paid, if any, and the value of such reasonable and necessary repairs as were of a lasting nature, if any, put on the premises by him.

The judgment is reversed and cause remanded for a new trial, under proceedings not inconsistent herewith.

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PFAFFINGER, &c. v. KREMER.

(Filed May 5, 1903.)

Street improvement—Void apportionment.—This appeal is prosecuted from a judgment enforcing a lien asserted by appellee on the lots of land belonging to appellants for the improvement by original construction of a part of Adams street. The contiguous territory upon each side of Adams street is not defined into squares or principal streets or bounded by principal streets, and the council provided that the property fronting on Adams street, to the depth of 200 feet, be required to pay the cost of said improvement. The territory designated to pay the cost of said improvement extended across the lots of appellants, but did not include the whole of any of their lots. The apportionment warrants issued upon this improvement were more in every instance than the value of any of the lots within the area designated by the ordinance after the improvement was made. The circuit court, however, subjected the whole of the lots to sale, and directed that the apportionment warrants should be paid out of the proceeds in proportion that the area thereof that was within the improvement district bore to the whole of the lot, surface measure. On appeal, Held—That said judgment was erroneous. It was illegal to require that any part of appellant's property not within the improvement district should pay any part of the improvement. Such a requirement would be in effect imposing a personal judgment on appellants which is prohibited by law. The assessment on the lots improved being equal to their value, is equivalent to confiscation, and is void.

Lane & Harrison for appellants.

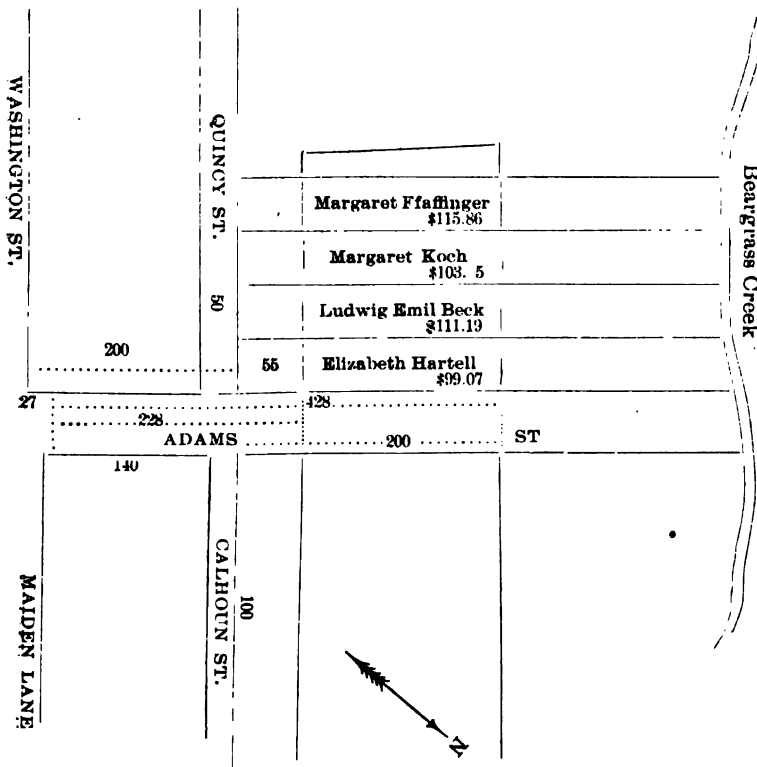
M. S. Tyler and Carroll & Carroll for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge O'Rear.

This appeal is prosecuted from a judgment enforcing a lien asserted by appellee, assignee of the contractor, on the lots of land belonging to appellants for the improvement by original construction of a part of Adams street, Louisville, from a line 228 feet northwestwardly of Maiden lane for a distance of 200 feet. The territory contiguous to the improvement sought to be taxed upon each side of Adams street is not defined into squares or principal streets, or bounded by principal streets, and, therefore, the general council in the ordinance providing for the improvement designated the depth upon which the assessment should be laid on each side of the way as improved, to pay the cost thereof. The improvement began some fifty-five feet from Quincy street, the nearest intersecting street. A lot of land owned by Elizabeth Hartell, but which does not extend to the full depth fixed by the general council for the territory bearing the burden of the improvement, lay parallel with the street, but between that lot and the furthestmost line of the improvement area would be included parts of the three lots of appellants. As a matter of fact the territory designated to bear the cost of this improvement

extended across the lots of appellants, but did not include the whole of any of their lots. The apportionment warrants issued upon this improvement were more in every instance than the value of any of the lots within the area designated by the ordinance after the improvement was made. The circuit court, however, subjected the whole of the lots to sale, and directed that the apportionment warrants should be paid out of the proceeds in the proportion that the area thereof that was within the improvement district bore to the whole of the lot, surface measure. The following plat will make plain the situation of the lots, and the street improvement sought to be charged thereon :



The appellants are Margaret Pfaffinger, Margaretha Koch and Ludwig E. Beck. The amount of the apportionment warrant assessed against each of their lots is shown in figures on the plat. The proof is uncontradicted that each of these lots is worth not exceeding \$100, that is, the portion embraced by area defined by the ordinance, while if the whole is considered, running from Quincy street to Beargrass creek, then the value of each lot is several hundred dollars.

Appellants present three principal grounds upon which a reversal is sought. In the first place they contend that inasmuch as none of their lots fronted upon Adams street, they were not liable to assessment for the improvement

of that thoroughfare. But we are of opinion that it is not a question under the statute whether the lot required to bear some part of the street improvement assessment actually fronts or abuts upon the street or the part thereof so improved. Taxes must be uniform as far as may be practicable, but absolute equality is unattainable. The most practical application of the doctrine of uniformity in such cases as this is to provide a certain district, which in fact or in every probability is, or from its situation is conclusively deemed to be, benefited by such improvement, upon every part of which an apportionment tax may be laid ratably and equally. Where the public way to be improved is abutted by property defined into squares by principal streets, or the property to be assessed is bounded by principal streets, then the quarter sections of the square contiguous to the property improved is deemed to be the proper territory to bear the cost of the improvement. Or, if the territory is not laid off into squares or principal streets, then the council must, in the ordinance providing an improvement, select and define the territory contiguous thereto which should bear the cost of that improvement. (Section 2833, Kentucky Statutes.) Therefore, the front foot theory has nothing to do with the question; but it is one of proportion, its part of the cost of the improvement being as the number of square feet in the lot taxed bears to the area of the designated district to which it belongs.

The second proposition is that inasmuch as the apportionment warrant issued against each of appellants is more in every instance than the property owned by any one of them within the apportionment district, therefore, it amounts to spoliation, as defined by this court in numerous decisions. (*Broadway v. McAtee*, 8 Bush, 519; *Preston v. Rudd*, 84 Ky., 156; *James v. Louisville*, 19 Ky. Law Rep., 448; *Louisville v. Lou. Rolling Mills*, 3 Bush, 416.)

For appellee it is argued that the test is not whether the value of the property within the apportionment district is less than the cost of the improvement apportioned against it, but whether such proportionate cost of improvement is as much or more than the value of the whole lot, of which the part sought to be subjected to the tax is a parcel. We can not agree with this reasoning. The thing taxed is the designated district, and that alone, not its owners, nor is it considered in connection with other property held by the same owners. This must be so, because the true theory underlying this method of taxation is that the territory selected and made to bear the tax is the only one presumably directly benefited thereby. Else, to hold that other territory is also directly and equally benefited, but not taxed at all for that improvement, is to impose a tax upon one man's property for the benefit of another's, of the same kind and class, which is not taxed at all. This would destroy that uniformity and equality which, in theory and practically in fact, run through and support this whole doctrine. Besides, it would otherwise be unjust. For example, in the case at bar, if we assume that the portions of appellants' lots not embraced in the designated area are to be considered in determining whether the tax or cost of improvement imposed is as great or greater than the value of the property made to bear it, then when that part of the public way lying adjacent to these outlying parts come to be improved, they would again be taxed for a similar improvement. So that while in the aggregate the costs of say three improvements corre-



sponding in length with appellants' lots would be more than the value of their lots, yet no one of the improvements would be as much. The result to the owner of the lot would be that his lot has been taken entirely for the improving of the adjacent public way. That is spoliation, if anything is. If the tax imposed is equal to the value of the property taxed after the improvement for which the tax is laid, it is not material to the lot owner whether it is more, or how much more, for he loses interest at the point where the proposed tax consumes the property taxed. In the case of each of the appellants the tax sought to be imposed is greater than the property upon which it is, or can be, laid, and is, therefore, void.

The remaining question is close akin to the one just decided. That is, could the court properly apply any part of appellants' properties outside of the improvement district to the payment of the tax? We do not understand that his honor, the learned judge who tried this case, really meant to hold that they could be. What the judgment undertook to provide was a sale of an indivisible piece of property as a whole, in a proceeding against the owner to enforce a lien against a part of it. The circuit court correctly decided that the whole lot should be sold (provided the tax was a valid one); but the proceeds of the sale should not have been adjudged upon the proportion of superficial areas. If the part of the lot in lien to appellee was one-fourth, say, of the area of his whole lot, but only one-tenth of the value of the whole, this judgment might result in appropriating a part of appellant's lot in lien to the payment of the lien. The effect would be to indirectly make the lot owner personally liable for some part of the tax, which this court has held could not be done, under the statute. (*Meyer v. Covington*, 108 Ky., 546; *Barker v. The Southern Construction Co.*, 20 Ky. Law Rep., 795; *Fehler v. Gosnell*, 99 Ky., 330.)

To make other property liable than that taxed is equivalent to a personal liability of the owner, although a personal judgment is not rendered, because it amounts to the same thing as a personal liability, which is nothing unless the person's property may be subjected to its satisfaction.

The judgments are reversed and cause remanded, with directions to dismiss the petition so far as it seeks a recovery against appellants.

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RUPPLE v. KISSEL, &c.

(Filed May 6, 1903—Not to be reported.)

Married women—Estoppel—Bills and notes—A. held a note on B. for \$1,000. B. owned a lot adjoining that of C., who desired to purchase it. By agreement of parties A. surrendered his note to B. and accepted the note of C. and D., her husband, for the same amount, with the understanding that the lot should be conveyed to C., but without any knowledge of A. it was conveyed to her husband, and all parties recognized the note as the debt of the wife. The husband and wife sold the lot to other parties. The wife afterwards paid to A. \$600 on the note, and became insane, and the court adjudged that the note was null and void, and adjudged that the \$600 was paid by the wife without consideration. Held—That the court erred in permitting the recovery of the \$600, as the same was paid on a debt which the wife in honor and good conscience owed, and under the rules of equity should not recover.

W. W. Thum and G. Garner Clark for appellant.

H. H. Cooke and J. W. S. Clements for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hobson.

In the year 1887 appellant, Phillip Ruppel held a note for \$1,000 on Mary Strasser. Miss Strasser owned a lot adjoining the home of her sister, Catherine Kissel, which Mrs. Kissel wished to buy from her for \$1,000. Miss Strasser and Mrs. Kissel then made an arrangement with Ruppel, who was a friend of theirs, that he would accept Mrs. Kissel's note and surrender Miss Strasser's, explaining to him that Miss Strasser would convey her property to Mrs. Kissel. He was sick in bed at the time. Mrs. Kissel and her husband executed to him a note for \$1,000, and he surrendered Miss Strasser's note to her. Miss Strasser then made a deed to the property to Mr. Kissel, reciting the consideration as paid. Why the deed was made to the husband is not shown, and Ruppel did not know of this. The parties were friends, and there seems to have been the utmost confidence between them. The interest was paid on the note thus given to Ruppel from year to year until 1890, and several renewals were made, each signed by the husband and wife, the husband's name being placed first and the wife making the payments of interest. Kissel and wife ran a bar room and grocery. He stayed in the bar room and she in the grocery. At the time of the novation of the debt Miss Strasser had another offer for the property, and there seems to have been no reason for the change, except the desire of Mrs. Kissel to get the property. Ruppel's only motive appears to have been to accommodate his friends. Mr. Kissel died in the year 1894; there was an insurance of \$2,000 on his life, and out of this Mrs. Kissel, in the year 1896, paid to Ruppel \$600 on the note. Subsequently she became insane, and was sent to an asylum. Ruppel then brought this suit against her and her committee to recover the balance of the debt. The committee pleaded her coverture in bar of the action; also that the note was without consideration. He made his answer a counter-claim, alleging that the \$600 paid by her on the note after her husband's death was paid through ignorance of her legal rights, when she was of feeble mind, and by reason of the fraudulent advantage taken of her. Judgment was prayed for the recovery of this sum by the committee. On final hearing the court dismissed the plaintiff's petition and gave judgment against the plaintiff for the \$600 and interest, which Mrs. Kissel had paid upon the note after her husband's death.

The judgment in favor of the defendant on the note was proper, as Mrs. Kissel was a married woman when she executed it, and the note was void. Being void, she could not ratify it by recognizing it as her debt after she became discoverd, or by making a partial payment on it and promising to pay the remainder, no new consideration being given. (*Chaney v. Flynn*, 2 Ky. Law Rep., 417; *Cheves v. Clover*, 4 Ky. Law Rep., 360 *Miller v. Payne*, 7 Ky. Law Rep., 296; *Bagby v. Bagby*, 10 Ky. Law Rep., 540.)

But a different question is presented as to the \$600 paid by Mrs. Kissel on the note after her husband's death. Although she afterwards became insane, the proof is clear that her mind was unaffected at the time of this payment. There is also an utter failure of proof as to any imposition, misrepres-

sentation or fraud of any kind. She paid the money voluntarily because she recognized the debt as her own, and felt under a moral obligation to pay it. It is also true that she thought she was under a legal obligation to pay it, and did not understand that in law she could not be compelled to pay it. It is insisted that her payment having been made under a mistake of law and when she was not legally bound, the money may be recovered. The rule in this State is that where money is paid without consideration under a palpable mistake of law or fact, which was not owing in law or conscience, and ought not in justice to be retained, it may be recovered. (*Underwood v. Brockman*, 34 Ky., 310; *McMurtry v. Kentucky Central R. R. Co.*, 84 Ky., 464; *Louisville Banking Co. v. Asher*, 23 Ky. Law Rep., 1183, and cases cited.) On the other hand, the rule is that although money was paid under a palpable mistake of law, yet if in conscience and justice it should not be returned, no recovery can be had. Thus in *Louisville v. Zanone*, 58 Ky., 151, where a property owner had paid an assessment for a street improvement in ignorance that by an error of the council he was not legally liable, it was held that he had received a benefit from the improvement, and that it could not be said that, in honor or good conscience, the money ought to be paid back to him by the city. This principle was also applied in *Mitchell v. Stoddard County Bank*, 23 Ky. Law Rep., 1562; *Brands v. City of Louisville*, 23 Ky. Law Rep., 442, and cases cited.

In his reply to the counterclaim Rupple, after setting out the facts above stated as to the origin of the note, aptly pleaded that he surrendered the Strasser note and accepted the Kissel note on a distinct agreement that Miss Strasser would convey the property to Mrs. Kissel; that this conveyance was not made by their fault and without his knowledge; that he supposed the agreement had been carried out, and in all transactions had with Mrs. Kissel, and from her statements, he was led to believe the property had been transferred to her, and did not know otherwise until after this suit was brought; that she always acknowledged the debt as hers; that the property has since been transferred to another person, and that she always held herself out to him as the principal in the note, and by her fraud and mistake the property was conveyed to her husband and not to her. We think the proof sustains these allegations, although we are satisfied that Mrs. Kissel and her husband, no less than Rupple, acted in good faith and with entire honesty of purpose. Still the fact remains that Rupple has lost his debt so far as it has not been paid, and that he and Mrs. Kissel throughout the arrangement regarded her as the principal debtor. She made the arrangement with him, and she made also all the payments on the debt. If the property had been conveyed to her, it or its proceeds would have been subject to the debt while in her hands. She suffered it to be conveyed to her husband. Having done this, she recognized the debt as hers, and being under at least a moral obligation to pay it, paid the \$600 on it freely and voluntarily. We can not say, under the evidence, that this is money which in honor and good conscience she ought not to have paid, or that he ought not to retain it.

Judgment reversed and cause remanded, with directions to dismiss the counterclaim.

## SHUMAKER'S ADM'R v. LOUISVILLE &amp; NASHVILLE R. R. CO., &amp;c.

(Filed May 6, 1908—Not to be reported.)

Appeals—Final order—The lower court having ordered a fund recovered from a railroad company to be paid into court, pending a proceeding to determine the proper parties to whom payment should be made without any order having been made as to whom the money should be paid, is not a final order from which attorneys and parties in interest can appeal.

Robert Harding and John W. Rawlings for appellants.

Edward W. Hines and C. R. McDowell for appellee, Louisville & Nashville R. R. Co.

McMillan & Talbott for appellee, Jennie S. Hurst.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Paynter.

John Shumaker's personal representative recovered a judgment against the appellee, Louisville & Nashville R. R. Co., for \$5,000, and it was affirmed in this court. Before the mandate or execution was issued the Louisville & Nashville R. R. Co. instituted this action to restrain the issuing of an execution, and sought to have the court take charge of the amount due under the judgment, upon the ground that there was a question as to who was the personal representative of the deceased, and to determine who, if any, of the persons claiming to have, were entitled to liens upon the judgment. Under the averments of the petition there was an issue between the attorneys for the plaintiff as to their respective rights in the judgment; and also an issue with the widow and the guardian of the child of the deceased, besides an issue as to whether the party claiming to be was the personal representative of the deceased. The court accepted the tender of the fund and placed it in the hands of the Boyle National Bank, and there to remain until ordered to be distributed by the court. From that judgment the appellants, Voris claiming to be the personal representative of the estate, Robert Harding and J. W. Rawlings who, as attorneys, represented the plaintiff in the suit in which the judgment for \$5,000 was rendered, prosecuted this appeal. From the statement filed with the transcript the following persons were made appellees, namely: Louisville & Nashville R. R. Co.; Jennie S. Hurst, as former administratrix of John Shumaker, deceased; Jennie S. Hurst; Bernie Shumaker, an infant under fourteen years of age; Sylvester Russell, and R. G. Price, as clerk of the Boyle Circuit Court. Motions were entered by Louisville & Nashville R. R. Co., Jennie S. Hurst and Jennie Hurst, as guardian, to dismiss the appeal. On October 30, 1902, the motion was sustained as to the appellee, Louisville & Nashville R. R. Co., and Jennie S. Hurst.

The rights of these appellees last named can not be considered in reviewing the action of the court because they are no longer parties to this appeal. So the question is no longer here as to whether the Louisville & Nashville R. R. Co. had the right to maintain this action, or whether or not the court erred in ordering the money to be paid to the Boyle National Bank. The court below did not adjudge the rights of parties to the fund. The judgment from which the appeal is prosecuted reserves that question.

Nothing was adjudged in favor of the remaining appellees against the appellants, nor does the judgment affect their rights with respect to each others' claims to any extent whatever. It results that there is no final order from which appellants can prosecute an appeal.

It is, therefore, dismissed.

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CHILDERS v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed May 6, 1903—Not to be reported.)

**Railroads—Damage from surface water**—Appellant sold the right of way through her land to appellee. The road constructed a cut through the land and sloped its sides so as to gather a large amount of surface water, which it gathered in ditches and discharged on the premises of appellant in such quantities as to greatly injure her spring and other property. This action was instituted to recover damages for such injuries. The lower court gave to the jury a peremptory instruction to find for appellee, from which this appeal is prosecuted. Held—That the court erred in giving said peremptory instruction. The deed from appellant granting the right of way did not confer upon the appellee the right to accumulate water and discharge it in an artificial channel on the remaining part of the land, thus to produce a serious damage. No such damage was in the contemplation of the parties. Appellee is responsible for the construction of the approaches so as to contribute to the injury, but would not be responsible for injuries resulting from a cloudburst or excessive rain on a special occasion, but this was a matter that should have been submitted to the jury.

B. B. Golden for appellant.

J. W. Allcorn and E. W. Hines for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Paynter.

The appellant owns land at the end of one of the appellee's tunnels. The appellee, for the consideration of \$55, in 1886 purchased the right of way over the land of the appellant, and about that time constructed the tunnel. When the tunnel was first built the approaches to it for some distance next to the premises of the appellant were supported by timbers, and by reason of which a narrower cut was necessary to the approach of the tunnel. In 1896 the timbers decayed, and the appellee removed them and sloped the sides of the cut so that the distance from bottom to the top of the slope is from 150 to 200 feet. Ditches were cut along the track so as to carry away the surface water, which was precipitated upon the track by the sides of the cut. The plaintiff's house is situated just below the track. Previous to the removal of the timbers and sloping of the sides to the cut the surface water was not discharged upon the land of the appellant so as to injure it in any way. Afterwards the surface water was carried upon her premises in such a way as to destroy her spring and render uninhabitable her residence. This action was brought to recover damages for that injury. The court gave peremptory instructions to find for the defendant. The question here is, did the court in doing this err?

The testimony offered in behalf of the plaintiff tends to show that her

premises were not injured by surface water until the change in the cut which we have described; that it cut great gullies in her premises; that had practically destroyed her spring; that on one occasion, after a heavy rain, water was thrown upon her premises so as to carry away her shed and smokehouse; that her fences were carried away thereby. The plaintiff testified that the water ran in her spring every time it rained, and that she has been forced to abandon her house by reason of the water that has been cast upon her premises on account of the change in the tunnel and the construction of the ditches. The plaintiff also testified that, in her opinion, some of the water which formerly flowed through the other end of the tunnel now, by reason of the ditches which had been dug, was brought toward her premises and thrown upon them.

It is urged that because the plaintiff had conveyed to the appellee the right of way it had the right to construct the road in the manner in which it was, and if in consequence of that the plaintiff's property was injured, she is not entitled to recover. This contention is answered in *Louisville & Nashville R. R. Co. v. Brinton*, 22 Ky. Law Rep., 666, wherein the court said: "The deed is one which simply purports to convey the right of way to the appellant. There is nothing in it which gives the appellant the right to make an unlawful use of property conveyed by it. The vendor had the right to rely upon the fact that the railroad would be constructed so as not to damage him by its wrongful act. It did not confer upon the appellant the right to accumulate water and discharge it in an artificial channel on the remaining part of his land, and thus produce a serious damage. No such damage was in the contemplation of the parties at the time the deed was executed, neither does it relinquish a claim for damages for such an act."

In that case the court quoted with approval *Gould on Waters*, wherein it said: "An owner of land has no right to rid his land of surface water, or superficially percolating water, by collecting it in artificial channels and discharging it through or upon the land of an adjoining proprietor. This is alike the rule of the common and civil law." \* \* \*

It certainly was not in the contemplation of the parties when the right of way was granted that the appellee had the right to construct its road so as to cast surface water upon the grantor's premises so as to practically destroy them. Its reasonable and proper use of the right of way does not allow it to construct their railroad so as to produce the effect which the plaintiff's testimony tended to prove in this case. The court below seemed to be of the opinion that all the damage had been produced by the excessive rain on one occasion, which resulted in the carrying away of the shed and smokehouse, and for that reason the plaintiff was not entitled to recover. If the injury complained of was the result of a cloud burst or excessive rain, and the manner of the construction of the approach to the tunnel did not contribute to the injury of the plaintiff, then of course the appellee has no responsibility for the injury resulting on that particular occasion. This is a question for the jury. Besides, the testimony tended to show that every time it rained the water was discharged upon the plaintiff's premises to her damage. In our opinion the case should have gone to the jury.

The judgment is reversed for proceedings consistent with this opinion.

ACTON, &c. v. WALKER'S EX'TX.

(Filed May 6, 1903—Not to be reported.)

**Bills and notes—Specific performance of contract—Pleading—**This action was instituted by appellee as executrix of W. to recover judgment on four notes of \$100 each for purchase money for land; also for judgment for \$100 on another instrument purporting to be a mortgage on horses to secure the payment of the first note. Held—That no judgment should be rendered on the last instrument as it is simply a mortgage to secure the payment of a note; at least it is not an obligation to pay any sum of money. The petition is insufficient to authorize a recovery on the four notes, as it fails to aver where the testator died, and in what court she qualified as executrix, and in what court the will was probated. The terms of the title bond are not averred specifically. The plaintiff failed to allege the terms of the will, and that under the will she was vested with the title to the land which had been sold appellants, or state the facts that would show that she had the right to make and tender them a deed which they were bound to accept under the terms of the title bond.

W. H. Barnes and E. P. Neal for appellants.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Paynter.

The appellee instituted this action to recover on five several papers, which are as follows:

"One year after date we will pay, with interest, E. Dudley Walker \$100, first payment on land. November 29, 1884.

"J. W. ACTON,  
"RANDLE ACTON.

"Attest: JOHN P. BARRETT."

"Two years after date we will pay, with interest, E. Dudley Walker \$100, second payment on land. November 29, 1884.

"J. W. ACTON,  
"RANDLE ACTON.

"Attest: JOHN P. BARRETT."

"Three years after date we will pay, with interest, E. Dudley Walker \$100, third payment on land. November 29, 1884.

"J. W. ACTON,  
"RANDLE ACTON.

"Attest: JOHN P. BARRETT."

"Four years after date, with interest, we will pay E. Dudley Walker \$100, fourth and last payment on land. November 29, 1884.

"J. W. ACTON,  
"RANDLE ACTON.

"Attest: JOHN P. BARRETT."

"We owe E. Dudley Walker a note of \$100, with interest, due in one year, first payment on the land, and to secure him mortgage him mine, J. W. Acton's bay mare, about ten years old, and mine, Randle's, one bay horse, about three years old. November 29, 1884.

his  
"J. W. x ACTON,  
mark  
"RANDLE ACTON.

"Attest: JOHN P. BARRETT."

The petition is not in paragraphs. It is in substance averred in the petition that the plaintiff's testator, by title bond, conveyed a certain boundary of land to the appellants, and for the purchase money the obligations sued on were executed. The court rendered a personal judgment against the appellants for \$500, with 6 per cent. interest per annum from 29th of November, 1884, the date of the notes.

It will be observed that the notes are for \$100 each, and in the one due one year after date it is recited that it is the first payment on the land; in the one payable in two years after date it is recited that it is for the second payment on the land; in the one due three years after date it is recited that it is the third payment on the land, and in the one due four years after date it is recited that it is for the fourth and last payment on the land. From the terms of these four several promissory notes the obligors only promised to pay the plaintiff's testator the sum of \$400. By the other writing copied above the plaintiff claims the appellants promised to pay an additional \$100.

It does not import a promise to pay plaintiff's testator \$100. It purports to be a mortgage on J. W. Acton's bay mare and Randle's bay horse to secure the payment of a 100 note payable one year after date executed for the first payment on the land. This paper bore the same date of the notes. We conclude that it is not a promise to pay money, but it is a mortgage of two horses to secure the payment of the note executed for the first payment on the land. But in any event, if it is not a mortgage of property to secure that note, it is certainly no obligation to pay money, but only mortgage of property to secure the payment of money. It, therefore, follows that the court erred in rendering judgment against appellants for \$500.

The plaintiff fails to aver where the testator died and in what court she qualified as executrix, and in what court the will was probated. The terms of the title bond are not averred specifically. The plaintiff failed to aver the terms of the will, and that under the will she was vested with the title to the land which had been sold appellants, or state the facts which would show that she had the right to make and tender them a deed which they were bound to accept under the terms of the title bond. Failing to make these averments the petition was defective. The tender of the deed in the absence of the averments as to the terms of the will showing the right of executrix to make it is insufficient. (*Cavin & Elliott v. Williams & Ray*, 8 Bush, 343.) The demurrer should have been sustained to the petition.

The judgment is reversed for proceedings consistent with this opinion.

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SIMPSON'S GD'N, &c. v. MILLER.

(Filed March 6, 1903—Not to be reported.)

Homestead—Purchase money—Where money is borrowed to pay purchase money on a farm the farm may be subjected to the debt notwithstanding the owner may claim it as a homestead, as such claim can not prevail against a debt created prior to the acquisition of the land and payment of purchase money.

J. S. Glenn for appellants.

J. E. Fogle for appellee.



Appeal from Ohio Circuit Court.

Opinion of the court by Judge Hobson.

Mary C. Simpson owned a farm of value \$300 in Ohio county. She and her husband traded this farm to M. F. Allen for another tract of land worth \$600, and arranged with appellee, David Miller, that he would pay Allen \$300. Allen then conveyed the latter farm to Mrs. Simpson. The consideration of the conveyance is expressed in the deed in these words: "In consideration of an exchange of land, amount of \$300, and \$300 cash in hand paid, which is furnished by D. A. Miller, which retains a lien, notes being executed this day, note \$150, due 16th of January, 1895, two notes for \$150, due 16th of January, 1896, the receipt of which is hereby acknowledged."

Mrs. Simpson and her husband executed notes to Miller, payable as above, containing the following recitals: "The above is secured by a lien on our farm and is evidence of money borrowed, being purchase money on said farm." Miller brought this suit on the notes and to enforce the lien on the land. The defendants claimed the land as a homestead, and insist that there was no lien on it to the extent that it was paid for by the \$300-tract, on which they resided with their family before the trade. The circuit court enforced the lien, and the defendants appeal. The proof clearly shows that the money was borrowed of Miller to pay the balance of the purchase money of the tract of land conveyed by Allen to Mrs. Simpson, and was paid to Allen. It also shows that there was a distinct understanding that Miller was to have a purchase-money lien on the land for the money. The notes were executed in accordance with this agreement, and the deed which retained the lien on the land for the money was accepted by the grantee and recorded. The proof also shows that the reason for borrowing the money was that there was a lien on the land by mortgage due by Allen, which had to be removed, and this mortgage was paid off out of the money which Miller furnished.

It is insisted for appellant that a married woman can not encumber her land in any other way than that pointed out by the statute, and that the homestead right having vested in the \$300 tract, continued in the other tract to the extent that its proceeds went into it. (*Rulo v. Murphy*, 51 S. W., 312; *Carr v. Winlock*, 22 Ky. Law Rep., 1047; *Blakely v. Adams*, 21 Ky. Law Rep., 268.) But none of these cases are in point here. Simpson and wife conveyed away the \$300-tract to Allen, and when they come to claim a homestead in the \$600-tract they are met by the provision of the statute that the homestead exemption "shall not apply to sales under execution, attachment or judgment, if the debt or liability existed prior to the purchase of the land or of the erection of the improvement thereon." (Kentucky Statutes, section 1702.) Under this provision the exemption does not exist as against purchase money for the land, nor can it be claimed against a note given for borrowed money used to pay the purchase money. (*Bradley v. Curtis*, 79 Ky., 327; *Coleman v. Parrot*, 17 Ky. Law Rep., 814.) The money borrowed of Miller was the purchase money of the tract, and Miller has the same lien on the land under the deed that Allen would have had if the notes had been executed to Allen and not to Miller. The deed was accepted. It in terms retained a lien on the land, and as against this lien no right of homestead exists.

After Mrs. Simpson's death the action was revived against her infant children, and the guardian ad litem filed an answer, pleading that there was a mistake in the notes in reciting a lien on all the land. This was denied by the reply, and no proof was taken to sustain the allegation. Besides, there was no allegation of mistake in the deed, which had been accepted, and the money being used to pay for the land and borrowed for this purpose at the time the deed was made, by the terms of the statute the exemption does not apply as against the debt.

Judgment affirmed.

LOUISVILLE RY. CO. V. SOUTHWESTERN ALCATRAZ ASPHALT  
AND CONSTRUCTION CO., &c.

(Filed May 6, 1908—Not to be reported.)

Street improvements—Appellant owning property at the intersection of Highland avenue and Von Borries avenue, on this appeal complains of the method of assessment of its property to pay for the improvement of Von Borries avenue because property on the opposite side of Von Borries avenue is not assessed to the same extent. Held—That the method of assessment is not objectionable for this reason as the property on the other side of said avenue lies in a triangle formed by Von Borries and Baxter avenues, and has been required to contribute to the improvement of Baxter avenue; besides, the assessment can not be extended across a principal street.

L. R. Yeaman for appellant.

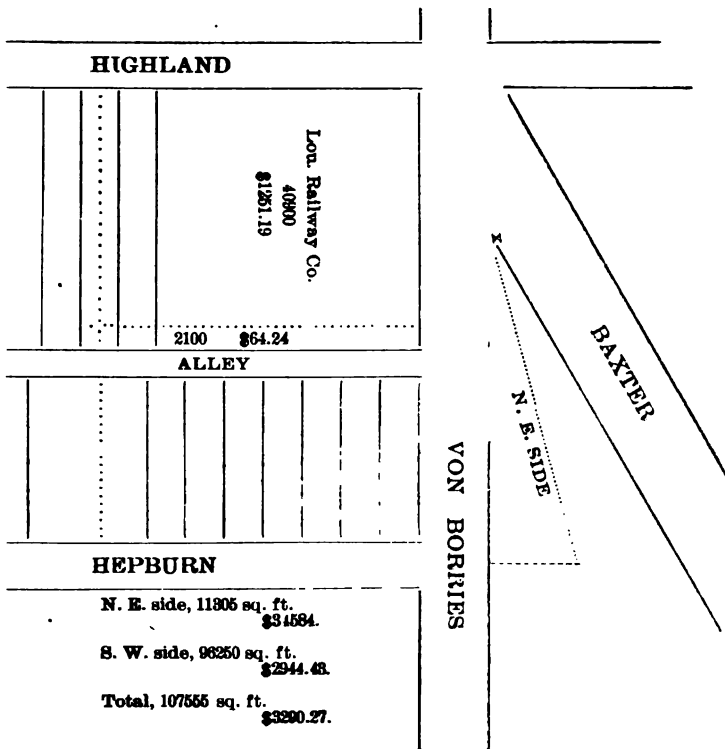
William Furlong for S. W. A. A & C. Co.

H. L. Stone for city of Louisville.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hobson.

The city of Louisville made a contract with appellee for the improvement of Von Borries avenue, from Highland avenue to Hepburn avenue, and assessed the cost of the improvement to the property owners abutting thereon. Baxter avenue intersects Von Borries avenue at an acute angle, and in this way the amount of property on the northeast side of Von Borries avenue assessed for the improvement is small. This threw a larger burden on the property on the south side than would otherwise have fallen on it, as the cost under the statute is assessed to both sides according to the total number of square feet. The total area assessed is 107,555 square feet. Of this, 11,305 square feet are on the northeast side of the street, and 96,250 on the southwest side. The situation is shown by the following map:





Appellant, the Louisville Ry. Co., who owns the lot at the intersection of Highland avenue and Von Borries avenue, complains of the assessment on the ground that something like 80 per cent. of the cost of the improvement was thrown upon the property on the southwest side of the street. But the property on the northeast side pays at the same rate per square foot, and from the shape of that property we are by no means sure that the burden does not fall as heavy on it as on the property on the opposite side of the street. There was no mistake in not assessing the property north of Baxter avenue for this improvement. This property has been assessed for the improvement of Baxter avenue, and we have held in several cases that the council can not cross a principal street in making an assessment. The property owners north of Baxter avenue having been assessed for improving it, no injustice has been done appellant in the assessment in controversy. (*Zender v. Barber Asphalt Co.*, ante, 2279, decided April 29.)

Judgment affirmed.

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EARLEY v. SUTTON.

(Filed May 6, 1908—Not to be reported.)

Appeals—Bill of exceptions—Where the record shows that a bill of exceptions was filed and signed at a term of court subsequent to the term at which the motion for a new trial was overruled, without any order appearing which extended the time for filing a bill of exceptions, it will not be considered on appeal.

R. S. Crawford for appellant.

G. W. Lester and S. V. D. Stout for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action in ejectment was brought by appellee in the Whitley Circuit Court against the appellant to recover a small boundary of land which it was alleged he was wrongfully in the possession of. The defendant, by answer, traversed all the affirmative allegations of the petition, and the jury under proper instructions found for the plaintiff. And the defendant upon this appeal asks a reversal mainly upon the ground that the verdict was flagrantly against the weight of evidence. The trial was had and plaintiff's motion and grounds for a new trial filed at the January term, 1901, of the Whitley Circuit Court; but they were not acted upon at that term, and during the following May term additional grounds for a new trial were filed, and the motion for new trial overruled, and the plaintiff awarded the possession of the land. At the following, August, term of the court the defendant tendered and had signed his bill of exceptions. The record fails to show that time was given to appellant at the term that his motion was overruled to prepare and tender his bill of exceptions at the succeeding term of the court as provided by section 334 of the Civil Code. We, therefore, can not legally consider upon this appeal that part of the record which purports to be a bill of exceptions. (*Vandever v. Griffith*, 59 Ky., 425; *Lynch v. Reynolds*, 69 Ky., 457.) But for the satisfaction of counsel we will say that we have read the testimony as therein contained, and, in our opinion, it

abundantly supports the finding of the jury. The pleadings in the case also support the judgment.

Judgment affirmed.

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BOWMAN & COCKRELL v. DILLION.

(Filed May 6, 1908—Not to be reported.)

**Contracts—Injunction**—A conveyance of the joint use of a river bank for the purpose of tying logs and rafts does not give the purchaser the right to erect a boom along the bank for the purpose of catching logs, and the owner of land on the opposite side of the river may enjoin the operation of the boom when it interferes with his right to float rafts or logs.

Beckner & Jouett and C. C. Williams for appellants.

J. W. Brown and J. W. Alcorn for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Hobson.

On July 17, 1866, the Livingston Coal Co. conveyed to Denny, Faulkner & McLean four acres of land lying at the junction of Round Stone creek and Rockcastle river, on the east side of Round Stone and the north side of the river, fronting on the river 26 poles and 19 links. The deed also contained this provision: "The second party is to have the joint use of the bank on both sides of Rockcastle river above the mouth of Round Stone up to where the lines of the first party crosses said river for the purpose of tying logs and rafts to the trees on said bank. This privilege is to be used and enjoyed in connection with and jointly with the mill seat now occupied by Roberts, except that the second party is to have the whole and exclusive use of the banks fronting on Rockcastle river and on the land herein conveyed to them from the water's edge at the junction of Round Stone and Rockcastle river up said river 26 poles and 19 links to the corner of the land of the second party."

The property conveyed by this deed passed through several hands, and is now owned by appellants, Bowman & Cockrell, who operate a sawmill on it. On the opposite side of Round Stone, and just below them on the river, is the mill of appellee, W. R. Dillon, who purchased his property in the year 1898 from Margaret Sambrook, who also claimed under the Livingston Coal Co. by a deed subsequent to that of Denny, Faulkner & McLean. Dillon owned fifty acres of land lying on the river above appellants' mill; also a strip of land 150 feet wide on the south side of the river and adjoining this tract. Appellants put a boom in the river on the south side opposite this 150-foot strip, and appellee filed this suit to enjoin them from maintaining it. Their right to maintain the boom depends upon the meaning of the clause in the deed to Denny, Faulkner & McLean, above quoted. It is shown that the mill seat occupied by Roberts is no longer occupied as a mill seat. It is also shown that owing to the size of Rockcastle river it is difficult to raft logs down it, and that the most practicable way to get them down is to float them down loose on a tide and catch them in a boom. The boom as maintained by appellants was put in by Denny, Faulkner & McLean soon after they got the property, and was

maintained by them until they failed, about the year 1890. The boom afterwards broke, but parts of it remained. While it was in this condition Dillion bought it from Mrs. Sambrook in 1893. After this appellants bought the Denny, Faulkner & McLean property and repaired the boom, and have since maintained it. While the proof shows that all the parties have had booms since about the year 1884, it is not shown that there were any booms in the river at the date of the deed from the Livingston Coal Co. to Denny, Faulkner & McLean, or that there had been any before that. On the contrary, we think the proof shows that up to this time the logs were brought down in rafts. On these facts, the question to be determined is, what is the effect of the grant of the joint use of the bank on both sides of Rockcastle river for the purpose of tying logs and rafts to the trees on the bank? It is conceded by appellee that appellants have the right to tie their logs and rafts along the bank in front of his property. He only disputes their right to maintain the boom there. In determining the meaning of these words the rest of the clause must be looked to by the court. The privilege thus conveyed, it is stipulated, is to be used and enjoyed jointly with the mill seat occupied by Roberts, except as to the bank in front of the land conveyed. The tying of logs and rafts to the trees along the bank could be used and enjoyed jointly by two parties; but the privilege of maintaining a boom would not naturally be conferred jointly on two mill owners. And as the practice had been to bring down the logs and rafts and tie them to the trees, the natural meaning of the language of the deed when it conferred a privilege jointly with Roberts of tying logs and rafts to the trees on the bank is that the grantor did not convey the right to maintain a boom, which is a very distinct right and of much greater value than the mere right of using the bank to tie the logs and rafts to. This conclusion is fortified by the difference of language used in reference to the bank in front of the land conveyed to Denny, Faulkner & McLean. As to this it is provided "that the second party is to have the whole and exclusive use of the bank fronting on Rockcastle river and on the land hereby conveyed to them." The whole and exclusive use of the banks is a very different thing from the joint use of the banks for the purpose of tying logs and rafts to the trees on it. We, therefore, conclude that the circuit court properly held that appellants under their deed did not acquire the right to maintain a boom in the river opposite the 159-foot strip. The question is not before the court here as to what may be their rights as to the bank in front of their own land, not unreasonably interfering with the free use of the river by others. The amended answer only elaborated the defense made in the original answer. Considering it as filed, we see no reason under all the evidence for disturbing the judgment. The proof fails to make out the case for the operation of an estoppel.

Judgment affirmed.

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HOCKENHAMMER, &c. v. LEXINGTON & EASTERN RY. CO.

(Filed May 6, 1903—Not to be reported.)

Railroads—Negligence—Throwing corpse from wagon—Appellant states in his petition that while crossing the track of appellee's road with the corpse of his child, on the way to the burial, a train struck the wagon, throwing

the corpse to the ground, and prayed for damages for mental suffering on account thereof. The petition was dismissed on demurrer, from which this appeal is prosecuted. Held—That while a parent has the right of burial of his child, and may maintain an action for any interference therewith, in which he may recover damages for his injured feelings, yet in this case it is only charged that by the negligence of the defendant the corpse was thrown out of the wagon to the ground. It is not alleged that the corpse was mutilated in any way, or any injury done to it or the coffin. There is no reason why the same rule may not be applied to a corpse in a case like this as would be applied if the child were alive and no injury done to it. Appellant's petition stated no cause of action.

W. D. Jackson for appellants.

Arthur Carey and Morton, Darnall & Wilson for appellee.

Appeal from Powell Circuit Court.

Opinion of the court by Judge Hobson.

Appellant complains of the judgment of the circuit court dismissing on demurrer his petition. The original petition is in these words: "The plaintiff, John Hockenhammer, says that the defendant, the Lexington and Eastern Ry. Co., is a corporation created by the legislature of Kentucky, with authority to construct and operate a railroad from Lexington, Ky., eastward through Kentucky; that on the 4th day of September, 1899, the plaintiff, in company with his wife, mother and divers other persons, was bringing to Stanton, Ky., the corpse of his infant child, Virgil, for the purpose of burying it in the graveyard at Stanton; that on said day in crossing defendant's road at the regular county crossing made by defendant for said purpose, in Clay City, Ky., with a wagon containing the corpse of said child, by the willful neglect and gross carelessness of the defendant's servants and agents, said wagon was run over and the corpse therein thrown to the ground out of said wagon by the defendant's servants and agents in running defendant's engine and train of cars, which said servants and agents had been employed by the defendant to run, and which they were running under said employment, from said city of Lexington, Ky., east. Wherefore, the plaintiff asks for judgment against the defendant for the sum of \$10,000 damages and cost, and for all relief that he may be entitled to."

The defendant entered a motion for the plaintiff to make his petition more specific as to the injury to the wagon, and thereupon he avowed that he claimed no damages for injury to the wagon. The defendant then filed a general demurrer to the petition, which was sustained, and the plaintiff was given leave to amend. The following amendment was filed: "The plaintiff, by leave of court, amends his petition herein, and now makes all the allegations set out in his original petition a part of this amendment, and now states that by the willful negligence and gross carelessness of defendant's servants and agents said corpse was thrown out of said wagon, in the presence of plaintiff, his wife and divers other persons following the said corpse to its last resting place, causing the plaintiff great distress and anguish of mind, by the defendant's agents and servants in running defendant's engine and train of cars, which said servants and agents had been employed by the defendant to run, and which they were running under said employment, and that by reason of the said wrongful act, gross negligence and careless-



ness of this defendant and its servants and agents this plaintiff was damaged in the sum of \$10,000. Wherefore, he prays judgment for the aforesaid sum, and for all proper relief."

The demurrer was sustained to the petition as amended, and the plaintiff declining to plead further, the action was dismissed.

In 8 Am. & Eng. Ency. of Law, 834, it is said: "While a dead body is not property in the strict sense of the common law, yet the right to bury a corpse and preserve its remains is a legal one which the courts will recognize and protect. And any violation of it will give rise to an action for damages."

The English common law authorities are not applicable in America, for the reason that the ecclesiastical courts in England exercised exclusive jurisdiction as to the burial of the dead, and the common law courts treated such matters as belonging exclusively to the church. But as we have no ecclesiastical courts in this country exercising the jurisdiction conferred on such courts in England, rights in the bodies of the dead must be protected by the civil courts. Thus in *Larson v. Chase*, 47 Minn., 307, 14 L. R. A., 85, a widow brought an action to recover damages for the wrongful mutilation of the corpse of her deceased husband, and it was held that as she had the legal right to the custody of the body of her husband for the purposes of preservation and burial, she could maintain the action, and that as wherever a legal right is invaded compensation for the injury may be recovered, she was entitled to recover for mental pain and suffering, as these were the proximate and natural consequences of the defendant's wrongful act. In *Meagher v. Driscoll*, 98 Mass., 281, 96 Am. Dec., 759, the defendant entered upon plaintiff's land and dug up and removed the dead body of his child. It was held that the plaintiff could recover damages therefor, including mental anguish as an element of recovery; but in this case the court rests its opinion upon the idea that the gist of the action was the trespass upon the plaintiff's land. In *Bessemer Land Co. v. Jenkins*, 111 Ala., 135, 56 Am. St. Rep., 26, the same rule was followed. But in discussing this rule in *Larson v. Chase* the court said: "It would be a reproach to the law if a plaintiff's right to recover for mental anguish resulting from the mutilation or other disturbance of the remains of the dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises, while everybody's common sense would tell them that the real and substantial wrong was not the trespass on the land, but the indignity to the dead."

In *Renihan v. Wright*, 125 Ind., 536, 21 Am. St. Rep., —, the plaintiffs, who were the father and mother of a child, sued an undertaker who had charge of the body and agreed to keep it safely in a vault until they were prepared to bury it, but who had negligently allowed the body to be taken from the vault and in some way lost. It was held that they could recover, and that they were entitled to recover for mental anguish. The decision of this court in *L. & N. R. R. Co. v. Hull*, 24 Ky. Law Rep., 375, is in line with these cases. In that case it was held that damages for mental anguish might be recovered by a husband against a carrier for negligence in the transportation of the corpse of his deceased wife, following the principle laid down by this court in *Chapman v. Western Union Telegraph Co.*, 90 Ky., 265, and *Western Union Telegraph Co. v. Vancleve*, 107 Ky., 464.

On the other hand, it was held in *Griffith v. The Charlotte, &c., R. R.*, 23 S. C., 25, that there can be no suit for mutilating a dead body, and in *Gatzaw v. Buening*, 106 Wis., 1, 49 L. R. A., 475, that exemplary damages might be recovered for depriving the plaintiff of the use of a hearse and stopping it as he was burying the body of his child, but that mental suffering could not be considered, as there was no physical injury. But the South Carolina case was an action by an administrator whose rights were determined by the statute under which he was appointed, and in Wisconsin the rule adopted by this court as to the recovery of damages for mental suffering in the cases above referred to is not followed, and this seems to be the foundation for the difference of result reached.

In *Burny v. Children's Hospital*, 169 Mass., 57, 38 L. R. A., 413, a father sued a hospital to recover for an autopsy performed upon the dead body of his child, entrusted to it for treatment, without his consent. It was held he could recover, and the case of *Meagher v. Driscoll* was cited as holding that the jury might take into consideration the injury to the plaintiff's feelings. In *Foley v. Phelps*, 1 App. Div. (N. Y.), the same conclusion was reached, and speaking of the right to possession of the corpse the court said: "It is the right to what remains when the breath leaves the body, and not merely to such a hacked, hewed and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative."

In *Pierce v. Swan Point Cemetery*, 10 R. I., 227, 14 Am. Rep., 667, the court said: "There is a duty imposed by the universal feelings of mankind by some one towards the dead, a duty, and we may also say a right, to protect from violation: and a duty on the part of others to abstain from violation. It may, therefore, be considered as a sort of quasi property, and it would be discreditable to any system of law not to provide a remedy in such a case."

We, therefore, conclude that the great weight of authority sustains the rule that there is a legal right in the bodies of the dead, which the courts will recognize and protect by the proper action, as the case may be. It remains to determine whether the plaintiff's petition shows an actionable injury to his legal rights. It will be observed that it is only charged that by the negligence of the defendant the corpse was thrown out of the wagon to the ground. It is not alleged that the corpse was mutilated in any way or any injury done to it or the coffin. If the plaintiffs had been in the wagon themselves and been thrown out, but not hurt, they could not have maintained an action for the mental suffering thereby caused, for no rule is better settled than that mental suffering in cases of this character not connected with physical injury can not be recovered for; and if the child had been alive and had been thrown from the wagon just as the corpse was, but not hurt, no action could have been maintained. (2 *Shearman & Redfield on Negligence*, section 761, 764.) Both the railroad company and the wagon were rightfully upon the highway. It was not a case of willful trespass, but simply a case of collision between the two vehicles, and must stand as any other collision between vehicles on a highway. We see no reason why the same rule should not be applied to a corpse in a case like this as would be applied if the child were alive and no injury done it. To allow the action to be maintained would be to make an exception to all well settled legal principles not warranted by any precedents we have found.

Judgment affirmed.

## GRAINGER &amp; CO. v. PATTERSON, JR.

(Filed May 6, 1908—Not to be reported.)

**Liens—Agents—Estoppel**—P. made a contract with appellee to remodel a business house according to the plans and specifications prepared by an architect. P. made a subcontract with appellants to furnish the iron work, and on the completion of the work there was owing appellants a balance of \$624.29, for which they have asserted in this suit a lien on the property. The defense is made that P., the contractor, with the treasurer of appellant company, were present together in the office of the architect, when the treasurer finally consented that an order for the balance owing by appellee should be drawn in favor of P., the contractor, and that the balance would be settled between the parties afterwards. **Held**—That the evidence conducing to prove this defense of appellant the decision of the chancellor will not be disturbed, and appellant, by their agent, having consented that the order for the balance of the money should be given to P., ought not in good conscience enforce its collection against appellee again.

Fred Forcht, Jr., and Forcht & Field for appellants.

Pirtle & Trabue for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Burnam.

In August, 1899, the appellee, William Patterson, Jr., contracted with Andrew Peklenk to remodel a business house owned by him on Main street in the city of Louisville in accordance with plans and specifications prepared by Clark & Loomis, architects. Peklenk subcontracted the structural iron work called for in the specification to Grainger & Co., a corporation, at the agreed price of \$1,686.85, and during the progress of the work paid to Grainger & Co., \$1,062.06, leaving unpaid \$624.29. Mr. Charles J. Clark, one of the architects who drew the plans, supervised the erection of the building, and as the work progressed drew orders on Patterson in favor of the contractors in payment for work done. On the 13th day of July, 1900, Grainger & Co. instituted this suit against Patterson and Peklenk, in which they allege that on the 13th day of January, 1900, they had filed and caused to be recorded in the office of the county clerk of Jefferson county a statement of their claim, and taken all necessary steps required by the statute to secure a mechanic's lien on the building, and prayed for a personal judgment against the defendants, and for an enforcement of their lien for the balance due by a sale of the property. The defendant in his answer averred "that on the 8th of January, 1900, after the completion of the work, the plaintiff, by its agent, went with Peklenk to Clark & Loomis, the supervising architects of the building to collect the balance due on the work; that it was ascertained that the defendant, Patterson, owed Peklenk a balance of \$758.18 upon the building; and that Clark & Loomis, by and with the consent of plaintiff, drew an order upon the defendant, Patterson, in favor of Peklenk for the full amount thereof; and that the plaintiff's agent and Peklenk went together to see the defendant for the purpose of collecting it, but failed to find him on that day, and for this reason the order was not paid; that plaintiff's agent left this order in the possession of Peklenk, under promise from him that he would collect it and pay to the plaintiff the balance due to

them; that on the next day the order was duly presented by Peklenk to the defendant and paid;" and pleads that by reason of these facts the plaintiff is estopped from asserting any further claim against the defendant. The plaintiff, by reply, controverted the facts relied on as an estoppel. The chancellor thereupon transferred the case to the common law branch of the Jefferson Circuit Court for a trial of the issue of fact raised by the pleadings, which was duly had, under instructions which are not objected to, and resulted in a verdict in favor of the defendant. The case was then retransferred to the chancery division of the circuit court, where it was adjudged, in accordance with the finding of the jury, that Grainger & Co. were estopped by the consent of their agent; that the whole of the balance due by defendant should be paid to Peklenk; and that they would look to him for the amount due, and plaintiff has appealed.

The appeal presents for our decision practically only questions of fact. Charles J. Clark, the supervising architect, testified before the jury that Henry H. Martin, the treasurer of Grainger & Co., was present in his office on the 8th of January, 1900, when he drew the order on the defendant in favor of Peklenk; that he told Martin that he would issue two orders, one for the balance that Peklenk owed him, and the other for the balance that Patterson would then owe Peklenk, and that he could collect his own money from Patterson if he so desired; that Martin & Peklenk got into a controversy over the amount of the balance that was due Grainger & Co., and that Martin said to him: "Let Mr. Peklenk have the order for the full amount, and we will settle the balance between us;" that he then drew the order in favor of Peklenk for the full amount of \$758; and that Martin and Peklenk left the office together to go to see Patterson to collect the money. Martin and Peklenk both deny that Martin said to Clark that he could draw the order for Peklenk for the full amount, but neither deny that they were present in Clark's office for the purpose of obtaining the order for the balance due upon the work, and that this order was drawn in the presence of both of them, and that they went together to collect it from Patterson for the purpose of dividing it between them. Upon this question of fact both the jury and the trial judge have decided in favor of the defendant, and the rule is well established in this court that the decision of the chancellor will not be disturbed where the evidence is conflicting, and on the whole case the mind is left in doubt as to the truth. Having by their agent consented that Clark, as agent and representative of the defendant, should draw an order in favor of Peklenk for the entire balance due upon the work, appellant can not, in good conscience, ask that Patterson should be required again to pay this money, or any part thereof, to them.

Judgment affirmed.

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MITCHELL v. SOUTHERN RY. CO.

(Filed May 6, 1903—Not to be reported.)

Contracts—Damages—Appellant entered into a contract by which he was to do certain work in the construction of a tunnel on appellee's road in Indiana, according to the specifications, made a part of the contract. The specifications contain the following provision: The contractor takes all risks in regard to accidents and casualties of all kinds which may occur during

the progress of the work, and to be held responsible for all damages to work as well as to the machinery, rolling stock, persons and property which could have been avoided by the exercise of proper care and vigilance on his part. There was also a provision requiring the contractor to execute bond, with approved security, in the sum of \$15,000. Appellee, by the operation of one of its trains, injured one of appellant's workmen and compromised his claim for damages by paying him \$355.95, and appellant claiming that appellee owed him a balance on the contract brought suit for same, when appellee, as a defense, claimed the right to withhold payment of the amount paid as damages on the compromise. Held—That appellant was not liable for said damage. Such an interpretation should not be given a contract that would make the appellant responsible for the consequence of a negligent act of the appellee unless no other meaning can be ascribed to it. If a doubt existed as to its meaning, the court should resolve that doubt against the contention that the contract was intended to indemnify appellee against its own negligence.

Helm, Bruce & Helm for appellant.

Humphrey, Burnett & Humphrey for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Paynter.

On the 9th day of April, 1901, the appellant, Mitchell, and the defendant, Southern Ry. Co., entered into a contract by which Mitchell was to do certain work in the construction of a tunnel on the line of the appellee's railway in Indiana, according to the specifications, made a part of the contract. The specifications contained the following provision: "The contractor takes all risks in regard to accidents and casualties of all kinds which may occur during the progress of the work, and to be held responsible for all damages to work as well as to the machinery, rolling stock, persons and property which could have been avoided by the exercise of proper care and vigilance on his part."

Among the provisions of the contract was the following: "The contractor hereby agrees to give bond, same secured by some reliable surety company, accepted by the railway company, in the sum of \$15,000, for the faithful performance of the within contract, and for the purpose of indemnifying the railway company for the work contemplated under this contract, and for all cost accruing to said railway company in defending any and all liens, of whatsoever nature, enforced for labor and material under this contract. Said contractor further agrees to indemnify and save harmless said railway company from all casualties or accidents resulting to employes engaged in the work contemplated under this contract, or to any third person who may be in any manner injured or damaged by the said contractor, his servants or agents, in the performance of this contract."

The appellee entered upon and completed the work under the contract, which has been accepted and the contract price has been paid, except, \$355.95, which appellee withheld from the appellant on account of the following facts, namely: During the progress of the work on the tunnel Mills Buxton received an injury, which was due entirely to the negligence of the appellee, in the manner of its operation of a railway train through the tunnel, whilst Buxton was working as an employe of plaintiff's in the execution of

the work required by the contract. Neither the plaintiff nor any of his employees in the least degree contributed to the injury. The train which inflicted it was not used by the appellant or for him, but was one which was operated entirely by the appellee, and wholly within its control. Buxton instituted a suit against the appellee, to recover damages for the injury he had received. The suit was compromised for \$355.95, and it is conceded that the compromise and settlement was a prudent one for the appellee to make.

The question here for our consideration is, did the appellee have the right to withhold the amount which it paid Buxton out of the contract price of the work? The answer to this question depends upon the terms of the contract into which the parties entered. It is the contention of the appellee that the appellant indemnified it against losses occasioned by casualties and accidents resulting in the injury of the appellant's employees engaged in the performance of the work contemplated under the contract, notwithstanding that the injury might be inflicted solely by its own negligence. For the appellant it is insisted that it was not the intention that he should indemnify appellee against its own negligence, but that he was indemnifying against losses which might result to it by reason of his or his employees' conduct in the prosecution of the work. In construing a contract it should be the purpose of a court to ascertain, if possible, the intention of the parties to it. To do so it is sometimes not only important for the court to consider the language employed in the contract, but the circumstances surrounding the parties, and the object in view which induced the making of it. It is not proper in construing a contract for a court to seize upon some expression in it and allow that to control in disregard of other provisions of it. The whole of the contract should be read. When we consider the work to be done by the appellant was to yield him but a few thousand dollars in gross, and that his profits, if large, considering the work to be done, would necessarily be small in amount, it is improbable that he would undertake to indemnify the appellee against losses occasioned by its own acts of negligence. Especially is it so, when one act of negligence by the appellee might not only sweep away the profits derived from the work, but his entire fortune. Such an interpretation should not be given a contract that would make the appellant responsible for the consequence of a negligent act of the appellee unless no other meaning can be ascribed to it. If a doubt existed as to its meaning, the court would resolve that doubt against the contention that the contract was intended to indemnify appellee against its own negligence. Every presumption is against such intention. While the precise question was not under consideration in cases to which we now allude, yet we think the rule enunciated in them applies equally well to this case. In *Perkins v. New York Central R. R. Co.*, 24 N. Y., 236, the court said: "A party who claims exemption from liability for the negligence of his servants or agents must undoubtedly base his claim upon the express words of his contract. It will not be presumed in his favor."

In *Mynard, &c. v. Syracuse, &c., R. R. Co.*, 71 N. Y., 168, the court said: "When general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include it. Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any

business, and hence the general rule is that contracts will not be so construed unless expressed in unequivocal terms."

To read the contract in question without observing the punctuation, we at once conclude that it was not the intention of the parties that the appellee was to be indemnified against its own acts of negligence. If we read it with a comma after the words "to any third person," then it would read as follows: "Said contractor further agrees to indemnify and save harmless said railway company from all casualties or accidents resulting to employees engaged in the work contemplated under this contract, or to any third person, who may be in any manner injured or damaged by the said contractor, his servants or agents, in the performance of this contract."

To thus read it shows that the indemnity to the appellee is against the consequences of the acts of the contractor, his servants or agents in the performance of the contract. The U. S. Supreme Court in *Ewing v. Burnett*, 11 Peters, 54, said: "Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent upon judicially inspecting the whole, the punctuation will not be suffered to change it."

When the court takes the instrument by its four corners to ascertain its meaning and reads it without punctuation, the same conclusion is reached, as to the intention of the parties, as is reached when the comma is placed after the words "if any third person." In our opinion, if for no other reason, the comma should be so placed, because the language in the specifications which we have quoted above showed that the appellant was to be responsible only for damages which might have been avoided by the exercise of proper care on his part. By the terms of the specifications (and it must be read in connection with the contract as it is made part of it by express terms) the appellant is made responsible for "accidents and casualties of all kinds which may occur during the progress of the work, and will be held responsible for all damages to the work, as well as to the machinery, rolling stock, persons and property, which could have been avoided by the exercise of proper care and vigilance on his part." The word persons would comprehend all the appellant's agents, servants and employees and "third persons." If he is to be responsible for damages to his employees and third persons, which could have been avoided by the exercise of proper care and vigilance on his part, the converse of the proposition is true; that he is not to be held responsible for damages to his employees or third persons which were not the result of the want of his proper care and vigilance. To read this clause in the specification in connection with the clause in the contract, it is readily seen that the indemnity to appellee against damages to persons by accidents or casualties was such as were produced by the acts of the appellants, his servants or agents. The appellee did not have the right to withhold the amount in controversy.

The judgment is reversed for proceedings consistent with this opinion.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. v.  
CASKEY.

(Filed May 6, 1903—Not to be reported.)

Railroads—Damages from fire—Appellee recovered a judgment for \$900 damages resulting from fire, caused by sparks escaping from one of appellant's engines. On appeal it is insisted that the verdict is flagrantly against the evidence. Held—That the verdict will not be disturbed. While the doctrine is well settled that if a railroad company uses the latest and most approved means of preventing sparks from escaping from its engines it will not be liable for fires that may result, yet it is competent evidence to prove that large cinders escaped from the engines to rebut the contention of appellant that the fire escapes were in good condition.

C. H. Rodes for appellant.

Robt. Harding and Rawlings &amp; Vories for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by appellee, J. W. Caskey, in the Boyle Circuit Court, to recover damages against appellant, C., N. O. & T. P. Ry. Co., for negligently setting fire to his house, whereby it and a large portion of his furniture, and other personal effects therein, were burned.

The evidence for appellee showed that his house was situated about one hundred feet from appellant's line of railway, and on the — day of February, 1901, within twenty-five or thirty minutes after the passing of one of appellant's trains, the roof of the house was discovered to be on fire, and those present not being able to extinguish the flames, it was, in a short time, entirely destroyed; that on the day the fire occurred the weather was extremely dry, with a strong wind blowing from the direction of the line of railway towards the house; that as the train passed it was noticed that the smokestack of the engine was emitting dense clouds of smoke, and that cinders were escaping therefrom in such quantity and size that when carried by the wind against the house of appellee it sounded as if it was hailing, and that some of these cinders were as large as peas; that the fire originated at a point on the roof next the line of railroad; that it could not have originated from sparks coming from the chimneys of the house, the strong wind blowing from the direction of the railroad excluding this as a possibility; that the fires in the grates within the house were all down very low, and throwing out no sparks at the time, and there were no other fires in the neighborhood, except that in the engine of appellant's train, from which the conflagration which destroyed appellee's house could have originated.

The answer of appellant put in issue the allegations of negligence contained in the petition, and its evidence conduces to show that the smokestack of the engine in question was furnished with a spark-arrester of the most improved pattern known to science; that it was properly adjusted at the time; that the train was a light one, and not going at an unusual rate of speed. The jury, under the instructions of the court, returned a verdict in favor of appellee for the sum of \$900.

Appellant complains on this appeal of no technical error occurring during the trial, but bases its claim to a reversal solely upon the want of merit

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in appellee's cause of action; in other words, it complains only of the court's refusal to peremptorily instruct the jury to find for it after all the evidence was in.

In the case of the L. & N. R. R. Co. v. Samuel's Ex'ors, 23 Ky. Law Rep., 304, it is said: "The law is well settled in this State that a railroad company, authorized by its charter to use steam power, has necessarily the right to use fire as a means of generating steam; and it is not liable for injuries resulting from the sparks escaping from its locomotive if it was furnished at the time with the best and most improved screen and spark-arrester in practical use, when these appliances are in perfect order, if not otherwise guilty of negligence in the operation of its engine. But it is equally well settled that in an action against a railroad company to recover for loss by fire, alleged to have resulted from negligence in operation, or for failure to have the spark-arrester in proper condition, the testimony showing that sparks and cinders escaped from the locomotive in unusual quantities, was competent, and will, of itself, warrant the assumption that the arrester was out of order, or was improperly adjusted, and that the defendant was consequently guilty of negligence in this regard."

This case was approved in Illinois Central Railroad Co. v. Scheible, 24 Ky. Law Rep., 1708, in an opinion which reviewed all of the cases decided by this court on the subject of the negligence of railroad companies in the use and management of spark-arresters, whereby fires were caused to adjacent property. Undoubtedly, the evidence of appellant strongly conduces to show that it was not guilty of the negligence charged by appellee; but, on the other hand, the evidence of appellee was such, in our opinion, as created an issue of fact which was peculiarly within the province of the jury to determine, and as they determined it adversely to appellant we are not able to say that their verdict was flagrantly against the weight of the evidence.

Wherefore, the judgment is affirmed.

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BARRALL v. QUICK.

(Filed May 6, 1908—Not to be reported.)

1. Passways—Condemnation—Evidence—Instructions—In this action by appellee to condemn a passway through the lands of appellant the court did not err in refusing to admit evidence tending to show that the proposed passway was the most practicable and feasible route, as this was not a matter for the consideration of the jury. The finding of the jury that no fencing was necessary was not flagrantly against the evidence. The instructions were not erroneous because they failed to state how much land the passway should contain.

2. Misconduct of attorney—The misconduct of attorney for appellee in his argument to the jury can not be considered on this appeal, as it was not excepted to at the time.

3. Costs—The costs of the trial in the circuit court were properly adjudged against appellant as the finding in that court was less than that in the county court.

Charles Carroll for appellant.

J. F. Combs for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Barker.

This proceeding was instituted in the county court of Bullitt county by the appellee to condemn a private passway over the land of appellant, under the provisions of article 2, chapter 110 of the Kentucky Statutes, entitled "Passways." Commissioners were appointed by the county judge to view the premises for the purpose of ascertaining a practicable and feasible passway over appellant's land to the nearest meetinghouse, mill, warehouse and railroad depot, in pursuance of the prayer of appellee's petition. These commissioners made a report, recommending a route across about fifteen acres of appellant's land.

Exceptions were filed to the report of the commissioners; a trial by jury was had, which being unsatisfactory to appellant, he appealed to the Bullitt Circuit Court, where a trial de novo took place. The verdict and judgment in that trial being adverse to appellant, he appealed to this court, and the case was reversed, in an opinion contained in 23 Ky. Law Rep., 421, to which reference is now had for a more elaborate statement of the facts than is here thought necessary to be set forth.

Upon the return of the case a second trial was had, in which the jury returned the following verdict: "We, of the jury, find it necessary for applicant to have a passway over the defendant's land where the court's commissioners viewed it. Give the defendant \$9 for its use. We, of the jury, find it not necessary to have any additional fencing. Assess the damages at \$10. Applicant shall erect and keep up all necessary gates."

Upon this verdict the judgment was rendered, establishing the passway as laid off by the commissioners, and adjudging the costs of the proceedings in the circuit court against the appellant, and from that verdict and judgment a second appeal is now prosecuted. The first error complained of is the refusal of the court to admit evidence on behalf of the appellant to establish whether or not the proposed passway was the most practicable and feasible route. We do not think the court erred in excluding this testimony. The questions submitted to the jury were, first, whether or not it was necessary for appellee to have a passway from his residence to the points mentioned in the petition, and, if so, the damage accruing to appellant by reason of the taking of the land and the consequential damage to the balance of the tract through which the proposed passway ran. The question as to whether the proposed route was the most practicable or feasible one was not, under the statute, for the determination of the jury, and the court properly excluded it. Nor do we think the finding of the jury, that no fencing was necessary along the line of the proposed passway, was flagrantly contrary to the evidence. There was much testimony for and against this proposition, and the question was one peculiarly within the province of the jury to determine. The instruction of the court was not defective because it did not state the quantity of land which the proposed passway would take; there was no dispute upon this question, and the jury were thoroughly conversant with the quantity of land which the proposed route would occupy, being a passway twenty feet wide, running through a tract of fifteen acres of land, and amounting in all to seven-eighths of an acre.

We think the instructions of the court fairly presented all of the issues involved in the action between the parties, and were, as a whole, as favorable to appellant as he was entitled to. The misconduct of appellee's counsel in his speech to the jury can not be taken advantage of here, if it had any existence in fact; there was no exception taken to what was said at the time, and the fact that appellant's counsel was called out of the courtroom while appellee's counsel was speaking, leaving an inexperienced young attorney to represent him, and this attorney, by reason of his inexperience, failed to object to the words complained of, can not better appellant's rights with reference thereto. This court can not go into the question as to how far an attorney's experience may justify his failure to properly represent his client's interest.

The verdict rendered by the jury in the county court, and the two verdicts rendered in the circuit court, all show that the land taken in this action is of very small value; there was little or no practical difference between them, and we are constrained to the conclusion that by the verdict complained of appellant obtained all to which he was entitled. There was no error in adjudging the costs accruing in the circuit court against appellant, as the verdict there was less than that in the county court. (*Vice v. Eden*, 24 Ky. Law Rep., 132.)

Perceiving no error in the record the judgment is affirmed.

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CLARK, &c. v. YOUNG, &c.

COHOON, &c. v. SAME.

(Filed May 6, 1908—Not to be reported.)

**Personal representative—Compensation—Attorney's fees—**This appeal involves the correctness of the allowance of \$500 to an administrator for extra services; also of an allowance of \$1,400 for attorney's fees for services in bringing a suit for settlement of the estate. Held—That the court has inherent power to allow an attorney's fee to a personal representative for legal services rendered for the benefit of the estate, but the court erred in fixing the amount of the attorney's fee without hearing proof and permitting parties to be heard in the matter. The allowance of \$500 to the administrator was made after proof was heard, and it will not be disturbed as it seems to be reasonable.

C. T. Baker, W. W. Clippinger and J. G. Hudson for appellant, Chas. Clark.

W. A. Burkamp for appellants, Cohoon, &c.

L. J. Crawford for appellees.

Appeals from Campbell Circuit Court.

Opinion of the court by Judge Barker.

William Ringo died testate, domiciled in Campbell county, Kentucky. By his will he devised his estate to certain-named trustees for the use and benefit of his six adopted children. By the eighth clause of the testament in question it is provided as follows: "When the youngest of my aforementioned adopted heirs arrives at the age of twenty-one, my executors shall divide all

of my estate, real, personal and mixed, among my said heirs, and my said executors shall convey to each of said children one equal sixth part of all my said estate. Should any of said heirs die before such division can be made, without having living issue at the time of such division, then, in that event, the share of the one so dying shall be equally divided among the survivors of my said heirs. When this division is made each of my adopted heirs shall take his or her share in fee simple. My executors shall not sell any of my improved or productive estate, but they shall preserve the same until the division thereof can be made as hereinafter directed."

Upon the coming of age of the youngest of the devisees, one of them, Charles Clark, instituted an action in equity in the Campbell Circuit Court, alleging that a division of the estate was impossible, and asking for a sale and division of the proceeds according to the terms of the testator's will.

Upon the day following the institution of the action by Clark, W. H. Dyer, who was then the administrator with the will annexed, instituted an action in the same court, setting up the terms of the will and the arrival of the time fixed therein for a division of the testator's estate, alleging that it could be divided among the six devisees, and asking the aid of the chancellor in making this division, and also praying for a reference of the case to the commissioner for the purpose of settling his accounts as trustee. Afterwards the court, upon motion, consolidated these two actions, and they were thereafter treated as one. The court appointed commissioners to divide the estate according to the terms of the will, which was done in a report which was confirmed without objection, and each of the heirs accepted without demurrer the estate assigned to him in the division, and that branch of the case came to an end.

In the settlement of his accounts the commissioner allowed to the administrator, in addition to the statutory commission, the sum of \$500 for extra services, which was confirmed by the court. The court also allowed to his attorney the sum of \$1,400 as a fee in representing the administrator in this action. Four of the six devisees accepted these allowances as just, and acquiesced in their payment out of the trust estate; two of them, the appellants, William Clark and Maud Cohoon, excepted to the allowances, and have brought the case to this court for a review of the judgment allowing them. William Clark also complains that the court erred in overruling his plea of abatement filed in the action instituted by the administrator, based upon the fact that the action instituted by him preceded that of the administrator, and that the settlement and division should have been made therein.

We think this objection immaterial on this appeal. Both actions were seeking for a division of the estate and a settlement of the trust, and this has been accomplished to the satisfaction of all the heirs, except as to the allowances made for services before mentioned. The right of the trustee to be allowed his costs, including a reasonable fee to his counsel, is not dependent upon the statute of contribution, but grows out of the very nature of the trust itself. The trustee has no beneficial interest in the trust estate, and it would be eminently unjust to require him, out of his own estate, to employ counsel to represent him in litigation concerning his trust, where he acts in good faith, and is chargeable with no wrong or laches; and this allowance, under these circumstances, is due him, whether he occupies the position of plaintiff or defendant in litigation involving the trust.

The case of *Thirlwell's Adm'r v. Campbell*, 11 Bush, 163, and all of the other cases cited by appellants concerning the allowance to appellee's counsel, involved constructions of the statute of contribution, and are not applicable to the case at bar.

In the *Encyclopædia of Pleading and Practice*, volume 22, page 211, it is said: "The court has the power to make an allowance to the trustee, or to his counsel, out of the trust funds, for counsel fees properly incurred for the benefit of the trust estate, and as a general rule, where trustees are entitled to costs out of the fund, they are also entitled to allowance for counsel fee."

And in the case of the *Matter of Holden*, 126 N. Y., 589, it was held that a court of equity has inherent power, independently of the statute, to make allowances to trustees and others acting in a fiduciary capacity, for all expenses, including counsel fees necessarily incurred in the faithful performance of their duties, but it has no power to make such allowances to any other class of parties independent of statutes.

In *Perry on Trusts*, section 894, the rule is thus stated: "The general rule is that trustees shall have their costs either out of the trust fund or from the cestui que trust, personally. If there is a fund within the control of the court, they may have their costs as between solicitor and client. \* \* \* So if it appears to the court by the pleadings, or otherwise, that they have sustained charges and expenses beyond the costs of suit as between solicitor and client, the court will order such further expense properly incurred to be paid to them."

And again, in section 899, it is said: "The general rule that trustees are to have their costs, applies whether they are plaintiffs or defendants." The same rule is announced in *Hill on Trustees*, pages 565-6. But while we are clearly of opinion that the counsel of the trustee should have been allowed a reasonable sum for his services out of the trust estate, we are not able to say that the sum of \$1,400 is reasonable, in the absence of any evidence on that question.

In the case of *Schneider v. Schneider*, 28 Ky. Law Rep., 1154, it is said: "It is, however, insisted for appellant that the judgment complained of was rendered without any proof being heard, or without any opportunity to appellant to introduce testimony as to what would be a reasonable fee."

"It seems to be well settled that under section 900 of the Kentucky Statutes that courts may, in actions for divorce and alimony, include a reasonable attorney's fee for the wife in the judgment for costs against the husband. The question of a reasonable fee must, like any other question, be determined by the evidence, as to which each party must have opportunity to be heard."

There is no difference in principle between the allowance of a reasonable fee to the attorney for the wife in a divorce case and the allowance to counsel for the trustee in a case like this; both actions are in equity, and the judge has the whole record before him in the one case, as in the other, and he is as capable of determining, from the record, the value of the services rendered by counsel in the one case as in the other; and we think it was error to have made the allowance without evidence as to the value of the services rendered.

We do not think that the court erred in allowing the administrator with

the will annexed \$500 for extra services. The case was referred to the commissioner for the purpose of hearing evidence on this subject, and reported that the sum of \$500 was reasonable for the extra services performed. There was evidence as to the extra services rendered, and we can not say that the court erred in making the allowance of the sum stated.

The judgment is reversed for the purpose of allowing evidence to be taken as to the value of the services rendered by counsel for the trustee, and for other proceedings consistent with this opinion.

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DOUGLASS, &c. v. DOUGLASS, &c.

(Filed May 6, 1903—Not to be reported.)

1. Decedents' estates—Claims—Husband and wife between them owned sixty-six acres of land, of which the husband owned thirteen and a half acres and the wife the remainder, and it could not be divided without impairing its value. The farm was occupied by them as a homestead during their lives, and by the wife after the husband's death. After the death of the wife C., one of the heirs, brought this action for a sale of the land and a division of the proceeds among their heirs. He also set up a claim for \$76.83 as due him for money paid for a certificate obtained by another at a tax sale, and asked that this amount be paid out of the proceeds. R., a brother, filed an answer, contesting the claim and setting up claim as owner of the thirteen and a half acres of land under a title bond obtained from his father many years before, and alleged that he had been in the possession of same continuously since. R. also set up a claim against his mother's estate, amounting to about \$400, for personal services rendered her for about five years before her death. The issues were made up and the suits consolidated and on submission the claim for services was continued until the succeeding term. C. was properly allowed his claim for taxes, and the claim of R., as owner of land purchased from his father, was properly denied, and the property was ordered to be sold as a whole and the proceeds divided.

2. Clerical misprision—The judgment was not a clerical misprision as it was proper to make an order continuing the claim as to personal services as it was not submitted for trial on that issue.

3. Continuance—Appellant was not prejudiced by the refusal of the court to grant him a continuance on the ground of absence of his attorney as he was ably represented by other attorneys.

Wood & Rice for appellants.

H. S. Robinson and W. L. Young for appellees.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Barker.

C. A. Douglass and his wife, Anne Eliza Douglass, between them owned a tract of sixty-six acres of land in Taylor county, Kentucky, upon which they resided; of this the husband owned thirteen and a half acres, upon which was situated the dwelling house and all of the improvements used in connection with the homestead; the title to the remaining fifty-two and a half acres belonged to the wife.

In 1885 C. A. Douglas died intestate, and his wife continued to occupy the homestead until her death, which took place several years thereafter.

After the death of the mother C. W. Douglass, one of the children and heirs at law of C. A. and Anne Eliza Douglass, instituted an action in the Taylor Circuit Court for the sale of the homestead interest and the division of the proceeds equally among the heirs thereto, of whom there were some ten or twelve in number. The petition sets forth that the land was not susceptible of division without materially impairing its value, and erroneously recites that the whole tract of sixty-six acres was the property of C. A. Douglass; it also contains the allegation that the land had been sold for taxes and purchased at the tax sale by J. R. Davis, who had obtained a certificate of purchase from the tax collector of Taylor county; that in order to redeem the property appellee had purchased whatever rights J. R. Davis had acquired under the tax sale, by an outlay amounting in the aggregate to some \$76.32; that appellee made no claim to owning the land in question under the tax sale, but held it for the joint benefit of himself and the other heirs of his deceased parents, only praying that out of the proceeds of sale there should be repaid to him the amount expended in the redemption, with 6 per cent. interest from the time the outlay was made.

In this proceeding all of the heirs at law of C. A. and Anne Eliza Douglass were made parties, and properly brought before the court, the nonresidents having attorney, and the infants having guardians ad litem appointed for them.

R. T. Douglass, a brother of appellant, filed an answer, contesting appellee's claim to be repaid the sum of \$76.32 expended in redeeming the land; denying that his father was the owner at his death of the thirteen and a half acres upon which the dwelling house was situated, and setting up a claim to owning it himself, under a title bond executed by his father to him on the 2d day of November, 1869, and alleging that of the purchase price he had paid in work and money \$250; he also claimed to have been in the actual, adverse possession of the land in question since the date of his purchase, and pleaded the statute of limitation as giving him a possessory title to it. All these allegations of ownership on the part of R. T. Douglass were properly put in issue by appropriate pleading. Within a short time after the institution of the action by W. C. Douglass, R. T. Douglass instituted an action in the same court, in which he set up the ownership by his mother at her death of the fifty-two and a half acres of land; its indivisibility without materially injuring its value, and sought therein to have it sold for division among her heirs at law; he also set up a claim against her estate for personal services rendered her by him during the five years immediately preceding her death, amounting to the sum of \$400, which he asked to be paid him out of the proceeds of the sale of the land.

In this second action all of the heirs at law of Anne Eliza Douglass were properly made parties, and brought before the court by appropriate proceeding. Afterwards these two cases were consolidated, and thereafter proceeded to judgment as one case. By an agreed order the allegations of the petition in the case instituted by R. T. Douglass were controverted of record. It has not been deemed necessary to minutely set forth the particular allegations of the pleadings in this case; it is sufficient to say that they properly presented the issue of the validity of C. W. Douglass' claim, to be paid out of the proceeds of sale, the sum of \$76.32, alleged to have been expended by him

in redeeming the land involved in this litigation, and the claim of R. T. Douglass to the ownership of the thirteen and a half acres upon which his father resided at the time of his death.

All the evidence having been taken, the case was submitted to the court, and a judgment rendered sustaining C. W. Douglass' claim, for the sum of \$76.32 expended in the redemption of the land from the tax sale, and decreeing that the sixty-six acres of land described in the petition be sold, and after refunding to C. W. Douglass the amount awarded to him, the proceeds to be divided among the heirs at law of C. A. and Anne Eliza Douglass, according to their respective rights; and further, that R. T. Douglas had no claim to the thirteen and a half acres to which he set up title except as an heir at law of his father, C. A. Douglass. The issue as to R. T. Douglass' claim against his mother's estate for services rendered to her was reserved, and the hearing thereof continued until the succeeding term of the court, for the purpose of allowing him to take proof on that issue; to all of which R. T. Douglass excepted, and prayed an appeal.

The appellant now contends that the lower court was guilty of a misprision by submitting the case prematurely. This contention is based upon the fact that by oversight the issue was not made up on his claim against his mother's estate until the term of the court at which the final submission of the action was had. There would be merit in this contention if the court had submitted the case on this issue, but the judgment specially reserved it, and continued the case for preparation thereon until the succeeding term. This reservation thoroughly protected appellant's rights in the premises, and he has no just ground for complaint at the court's action in regard thereto. The other issues had been made up more than sixty days before the term in which the submission was had, and there was no reason why the case should have been continued as to them any further. Nor did the court err in refusing to grant a continuance of the case to appellant because of the absence of one of his counsel, S. A. Russell. He seems to have been most ably represented by the counsel who appeared for him in this court, and we do not believe that any interest of his suffered by reason of the absence of the counsel named.

We think the evidence abundantly sustains the judgment of the chancellor in allowing the claim of C. W. Douglass for \$76.32. He appears in a very meritorious role in regard to it; he advanced the money for the benefit of his co-heirs in the estate of his father and mother, claiming no rights in the purchase of the tax title to the common property superior to theirs. As we understand it, there is little or no difference between the amount conceded by appellant to have been expended and that claimed by appellee; and even if the chancellor had erred in allowing appellee \$10 or \$15 too much, as claimed by appellant, his part of the overpayment would be so insignificant as to bring the matter within the maxim *de minimis lex non curat*.

The chancellor properly adjudged adversely to appellant's claim to the ownership of the thirteen and a half acres of land. The preponderance of the evidence shows that he never had any possession of it, adverse or otherwise, and without discussing the testimony in detail we are satisfied that the decree adverse to his title is amply sustained. We have not discussed the question of competency of the evidence, as we do not think that any substantial right of appellant was injured by the ruling of the court.

The evidence which is complained of is amply sufficient to uphold the finding of the chancellor, and the judgment is, therefore, affirmed.



## ALTEMUS, &amp;c. v. NICKELL.

(Filed May 7, 1903.)

**Title—Champerty—Warranty**—A patentee for a large boundary of land, which includes a smaller tract embraced in an elder patent, who sells same, gives a deed which is champertous as to the elder patent under which adverse possession is held. If the vendor making this champertous deed afterwards acquires title to any part of the land embraced in the elder patent his vendee under the former deed can not recover the after acquired title. His recovery must be based on a warranty, and as the deed was void and champertous, the warranty was void.

W. S. Pryor and D. D. Fields & Son for appellants.

Wm. Low and W. F. Hall for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge O'Rear.

Wm. H. Nickell was the patentee of a boundary of 34,800 acres of land in Letcher county. The patent was issued after other patents for smaller tracts had been granted by the State, covering in part the same land. To the extent of the laps of the elder and junior grants the latter, by statutory enactment and judicial interpretation, were void, and passed no sort of right to the junior patentee. (General Statutes, chapter 109, section 3, now section 4704, Kentucky Statutes; *Hartley v. Hartley*, 3 Met., 56; *Goosing v. Smith*, 91 Ky., 157.)

Wm. H. Nickell attempted to convey to Altemus and Jones the whole of the 34,800 acres without excluding the previously patented land within the boundary. Among the elder grants embraced in Nickell's patent was one then owned by G. W. Caudill, who was then in possession of his land, so the petition says. Thereafter Nickell acquired title from Caudill to the oil, mineral, coal, gas and mineral products, within the Caudill boundary, and took deed therefor. He has sold and conveyed the title so acquired to appellee. This suit is by the vendees of Nickell's first grantees, Altemus and Jones, against his last grantee, appellee, to quiet their title to the oils, gas, minerals, etc., contained within the Caudill tract, upon the theory that Nickell's after-acquired title inured to their benefit as warrantees under his deed.

Conceding the correctness of the general proposition that one who conveys with warranty land to which he has not the title, and afterwards acquires the title, will be held estopped to claim it as against his warrantee, and that it inures by the fact of his conveyance and warranty to his grantee, we come to consider whether the doctrine can be applied in this case. Caudill being in the adverse possession of the tract claimed by him at the time Nickell conveyed to Altemus and Jones, that conveyance, so far as the tract in Caudill's possession was concerned, was in violation of the champerty statute of this State. Section 210, Kentucky Statutes (re-enacting section 2, chapter 11, General Statutes, in force when the conveyance under consideration was made), reads, in part: "All sales or conveyances, including those made under execution, of any lands, or of any pretended right or title to the same, of which any other person at the time of the sale, contract or conveyance, has adverse possession, shall be null and void."

And section 216 (chapter 11, section 8, General Statutes) reads: "Neither party to any contract made in violation of the provisions of this chapter shall have any right of action or suit thereon."

This statute, without material alteration, has been in force in this State since 1824. The same policy had prevailed previous thereto, and indeed had come to us from our mother Commonwealth. This settled policy was one in behalf of the public. Its aim was "to protect bona fide occupants of land against vexatious litigation growing out of champertous contracts, which tend to generate suits that otherwise, in many cases, would never have occurred. So far as the parties to such contracts may alone be concerned it is not a matter of public concern whether the contracts be valid or invalid, legal or illegal. Neither their interests nor their rights were considered by the legislature; the peace of society and the repose of occupants were alone consulted by the statute. (*Cardwell v. Sprigg's Heirs*, 7 Dana, 38.) Not only are the sale and the conveyance prohibited, and declared to be void, but the further prohibition is added, that neither party to that transaction "shall have any right of action or suit thereon." The vice of the act is guarded against by making it absolutely ineffectual for every and any purpose.

The basis of the doctrine that after-acquired title attaches for the benefit of the vendee of one who has conveyed with warranty, but without title, is the warranty. In very ancient times, before the system of passing title by bargain and sale came into use, it was upon the implied warranty. But running through the treatises on the subject, it will be observed that a warranty must have existed in fact, or be supplied as a fiction, to support the reasoning by which the passing of title by estoppel was maintained. It must have been such warranty as runs with the land, and must have been attached to and have been a part of the deed of conveyance. (*Biglow Estoppel*, 386, et seq.)

If, then, the deed containing the warranty is void, every part of it must be ineffectual. To allow that the parties to a transaction prohibited as vicious might do, by indirection and circumlocution, that which they could not do directly, would be to bring a reproach upon the administration of the law. In the well-considered case of *Graves v. Leathers*, 17 Ben. Mon., 66 (opinion by Simpson, J.), it was observed that "under the construction which has uniformly been given to the statute by this court such deeds have been regarded as void, not only so far as the occupant of the land was concerned, but also as between the vendor and vendee."

The deed being void, so far as the land embraced therein, but then in the adverse possession of others, was concerned, its warranting clause was equally nugatory with its granting clause. It was ineffectual to pass title, then or thereafter. Vitality could not be imparted to it by the fraud of one of the parties, more than by his honest intentions. If the grantor was free to ignore his champertous deed, and to repossess himself of the property, even as against his vendee (*Crowley v. Vaughn*, 11 Bush, 517; *Cardwell v. Spriggs*, supra), he certainly could acquire from a stranger and hold a perfect title without regard to his own previous void deed.

It follows that the judgment of the circuit court, being in accord with these views, must be affirmed.

PEPPER'S EX'OR, &amp;c. v. PEPPER'S ADM'R, &amp;c.

(Filed May 7, 1908.)

**Wills**—Description of devised property—The testator, by the first clause of his will, devised to his brother, E., land described as follows: "The home farm on which I now reside, known as the Drenan farm;" also to the same brother all the personal property, after payment of the funeral expenses, and four specific legacies of \$100 each. The will further limits the devise to E., the home farm to E. for life, and at his death one-half thereof is to descend to the heirs of the testator. The testator also devises to his brother, G., for life ninety-five acres of land, and at his death to revert to the legitimate living heirs of the testator. E. qualified as executor, and two years thereafter filed a suit for a settlement of the estate and for a construction of the will, claiming that he was entitled to certain described property, and that his brother, J., was entitled to the balance of the estate to the exclusion of the nephews and nieces of the testator. The brother, G., died childless before the institution of the suit, which left E. and J. as the surviving brothers. E. further claimed that under the will he was entitled to the whole of the Drenan tract of 103 acres, and also to the 111 acres added to it after the date of the will; and also that he was entitled to the 100 acres, a part of the old Pepper farm, as part of the home farm described in the will. Pending the preparation of the case E. amended his petition and set up claim to half of all the lands, alleging that he and the testator were partners in the same, and that the title was conveyed to the testator in violation of his trust. The court adjudged that E. took under the will the whole of the Drenan farm, and the 111 acres adjoining it for life, and at his death one-half thereof; also the 100 acre tract and the ninety five acre tract reverted to the heirs of the testator. On appeal, Held—That the court erred in allowing E. to hold the tract of 111 acres as the intention of the testator was clearly expressed in limiting the rights of E. to the Drenan farm, and it is evident that he did not intend to give him a life interest in the 111 acres which was purchased after the making of the will. Held—That the court properly adjudged from the testimony that no partnership existed between the testator and E. in the ownership of the lands. Under the will E. was entitled to a life interest in the whole of the Drenan tract, and to a fee-simple title in one-half thereof; also to the whole of testator's personal property after paying the special bequests; and having paid out of said estate a debt owing by the testator as surety, he is entitled to whatever may be realized on said claim from the principal. He should not be credited in his settlement with the part of the taxes paid on his individual property for the years 1898, 1899, 1900, 1901. The balance should be credited on account of rents. The balance of the estate belongs to all the heirs of the testator.

J. P. McCartney, W. G. Dearing and J. D. Wyatt for appellants.

J. H. Power, G. A. Cassidy and B. S. Grannis for appellees.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Nunn.

On the 19th day of October, 1882, W. B. Pepper made and executed his will. In the month of February, 1897, he died. His will was probated in that month in Fleming county, the place of residence of decedent. The will, so far as applicable to this case, is as follows:

"1st. I will and bequeath to my brother, Enoch S. Pepper, the home farm on which I now reside, known as the Drenan farm; also I will and bequeath

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to the said Enoch S. Pepper all the stock that I may own at my decease, together with all crops, all farming implements, household and kitchen furniture and all the pertinances belonging to said farm; also I bequeath to the same brother (Enoch S. Pepper) all moneys, together with all the notes that I have at my decease, after the expenses of my funeral is paid and after my just and honest debts are paid, should there be any, and after the said Enoch S. Pepper shall have paid to my four nephews the following amounts:

"1st. I bequeath to Wesley Pepper, son of Joseph Pepper, \$100.

"2d. A. Wesley Clark, son of Thomas Clark, \$100.

"3d. Wesley B. Allen, son of John E. Allen, \$100.

"4th. Wesley B. McRoberts, son of Asa McRoberts, \$100.

"These amounts are to be paid to my four namesakes, of whom I have mentioned above, by E. S. Pepper, out of the amount I have willed to him, he, the said Enoch S. Pepper is to have and to hold all the property that I have bequeathed to him (except the amounts above mentioned) except the home farm, which he shall hold his natural lifetime and at his death one-half of the home farm shall go to my legitimate heirs, should there be any living at his decease, the other half of said farm, together with all the personalities that I have bequeathed to him, be at his disposal to will to whom he may see fit. To my brother, George F. B. Pepper, I will and bequeath the use of the ninety five acres of land that I bought of him (the said George F. B. Pepper), a few years ago; that he is to have the use and all the proceeds of said ninety-five acres of land his lifetime, and at his death I want the ninety-five acres to revert back to my legitimate then living heirs." \* \* \*

Enoch S. Pepper qualified as the executor of the estate, and on the 12th day of August, 1890, filed a petition in the Fleming Circuit Court against the heirs of the decedent, W. B. Pepper, for a settlement of the estate, and for a construction of the will, the executor, Enoch S. Pepper, claiming that under the will, and by a proper construction thereof, he was entitled to certain lands and personal estate, which will be hereinafter referred to, and that his brother, Joseph Pepper, was entitled to the balance of the estate.

The decedent, W. B. Pepper, was a widower and childless. His father and mother had died long prior to his death, and when he departed this life he left surviving him three brothers, to wit: Enoch S. Pepper, Joseph S. Pepper and George F. B. Pepper. He also left surviving him, in addition to the above-named brothers, three children of his deceased sister, Elytian Clark, and also three children of his deceased sister, Nancy Eumstatt, who are appellees herein.

When decedent made and published his will, and also at the time of his death, he lived on what is designated in his will as the "Drenan farm," and his brothers, Enoch S. and George F. B. Pepper, who were bachelors, lived with him.

When W. B. Pepper made and executed his will, in the year 1882, he was then the owner of three tracts of land, one of which was the Drenan farm, on which he lived until his death, as already stated, containing 108 acres; another tract of 100 acres, known as part of the old Pepper farm, and another tract containing ninety-five acres, adjoining the last-named tract. After making the will, and before his death, he purchased and received deeds of

conveyance for three other small tracts of land adjoining the Drenan farm, and containing in the aggregate about 111 acres.

When Enoch S. Pepper instituted this action George F. B. Pepper had died, and he instituted it in his individual capacity and as executor, and he construed the will to mean that the whole estate passed to his brother, Joseph S. Pepper, and himself, excluding the appellees, the children of his sisters, from participating in the distribution of the estate, claiming that the language in the will, "legitimate heirs," and "my legitimate then living heirs," sustained him in such construction. He further claimed that under the will he was entitled to the whole of the Drenan tract of land of 108 acres, and also to the 111 acres of land added to it after the date of the will, and also by the use of the words in the will "except the home farm which he shall hold," etc., he claimed the 100 acres of land known as part of the old Pepper farm.

After the parties joined issues, and had taken much proof, and in the year 1901, Enoch S. Pepper filed an amended petition, claiming that he and his brother, W. B. Pepper, had formed a partnership in the year 1867, and that they as partners owned the Drenan farm, and the three parcels so added to it, and afterwards, and during the same year, he filed another amended petition, in which he alleged that the partnership was formed in the year 1865, and that he and his deceased brother owned all the lands before referred to as partners, and that his deceased brother took the deed to all the lands in his own name and held same in trust. These amended petitions were controverted by answer. The depositions of a number of witnesses were taken, some of them for the purpose of helping to construe the will, appellants claiming that the terms thereof were ambiguous, and that by reason thereof such testimony was permissible. The court below excluded this testimony, and adjudged that Enoch S. Pepper took under the will the whole of the Drenan farm, and the 111 acres adjoining it, for life, and at his death one-half thereof was to revert to the heirs of W. B. Pepper, and that the 100-acre tract, and the ninety-five acre tract passed to the heirs at law of the decedent.

Appellants have appealed from this judgment, and appellees are here on a cross appeal from that part of the judgment giving Enoch S. Pepper the 111 acres of land adjoining the Drenan farm. Appellants contend that there is an ambiguity in the will as to the meaning of the words "home farm," and that these words do not refer to the Drenan farm, the home of the testator, but were intended to mean the 100 acre tract, part of the old Pepper place, and took several depositions to prove their contention. We can not agree with appellant in this matter. While the will is inartistically drawn, it is clear that the words referred to mean the Drenan farm, the home of the testator. The first provision of the will contains these words: "I will and bequeath to my brother, Enoch S. Pepper, the home farm in which I now reside, known as the Drenan farm."

The proof shows that the testator resided on the Drenan farm from the year 1867 until his death. It was his home farm, and in the language referred to he expressly says the Drenan farm is his home farm. But appellants contend that further along in the will the testator by the use of these words: "Enoch S. Pepper is to have and to hold all the property that I have bequeathed to him, \* \* \* except the home farm shall go to my legitimate

heirs, should there be any at my decease, the other one-half of said farm, together with all the personalty that I have bequeathed to him, be at his disposal, to will to whom he may see fit," evidently referred to the old Pepper place of 100 acres when he used the words "home farm."

This can not be, for the language just quoted does not pretend to devise or bequeath any land or property, but is used as an exception or limitation of what he had previously in his will bequeathed to his brother, and it is certain that no bequest of land to his brother, Enoch S., can be found in the will, except the "home farm, known as the Drenan farm." "Enoch S. Pepper is to have \* \* \* all the property that I have bequeathed to him except the home farm," etc. What land had he bequeathed to him except the Drenan farm, and why did the testator refer to it again? It was evidently for the reason that by the first clause he had given his brother the title to the whole Drenan tract, and he desires to limit the fee to one-half and the other half to a life estate. There is no escape from this conclusion. The language is plain, and not ambiguous.

This court is of opinion that language used by the testator, to wit, "my legitimate heirs," and "my legitimate then living heirs," were used in their literal sense and meaning, and applied to all the heirs of the testator at his death, and at the death of his devisees, Geo. F. B. Pepper and Enoch S. Pepper. There is not a word or sentence in the will indicating that it was the intention of the testator to limit it to his brothers.

This court, in the case of *Williamson v. Williamson*, 18 Ben Mon., 377, in discussing a similar question, said: "It is clearly incumbent on those who contend that the language of the testator is not to be understood according to its natural and literal meaning, to exhibit some solid and satisfactory reasons, drawn from the subject-matter of the devise, or its purpose and objects, the context, or from other provisions of the will, showing that the words employed in this clause are not to be understood in their clear, plain and literal signification."

There is not a word in the will which indicates that the testator meant by the words "heirs" or "legitimate heirs" to exclude any of his kindred or legal heirs after the life estate of Enoch S. Pepper and Geo. F. B. Pepper terminated.

The appellant took the deposition of several witnesses showing a partnership of some kind between testator and Enoch S. Pepper; statements of testator "that Enoch had as much interest and rights there as he had;" that he, Enoch, owned half of everything there, etc. But it is not shown by any witness or by any pleading or exhibit when the partnership was formed, to what extent or length of time it existed, what capital, if any, either of them had put into the partnership, what they or either of them had drawn out of the firm, if anything, or any proof showing that Enoch S. Pepper ever had any capital to invest in the partnership; nor was there any attempt to show or explain by the proof or any pleading why Enoch S. Pepper suffered and permitted W. B. Pepper to take the conveyance of each and every piece of land in his own name, and so hold it until his death, without any reference, in any deed or writing, showing, or even intimating, that he held the property in trust or otherwise than the fee-simple title in himself. And when we consider the further facts that Enoch S. Pepper lived with his brother, the

testator, when the will was made in 1882, and from that time until the death of W. B. Pepper in 1897, and both knowing that the Drenan farm was by the will given to Enoch S. Pepper; that in the will not a word nor an intimation exists indicating a partnership or any joint ownership of property, real or personal, but, on the contrary, referring to the property as his without any exceptions and reservations, and the further important fact that Enoch S. Pepper accepted the provisions of the will and became the executor in 1897, and continued as such until the year 1899, when he instituted this action, asking the court to construe the will, and when the pleadings were filed, and proof taken, and indications were that the court would not agree as to appellant's construction of the will; that in 1901 Enoch S. Pepper filed an amended petition, claiming half of the Drenan tract of land, and the adjoining 111 acres by reason of a partnership existing between himself and testator since 1867, and afterwards filed another amended petition, changing the date of the formation of the partnership from 1867 to 1863, apparently for the purpose of antedating the deeds to W. B. Pepper for the 100 acres old Pepper farm, and the ninety-five acre tract, and claimed that he owned half of them under this alleged partnership. In view of these facts we are of opinion that the circuit court was right in decreeing against appellant's claim of partnership.

We are of the opinion that the lower court erred to appellees' prejudice in construing the will, in this: That Enoch S. Pepper took under the will the Drenan farm and the 111 acres added to it, and purchased after the date of the will. We recognize the fact that a will should be construed to speak and take effect at the death of the testator unless a contrary intention shall appear by the will, and that, if possible, a will shall be so construed as to give to every word and clause some reasonable meaning.

The clause in controversy is as follows: "I will and bequeath to my brother, Enoch S. Pepper, the home farm on which I now reside, known as the Drenan farm; also I will and bequeath to the said Enoch S. Pepper all the stock that I may own at my decease."

Does this clause of the testator's will speak from his death, or "does a contrary intention appear?" As to the real estate devised, by the express terms it refers to the date of its execution, and as to the personal estate, by direct statement, it refers to the time of testator's decease, for in the one case he devised the "home farm upon which I now reside, known as the Drenan farm," and in the very next line he gives the same brother "all the stock that I may have at my decease."

It is conceded that at the date of the will testator's home farm, the Drenan farm, contained 103 acres, and evidently he intended to, and did, will to his brother this particular piece of property.

In Jarman on Wills, 332, it is said: "Another question is whether the enactment which makes the will speak from the death has the effect of carrying forward to that period words pointing at the present time. For instance, supposing the testator to bequeath 'all the message in which I now reside,' and that after making his will he changed his residence to another home belonging to him, which he continues to occupy until his death, does the act make the word 'now' apply to the home occupied by the testator at his death? It is conceived that the principle will not be carried such a

length, and that this would be considered as a case in which 'a contrary intention appears by the will,' for the reference is to a specific thing then in existence, and the words 'in which I now reside' are the only distinguishing terms of description."

It is not contended by appellants that any of the lands bought after the date of the will were ever the property or Drenan, or a part of the original tract, or were ever known as Drenan lands, but their contention simply is that as accretions to it, and under the statutory rule of construction referred to, the lands passed under the term "home farm on which I now reside." But to so hold the court must entirely disregard the last descriptive clause, "known as the Drenan farm," and regard it as surplusage, and without any meaning at all. Suppose the testator had been more exact in his description when he wrote his will, and had said: "I will and bequeath to my brother, Enoch S. Pepper, the home farm upon which I now reside, and bounded as follows," and had then proceeded to give the metes and bounds of the 113 acre Drenan tract, would any one contend that future acquisitions would pass under this devise, or that Enoch S. Pepper could hold under the will any land outside of the boundary given? We think not. Yet the descriptive words of the testator are as clear and strong as though he had given the metes and bounds. He knew when he wrote the will, and up to his death, what comprised the Drenan farm, and he described it in such manner as clearly to define his intention, which this court can not disregard.

It appears from the will that the testator devised to Enoch S. Pepper the real estate referred to, and all of his personal estate out of which his debts and funeral expenses, and four special devises of \$100 each were to be paid, and it appears from the record that testator's estate was bound as security on a debt to one Slack for appellee, Thomas Clark, and that Enoch S. Pepper paid this judgment. The court is of opinion that whatever may be realized on this claim should be returned to the estate of Enoch S. Pepper, for it was paid out of property willed to him.

On the settlement of accounts of Enoch S. Pepper, as executor, his estate should not be credited with that part of the taxes paid on his individual property for the years 1898-1899-1900-1901; the balance should be credited on appellants' account of rents, and not deducted from the personal estate willed to Enoch S. Pepper.

For the reasons indicated the judgment of the lower court is affirmed on the original appeal and reversed on the cross appeal and remanded for further proceedings consistent with this opinion.



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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

## KENTUCKY COURT OF APPEALS.

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LOUISVILLE & NASHVILLE R. R. CO. v. KIMBROUGH, BY, &c.

(Filed May 7, 1903.)

1. Railroads—Negligence—Jurisdiction—Infants—Guardians—Instructions—Appellee is an infant about thirteen years of age, apparently a waif, having neither father nor mother living who are known. He was riding on the steps of a Pullman car in Logan county, and was either thrown from them by some one on the train or fell from them and was injured, for which he brought this action for damages by a guardian appointed by the Logan County Court after the injury. It is insisted that the Logan County Court had no jurisdiction to appoint his guardian. Held—That there is no proof showing whether appellee is legitimate or illegitimate, or to show the residence of his mother if illegitimate. Under these circumstances the law will fix his residence in Logan county, and the county court of that county had the right to appoint his guardian under section 2015, Kentucky Statutes. On the trial appellant testified that a big fat man wearing a uniform pushed him from the step with his foot. After the employees on the train were introduced appellee failed to identify the man who pushed him off the steps. A verdict and judgment for \$1,550 damages for defendant resulted, from which this appeal is prosecuted. It is urged that the court improperly instructed the jury, and that the verdict is contrary to the evidence. Held—That it is doubtful whether the evidence sustains the verdict, but the court erred in giving an instruction which authorized the jury to find for the defendant if the news agent who was on the train on that occasion was neither in the service nor under the control of defendant; and if the jury shall believe that appellee was pushed or ejected from the train by the news agent, they must find for defendant unless they shall believe from the evidence that said news agent was one of defendant's employees in charge of and operating said train. Said instruction was misleading as there was no evidence to show that the news agent had anything to do with the operation of the train.

2. Pleading—The petition alleges that either the servants of the Pullman company or the servants of appellant pushed and kicked appellee from the moving train. Appellant answered without offering any objection to the

petition, or moving that plaintiff elect against which defendant he would prosecute the action. Appellant raises this objection the first time on appeal. Held—That by answering defendant waived the objection to the petition for misjoinder of actions.

W. F. Browder, J. C. Browder and E. W. Hines for appellant.

E. B. Drake for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee, aged about thirteen years, while stealing a ride on one of appellant's passenger trains, in Logan county, fell, or was pushed, from the steps of the rapidly moving car on which he was riding, and was severely injured. He had been a resident of Clarksville, Tenn., but had abandoned his home there (if it can be said that he had a home there) with the intention of making his home in this State. He was a waif, abandoned by his mother when he was about six months old, and his father is unknown. Whether his mother was living, or if living, where, was not shown. In his suit to recover damages from the railroad company, brought by his statutory guardian appointed by the Logan County (Ky.) Court after his injury, the first question presented was upon the jurisdiction of the Logan County Court to appoint the guardian, for the right of the guardian as such to maintain this action is denied.

Domicil is correctly defined as being either one of origin, of choice, or by operation of law. Every person must be assigned to one of these. So that the place of the residence of the father of a legitimate child, or if illegitimate, of its mother, at its birth, is its domicil of origin. As an infant is incapable of changing its domicil by choice (*Munday v. Baldwin*, 79 Ky., 121), it follows that wherever may be the domicil of its father, if it is legitimate, or otherwise, of its mother, controls. But where the child has neither legal father nor living mother, and where neither is shown to have maintained a domicil at any place, then it must follow that the child's domicil must be fixed by operation of law. If the mother's domicil was shown, the child's would be accordingly settled. But here is a waif, knowing nothing of its parents, and of whom nothing can be shown, stranded in a community within this Commonwealth. It probably has a certain right to property. Society is interested alike from motives of humanity and of policy in preserving to such one that which will likely save him from being a charge upon the public. The authorities of this State under its laws have taken charge of the person of this derelict, and committed him to the almshouse. They have fixed him a domicil, for the very good reason, in this case, that he appeared to have none other, and it was necessary that he have one, therefore, the law will make him one. The fiction of the law that his mother's domicil if living, or, if dead, her last domicile was his, should yield to the more practical fact that, being found a wanderer and an outcast, the law will take charge of him for his good and for that of the State; it will fix his status in the social state as affects his rights, the right of control of his person and the charge of his property. The State has "adopted" him, as it were: has fixed his residence, his place of abode. It is meet that it should, having thus taken charge of his person, whether with or without

his consent; also provide officials to take charge of and represent his property interests.

Our statute (section 2015, Statutes) Kentucky provides: "The court of the county in which the minor resides at the time of the appointment shall have jurisdiction to appoint his guardian."

We are of the opinion that the county court of Logan county, *prima facie*, had jurisdiction to appoint the guardian suing in this case.

The boy was riding on the rear steps of the Pullman car attached to appellant's northbound passenger train. The petition alleged that either the servants of the Pullman company or the servants of appellant pushed and kicked appellee from the moving train. It is now urged by appellant that the petition was defective in that it failed to state a cause of action against either of the defendants; that our Code provision (section 113, subsection 4), allowing charges in the alternative, did not extend to charging alternative defendants with a single wrongful act. (*L. & N. R. R. Co. v. Ft. Wayne Electric Co.*, 21 Ky. Law Rep., 1544.)

Without motion to compel appellee to elect which of the defendants he would prosecute, and without demurrer, appellant tendered an issue in the case. This objection is raised here for the first time. We hold that the defect, if it was a defect, was waived by failure to object before answering. (Sections 85-86, Civil Code.)

The verdict of the jury found for appellee \$1,550 in damages. Appellant relies upon these grounds for reversal, in addition to those already discussed, *viz.*, that the verdict is against the evidence, and error in instructions to the jury.

Appellee was the only witness who testified as to the manner of his having been injured. In his testimony he stated that between Guthrie and Russellville, about 9 o'clock at night, as he was sitting on the steps of the rear platform of the rear car of the train (which was the Pullman car), a person dressed in a uniform, having a blue coat and brass buttons, and a cap with writing on it, came out of the door, saw him and asked him what he was doing there. This person did not offer to molest appellee, but returned into the car and closed the door. Through fear appellee crept further down onto the bottom step, or the one next to it, and was crouching there, with his legs hanging down so that his feet struck the ties, when the person above described returned with another person, also wearing a uniform, including cap. The latter was described as being "a big fat man," who, appellee claims, placed his foot against him, without a word, and shoved, or kicked, him off the car. The train was traveling at thirty-five or forty miles an hour. Every person connected with the operation of that train, except the fireman and baggage-man, were introduced by appellant as witnesses. All of them, except one, testified that they had never seen appellee, and knew nothing of his presence on the train, or of his injury till afterwards. Appellee, on being re-examined after these witnesses, testified that none of them was the person who shoved or kicked him off the train.

Sharp, flagman on the train, testified that he went upon the rear platform to re-adjust a marker, a red light carried there, when he discovered appellee; that he was then hanging onto the hand bar and lower step of the car; that the side door of the vestibule was closed; that he asked appellee if he could

climb up onto the steps, and appellee told him he could not; that he pulled the signal cord to the locomotive, giving the emergency signal to stop, and went forward to inform the conductor of the situation; that the boy was so placed that the witness could not, with safety to his own life, at the speed the train was going, have taken hold of him and lifted him onto the car; that when he returned directly the boy was gone, and that the train ran about one mile and a quarter before stopping after the boy was first discovered by him.

The negligence complained of and sued for was not in failing to stop the train and rescue appellee from the peril of falling from an insecure, dangerous position, nor for failure to aid him in regaining his foothold on the steps, for he says (and he is the only witness who testified on that point) that but for the push or kick of the fat man in uniform he would not have fallen. This was the sole ground of negligence relied upon in the petition. Therefore, his whole case, as the pleadings now stand, depends on connecting this fat man with appellant as one in authority on that train, assisting in its operation, as one of appellant's servants. Whether baggagemen on trains and firemen wear uniforms such as described by appellee is not shown by the record. Whether it is a fact of such common knowledge that the courts should take notice of it is not at all certain. Such uniforms are not confined in their use by any means to trainmen. The only other person on that train who is shown to have then worn a uniform was the newsboy. He was not introduced as a witness. There was no evidence tending to show that the newsboy had any connection whatever, as a servant, with appellant, and of course, therefore, none that he had any authority whatever in the operation or management of the train. In the way the issue was formed it is doubtful if the verdict was sustained by the evidence.

The instructions are not subject to proper criticism, except the one given marked "O," as follows: "The court instructs the jury that 'if the news agent, who was on defendant's train on the occasion in controversy, was neither in the service nor under the control of the defendant, and even if the jury shall believe from the evidence that plaintiff was pushed or ejected from the train by said news agent, they must find for the defendant unless they shall believe from the evidence that said news agent was one of defendant's employes in charge of and operating said train.'"

As there was not a scintilla of proof that the news agent had any connection whatever with the operation of the train, or even that he was an employe of appellant, the instruction was misleading, and it was error to submit that question to the jury upon the state of the record.

For the reasons indicated the judgment is reversed and cause remanded, with directions to award appellant a new trial under proceedings not inconsistent herewith.

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COLUMBIA FINANCE & TRUST CO. v. BATES.

(Filed May 7, 1903—Not to be reported.)

1. Judicial sales—Inadequacy of price and surprise—Joint tenants—Appellant and appellee were joint owners of Tar Springs and each was anxious to become the sole owner, but they were unable to fix a price, and it was

agreed to have a suit to sell it. At the sale the property, which was worth about \$4,000, was sold by the commissioner to appellee for \$1,000. Appellant, in its exceptions to the sale, allege gross inadequacy of price; also misapprehension by an agent of appellant of conversation with attorney for appellee, which induced appellant not to have a representative at the sale to protect its interests. Said exceptions were overruled and the sale confirmed, from which this appeal is prosecuted. Held—That while this court will not set aside a judicial sale on account of mere inadequacy of price, yet when property worth about \$4,000 is sold for \$1,000 under circumstances showing surprise or unfairness as existed in this case, the chancellor should set aside the sale and require the bid to be started at the advanced price that party is willing to give.

2. Appraisement—No appraisement was necessary in this case as the sale was not for debt.

Helm, Bruce & Helm for appellant.

W. W. & J. R. Walls for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Settle.

Appellant and appellee being joint owners of the property known as the Tar Springs and tract of land upon which the same is situated, and unable to agree with each other as to the price upon their respective interests, instituted this action in the circuit court of Breckinridge county, where the property lies, to obtain a decree for its sale. The decree was duly rendered as prayed by the parties, and the property sold by the court's commissioner, appellee becoming the purchaser at his bid of \$1,000.

The sale was duly reported by the commissioner, and at the same term of the court exceptions thereto were filed by appellant, accompanied by a written offer and guaranty to start the bidding at \$2,500, if the court would order another sale of the property, and that it would take it at that sum if no higher bid should be made. The exceptions were overruled, and an order entered confirming the sale and directing the commissioner to execute a deed to appellee as purchaser. Appellant complains of the confirmation of the sale by the lower court, and has brought the case to this court by appeal. The objections to the confirmation of the sale presented by the exceptions are: That because of a misapprehension on the part of appellant, its officers and agents, as to the time of the sale, as to who was to attend it as appellant's representative, and as to the necessity for the presence at the sale of such representative, the property was sold at about one-third or one-fourth of its real value; and further, that there was no appraisement of the property before it was sold.

Numerous affidavits were introduced by the parties upon the trial of the exceptions, and while in some respects the evidence furnished by them was conflicting, taken as a whole it tends to establish the following facts, that it was the purpose of appellant's president and chief attorney to have a representative or agent of appellant at the sale to see that the property should sell for its true value; that one Ridgley Cayce was the person selected and instructed by appellant's president to attend and represent it at the sale, and that Cayce was prevented from being present at the sale because of a conversation which he had a short time before the sale with Hustin Quin, an

attorney, holding a position in the office of appellant's chief attorney, in which he understood Quin to advise him, as the representative of the chief attorney, that it would not be necessary for him to attend the sale, or represent appellant at that time. It can not be doubted that the sum bid for the property by appellee was grossly inadequate, for it appears from the record that the property was and is worth not less than \$4,000, and while mere inadequacy of price will not of itself authorize the setting aside of a decretal sale if the attendant circumstances of the sale are such as to indicate that there has been a sacrifice of the property, resulting from some surprise to or misapprehension on the part of one interested in the property, but for which he would have attended the sale and prevented the sacrifice by making the property bring its true value, it becomes the duty of the chancellor to order a resale. As said by this court in *Stump v. Mortin, &c.*, 72 Ky., 289, "there must be either fraud or misconduct in some one connected with the sale, some surprise or misapprehension on the part of those interested, or of the officer who conducts the sale, or some irregularity in the proceedings, or other circumstances attending, conducing to show unfairness, before the chancellor will refuse to confirm this act of the commissioner." \* \* \*

In *Morris v. McCadden, &c.*, 23 Ky. Law Rep., 539, it appears that exceptions were sustained and the sale set aside by the lower court upon the ground that the price was grossly inadequate, and that the sale took place at the time and in the immediate vicinity of a heated political meeting. In affirming the judgment of the chancellor this court said: "This court has often held that on account of the public interest in having purchasers at judicial sales secure in their purchases, it would not sanction the setting aside of such sales for mere inadequacy of price; on the other hand it has frequently held that where the attendant circumstances of the sale were such as to show that it was not a fair one, the added circumstances of inadequacy of price would be considered." In *Bean v. Hoffendorfer Bros.*, 84 Ky., 693, it is said: "Mere inadequacy of price, as has been frequently held by this court, is not alone sufficient to set aside a judicial sale, but when the price bid is greatly disproportionate to the actual value of the property only slight additional circumstances are required to justify and make it the duty of the chancellor to set it aside." \* \* \*

It is unnecessary to discuss the contention of appellant that the sale was invalid because of failure to appraise the property. There was no right of redemption, consequently no appraisal was necessary as the sale was not for debt. Although the guaranty of appellant that it will bid \$2,500 on the property in controversy if a resale is ordered is one hundred and fifty per cent. above what it was purchased at by appellee, such guaranty will not authorize a resale.

The courts of this State have never approved or adopted the rule of practice that has so long obtained in the chancery courts of England, to open the biddings and order a resale upon offer of an advance of 10 per cent. by the applicant and payment to the purchaser of his costs by reason of his bidding, but as, in our opinion, the sale made in this case should be set aside because of gross inadequacy of price, together with the surprise and misapprehension on the part of appellant, its officers and agents, whereby the sacrifice of the property resulted. Appellant should be required to make

good its guaranty by starting the bidding at \$2,500, and taking the property at that price if no better and higher bid is offered.

For the reasons indicated the judgment of the lower court confirming the sale and ordering the commissioner to convey the land to appellee is reversed and remanded, with directions to set aside the sale heretofore made, at appellant's cost, and order a resale in conformity with this opinion.

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MORAN v. VICROY.

(Filed May 7, 1903—Not to be reported.)

Damages—Evidence—Instructions—This was an action brought by appellant against appellee to recover damages for malicious shooting and wounding. A verdict and judgment resulted in favor of appellee, and appellant has prosecuted this appeal, urging that the court erred in admitting threats of appellant against appellee, running back several years; also erred in refusing an instruction offered by him. Held—That there was no error in admitting the evidence of threats as the rule is settled that upon the issue of self-defense, where there is evidence conducing to show that the plaintiff was the aggressor and made the first hostile demonstration against the defendant, evidence of previous threats and hostile demonstrations by him against defendant is always competent as tending to show that defendant was in peril at the time he shot, and that the plaintiff began the difficulty and his motive. The instruction offered by appellant and refused by the court, that the defendant could only shoot if he had no apparently safe means of escape from said impending danger, was properly refused. The instructions given properly presented the law of the case and the verdict will not be disturbed.

J. L. Chamberlain, W. D. Cochran and E. L. Worthington for appellant.

Wesley Vicroy for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Moran, brought this action against the appellee, Vicroy, for having maliciously shot and wounded him. The appellee admitted the shooting and wounding of appellant, but claimed that he did so in self-defense. The proof conduces to show that Moran and Vicroy owned adjacent farms; that Vicroy's servants were digging a gutter along the margin of the Maysville and Bracken Turnpike road in front of a gate leading into his premises for the purpose of putting in a culvert; that Moran, who lived nearby, went to the point where the culvert was in process of construction with a shot gun and warned Vicroy's servants not to extend the gutter below a certain point, upon the ground that it would interfere with his entrance. About this time Vicroy came out of his barn, about thirty-five feet away, and warned Moran to go away and let his hands alone; that Moran immediately stepped across the gutter in the direction of Vicroy, raised and cocked his gun, and that Vicroy immediately fired the shot complained of.

It is also in evidence that on the preceding day Moran had threatened to inflict personal violence upon Vicroy if he attempted to extend the gutter beyond the point indicated, and said to him that if he got out of his buggy that he would give him a thrashing at that time.

Upon the trial the court admitted proof of numerous threats made by appellant against appellee, running back for several years prior to the day of the shooting. The trial resulted in a verdict for the defendant. Appellant complains upon this appeal that the court erred to his prejudice in admitting proof of prior threats, and also in refusing to give an instruction offered by him, which told the jury "that they should find for plaintiff unless they believed from the evidence that when Vicroy shot he believed, and had reasonable grounds to believe, that he was in danger, and that he had no other apparently safe means of escape from said impending danger."

Upon the issue of self-defense, where there is evidence conducing to show that the plaintiff was the aggressor and made the first hostile demonstration against the defendant, evidence of previous threats and hostile demonstrations by him against the defendant is always competent as tending to show that defendant was in peril at the time he shot, and that the plaintiff began the difficulty and his motive. (Wharton's Criminal Evidence, section 757; Robertson's Kentucky Criminal Law and Procedure, section 223.) The instruction offered by appellant and refused by the court, that the defendant could only shoot if he had no apparently safe means of escape from said impending danger, has been frequently condemned by this court. By the third instruction the jury were told that "If they believed from the evidence that at the time Vicroy shot and wounded plaintiff he then believed, and had reasonable grounds to believe, that he was then in danger of loss of life or great bodily harm at the hands of Moran, then he had the right to use such force as was necessary, or as to him under all the circumstances seemed reasonably necessary, to protect himself from injury at the hands of Moran, and no more."

This instruction seems to fairly state the law.

Judgment affirmed.

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ALTEMUS, &c. v. ASHER, &c.

(Filed May 7, 1908—Not to be reported.)

1. Title—Pleading—In this action to quiet title to land, where the claim to land and growing timber is based on a deed which was made by their vendor before he acquired any title thereto, and they claim that the subsequent acquisition of title by their vendor enured to their benefit, Held—That this is true only where the claimant's deed contains a warranty of title, and in this action the petition failing to allege that the plaintiff's deed contained a covenant of warranty, the presumption will be indulged against the pleader and the petition adjudged insufficient.

2. Pleading—An exhibit filed with the petition can not help out an omission in the pleading to state a material fact.

W. S. Pryor and D. D. Fields & Son for appellants.

Wm. Low and W. F. Hall for appellees.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge O'Rear.

One W. H. Nickell, claiming to own as patentee a large boundary of about 4,800 acres of land, in Letcher county, sold and conveyed it by deed to J. B.



Altemus and Wm. D. Jones. Within the boundary so embraced in his conveyance were a number of tracts owned by others, whose titles were admittedly superior to Nickell's, because held under elder grants. Some years after Nickell's conveyance to Altemus & Jones he and one J. D. Cooley bought the standing timber on a number of the tracts, to which Nickell had not the title when he sold to Altemus & Jones.

Deeds were made to Nickell & Cooley conveying to them this standing timber. They have since sold and conveyed the trees to appellees. It is the contention of appellants in this suit to quiet their title to one-half of the timber named, and to obtain an injunction against its removal, that the after acquired title of Nickell, his one-half interest in the Nickell & Cooley purchase of timber, inured to the benefit of appellants, grantees of Nickell's first vendees. The circuit court sustained a demurrer to the petition.

It was not stated in the petition whether the conveyance to Altemus & Jones was by deed with warranty or not. We must, therefore, in construing the pleading against the pleader, assume that it did not. If one sells, and by deed conveys, land to which he had not the title, places his vendee in possession, and thereafter acquires the title, the after-acquired title inures to his grantee in the first named deed, provided that deed contained a covenant of warranty, general or special; or a covenant of seizin of title; but not otherwise. (Hermann on Estoppel, pages 787-789, sections 653-655.)

An exhibit filed with and referred to in a pleading will not be looked to to help out an omission in the pleading to state a fact material to the cause of action asserted. (Green v. Page, on rehearing, 80 Ky., 370; Huffaker v. National Bank of Monticello, 12 Bush, 291; Gebhard v. Garmier, 12 Bush, 325.)

In view of this conclusion we do not deem it necessary to notice the other questions argued.

Judgment affirmed.

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COTTRELL v. COTTRELL.

(Filed May 7, 1908—Not to be reported.)

Divorce and alimony—Appellee instituted this suit for divorce from his wife on the ground of abandonment. In defense the wife asked for a divorce "a mensa et thoro" and alimony and attorneys' fees. The lower court granted the husband's prayer for divorce, refused to allow the wife alimony, and allowed her attorneys a fee of \$25, from which she prosecutes this appeal. Held—That this court will review the action of the lower court in granting or refusing a divorce for the purpose of determining questions concerning alimony and allowances. The court properly granted the divorce on the application of the husband and refused alimony to the wife as she was in fault. The court will not disturb the allowance of attorneys' fee, although same was made without hearing proof. This objection can not be raised the first time on appeal.

Montgomery & Lee for appellant.

J. F. Askew and Victor F. Bradley for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Settle.

This action for divorce was instituted by the appellee against the appellant in the Scott Circuit Court upon the ground of abandonment. In the answer filed by her his right to a divorce was resisted by a traverse of the averments of the petition, and in addition she therein sought a divorce a mensa et thoro, claimed alimony of appellee, and to that end made her answer a counterclaim. Upon submission of the cause the chancellor rendered judgment granting appellee an absolute divorce, and refusing appellant alimony, but allowed her a fee of \$25 for her attorneys, to be taxed as cost and paid by appellee. From so much of the judgment as refused her alimony and limited the fee of her attorneys to \$25 she prayed an appeal, and the case is now before this court for review and adjudication.

We can not disturb the judgment of divorce, but may consider the entire record in determining whether or not the lower court erred in refusing appellant alimony, and in restricting the attorneys' fee to the sum named. From our examination of the record we are unable to disagree with the chancellor in the matter of granting the divorce sought by appellee, and as it could have been granted only upon the ground that appellant was the party in fault, of which there is sufficient proof in the record, it would seem to follow that her claim to alimony was properly disallowed. This court has time and again allowed the wife alimony in cases where the husband had sued for and been granted a divorce, but in all such cases it was shown that the wife was without fault notwithstanding the judgment of divorce in favor of the husband. This court has also decided that the wife is entitled to alimony, though the husband be granted a divorce, where it was obtained upon the ground that the parties had lived separate and apart without cohabitation for five consecutive years, for upon that ground the wife could also have obtained a divorce. But we are unable to recall any case in which this court has decided that the wife was entitled to alimony notwithstanding a judgment of divorce in favor of the husband, if it was satisfactorily shown that he was entitled to the divorce by reason of the fault of the wife. An examination of the following cases, which constitute but a small part of the number decided by this court in recent years, will, we think, sustain the views herein expressed, and serve in some sort to illustrate the many-sidedness of the law of divorce and alimony. (Newman v. Newman, 95 Ky., 383; Irwin v. Irwin, 20 Ky. Law Rep., 1763; Powell v. Powell, 24 Ky. Law Rep., 193; Parsons v. Parsons, 23 Ky. Law Rep., 223; Alderson v. Alderson, 24 Ky. Law Rep., 595; Turner v. Turner, 23 Ky. Law Rep., 370; Gooding v. Gooding, 20 Ky. Law Rep., 955; Lacy v. Lacy, 95 Ky., 110.)

The record in this case shows that appellant some years ago brought suit against appellee for divorce, which she withdrew upon his paying the costs and conveying to her a small tract of land; they then became reconciled and lived together until her abandonment of him more than a year before the institution by him of this action. She has and yet owns the land he conveyed to her, so notwithstanding the refusal of the lower court to allow her alimony in this case, she is not altogether penniless. Upon the other hand, he is shown to be nearing old age, has organic disease of the heart, and is by reason thereof and his great weight, and feebleness of health and body, wholly unfitted for labor of any kind. It is true that he owns something over 20 acres of land, but it is shown by the proof to be poor land, and

worth not exceeding \$10 or \$12 per acre; his personal estate is also of but little value, and, besides, four of the eight children born of the first marriage are infants, and dependent upon him for education and support.

The only other question to be considered is as to the refusal of the lower court to allow the additional attorneys' fee claimed by appellant and her counsel.

Section 900, Kentucky Statutes, provides that in a suit for alimony and divorce the husband is liable for a reasonable fee to the counsel of the wife as part of the costs where the wife is not in fault and has no estate. The court in construing this statute held that it is proper to allow the wife's attorney a reasonable fee in the character of cases named therein, but we are unaware that it has been decided that such allowance is proper where the wife is shown, as in this case, to be in fault and possessed of an estate of her own. (*Whitney v. Whitney*, 70 Ky., 520; *Williams v. Moore*, 18 B. Mon., 518; *Ballard v. Coperton*, 2 Met., 412.) It would seem, therefore, that appellant is not entitled to an attorney fee in this case, yet \$25 was allowed by the court to which no objection seems to have been made by appellee. It is, however, contended that the lower court erred in fixing the attorneys' fee without proof as to the value of the services rendered by them.

In *Schnider v. Schnider*, 23 Ky. Law Rep., 1154, it is said by this court that it is not proper for such an allowance to be made without the hearing of evidence as to the reasonableness of the fee claimed.

We apprehend that it is not the meaning of the opinion in that case that such an allowance if made without proof is void. In this case the depositions furnish no proof of the value of the attorneys' services, nor does it appear from the record that appellant or her attorneys offered, or requested to be permitted, to introduce such proof, either before or after the submission of the case, though it is shown that before the submission they entered of record a motion for the allowance. We think it was their duty to offer proof, but failing to do so, upon the submission the chancellor had the right, without suggestion to the contrary, to assume that the matter of the attorneys' fee was expected to be determined from the record alone. By their failure to offer, or introduce, proof as to the amount of their fee, we think, in all fairness, that the appellant and her counsel are estopped to make complaint for the first time, and in this court, that the fee was allowed by the chancellor without proof other than was furnished by the record.

Being unable to find in the record any error prejudicial to the rights of appellant or her counsel, the judgment of the lower court is affirmed.

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#### HENNING v. LOUISVILLE RY. CO.

(Filed May 7, 1903—Not to be reported.)

Street railways—Negligence—Appellant brought this action to recover damages for injuries alleged to have been sustained by the negligence of the motorman in starting the car before she had an opportunity to alight from it. A verdict and judgment resulted in favor of defendant, from which this appeal is prosecuted on the ground of error in not defining degree of care required to be exercised by appellee for the protection of its passengers. Held—That the court properly told the jury that it was the duty of defend-

ant to have exercised the highest degree of care which a prudent man would, under like circumstances, have exercised to afford appellant a reasonable opportunity to alight in safety. This was better than to have given an abstract instruction on the duty of defendant.

Bennett H. Young, E. C. Waide and Pryor & Sapinski for appellant.

Fairleigh, Straus & Eagles for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Chief Justice Burnam.

Appellant sought in this action to recover a judgment for damages for personal injuries which she alleges were due to the negligence of appellee's motorman in prematurely starting one of their trolley cars, on which she had been a passenger, while she was attempting to alight therefrom. A jury trial resulted in a verdict and judgment for the defendant. A reversal is asked upon the sole ground that the trial court did not properly define in its instructions to the jury the degree of care which the law imposed upon the appellee for the protection of its passenger. The instruction on this point reads as follows: "The court instructs the jury that it is the duty of the defendant to stop its cars long enough to permit its passengers to alight in safety when they reach their destination, and if they should believe from the evidence that at the time and place mentioned in the petition, the plaintiff was injured, and her injury was caused by the car on which she was a passenger being started before she could leave it in safety by the exercise of ordinary care, then the law is for the plaintiff and they should so find: Provided, She did not, by negligence, upon her part, contribute to cause the injury, and but for which she would not have been injured."

The only questions that the jury had to determine were whether or not the car on which appellant was a passenger stopped when she arrived at her destination long enough for her to alight therefrom with safety, and whether she exercised ordinary care in so doing. The court did not instruct the jury as to the degree of care due by a railway company to its passengers, but it did, in plain words, tell the jury what the duty of the defendant was under the particular facts testified to by the plaintiff, and on which she relied for recovery; and that it was negligence per se for a railroad company to have started their car without giving passengers who sought to alight therefrom time to do so with safety. The instruction complained of is more favorable to appellant than if the court had given to the jury an abstract instruction telling them that it was the duty of the defendant to have exercised the highest degree of care which a prudent man would, under like circumstances, have exercised to afford appellant a reasonable opportunity to alight in safety. This court has frequently approved instructions similar to that complained of. (*L. & N. R. R. Co. v. Rains*, 15 Ky. Law Rep., 424.) In our opinion the instruction properly defines the law of the case.

Judgment affirmed.

EVANS' ADM'R, &amp;c. v. EVANS, &amp;c.

(Filed May 12, 1903—Not to be reported.)

Decedent's estate—Waiver of rights of wife—E. died leaving his widow and five children and a child of a deceased daughter surviving him, all of whom were over twenty-one years of age. He left a valuable estate, consisting of both real and personal property. A few days after the death the widow wrote the county judge a note, in which she waived her right to administer on the estate, and requested that her son-in-law be allowed to qualify as administrator; she also stated in said note that she waived her rights in the property as widow, and agreed to accept a child's share. Afterwards a formal instrument to this effect was prepared for the purpose of being signed by all the parties, but some of the heirs refused to sign it. The widow afterwards brought this action, claiming her rights as widow, and stating that she being ignorant of her legal rights, was induced and persuaded to sign said instrument through misrepresentation, and asked that same be cancelled. The court granted her the relief prayed for, from which this appeal is prosecuted. Held—That the judgment of the lower court was correct as the widow could not waive her rights in the property without the consent of all the heirs, and they had not given their consent.

2. Husband and wife—Construction of statutes—The act of March 15, 1894, providing that the surviving widow shall have an absolute estate in one-half of the surplus personalty of her deceased husband repeals subsection 4, section 1403, Kentucky Statutes, which limited the rights of the widow to one-third of the surplus personalty where the deceased leaves issue.

Sweeney, Ellis & Sweeney for appellants.

Miller & Todd and Lucius P. Little for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hobson.

James R. Evans died a resident of Daviess county on April 5, 1899, leaving an estate consisting of something like \$6,000 or \$7,000 worth of realty and about \$20,000 of personalty. He left surviving him his widow, Nancy E. Evans, and five children, also one grandson, the child of a deceased daughter. Previous to his death there had been some talk in the family about the widow taking a child's part in the estate instead of the interest given her by law, and there is some evidence that the decedent requested this, although there is a conflict of testimony on the subject. On the Sunday after his death there was a meeting of the heirs at law at the house of the widow, and it was there agreed that appellant Neel should qualify as administrator, the widow declining to qualify, and also expressing a preference for a child's part in the estate. On the next day Neel and two of the sons went to Owensboro for the purpose of Neel's qualification as administrator. The county judge declined to allow him to qualify without a writing from the widow waiving her right. Thereupon they returned home and had the following paper prepared, which was signed by her and acknowledged before a notary public:

“Whitesville, Ky., April 12, 1899.

“E. P. Taylor, Judge Daviess County Court.

“Owensboro, Ky.:

“I, Mrs. Nancy E. Evans, widow of James R. Evans, deceased, hereby

waive my preferred right to administer on his estate, and ask that you appoint W. S. Neel to that position. I also wish to receive a child's part in the division of said estate.

her  
"MRS. NANCY E. x EVANS.  
mark

"Attest: JOHN KITTINGER."

Neel returned to Owensboro with two of the sons on the 18th and qualified as administrator. While there they went to see a lawyer and had him put in writing the terms of an agreement to be signed by the widow and children settling the estate. The writing is in nine paragraphs. The first three paragraphs, which are all that are material to the case before us, are as follows:

"The undersigned, the widow and all the children and heirs at law of James R. Evans, deceased, who recently departed this life intestate, domiciled in Daviess county, Kentucky, agree among themselves as follows: ,

"1st. W. S. Neel, whose former wife was and whose present wife is a daughter of the intestate, Jas. R. Evans, is to qualify in the Daviess County Court as the administrator of the said Evans. The other heirs, or some of them, will become the surety in his bond as such administrator.

"2d. The said James R. Evans died owing few, if any, debts, but such as he did owe can be readily paid out of the funds on hand, or which are easily available. The undersigned, who constitute all the heirs at law of James R. Evans, are over twenty-one years of age. They do not want any appraisement of his estate made. The undersigned heirs, and the widow of the intestate, propose among themselves to settle and distribute the personal estate of said Evans without cost or legal formalities.

"3d. The undersigned, Nancy E. Evans, who is the widow, renounces her right to claim as widow, but wishes to have herself considered and treated as one of the heirs; or, to put it in a more homely phrase, she wishes to take a child's part, and all of the children whose names are attached to this agree that she may do so. The said administrator, Neel, will promptly reduce the personal assets of the said Evans to cash, and distribute them among the parties in interest. As fast as he collects, or has in his hands cash for distribution equal to \$50 to each heir, he will distribute this among the heirs entitled to receive it. But in making such distributions, where any of the heirs are indebted to the estate, the sum distributed shall first be applied as a credit of the date of the distribution upon the debt which they may owe the estate. When all of the heirs have discharged their indebtedness then the distribution shall be in cash to each heir."

¶ They took the paper home, where it was signed by several of the children and by the widow, and it was then left there for the others to sign it. One of the daughters, Miss Dora Evans, was sick at the time, and when she got well declined to sign it. In this condition of affairs, and before the paper had been finally executed by all the parties, the widow, Nancy Evans, brought this suit to cancel it, and to recover her part of the estate as widow under the statute, alleging that she could not read or write; that her signature to the paper had been obtained by imposition, she being ignorant of her legal rights and not knowing that she thereby altered or diminished her interest in her husband's estate. The allegations of the petition were denied, and on final hearing the court decreed to her the relief sought.

It is earnestly insisted for appellant that the paper signed by the widow on April 12 relinquished her share in her husband's estate, and that this paper not being attacked in the petition, the judgment of the court is erroneous. But as will be seen above the paper referred to was addressed to E. P. Taylor, judge of the Daviess County Court. It does not purport to be a contract; it purports to be only a waiver of the widow's preferred right to administer on the estate and a request of the appointment of Neel. The concluding words of the paper are only the expression of a wish, and are no more than a reason for what precedes. The widow could not take a child's part except by consent of the heirs. None of them were parties to this paper, or bound by it in any way, and it did not bind the widow further than as a waiver of her right to administer on the estate.

In view of the age of the widow, the short time that had elapsed since her husband's death, her physical condition at the time, her inability to read or write, her want of counsel and ignorance of her rights, the court did not err in cancelling the paper April 13. The proof shows that she was in frail health; that she preferred to have what was set apart to her absolutely rather than a larger amount for life; that she had no idea what she was relinquishing and that she signed the paper because it had been gotten up by her son-in-law and her sons, supposing that they would not ask her to sign anything that she ought not to sign. By the statute she was entitled absolutely to one-half of the surplus personalty, amounting to about \$10,000; while by the contract she got only one-seventh of this, or less than \$3,000. Her life estate in one-third of the land was of more value than one-seventh of the land in fee, and was more desirable to her as she thus retained her home and the exempt property set apart to a widow. It is perfectly clear under the evidence that the old lady did not understand the sacrifice she was making, and the agreement not having been executed, and in fact never having been signed by all the parties, the court properly disregarded it. (*Johnson v. Corbett*, 5 Ky. Law Rep., 177; *Tennelly v. Tennelly*, 9 Ky. Law Rep., 850; *McHarry v. Irwin*, 85 Ky., 352.)

It is insisted for appellant that section 1403, Kentucky Statutes, subsection 4, to the effect that if the intestate leaves issue his widow shall have one-third of the surplus personalty, is not repealed by the act of March 15, 1894. (Kentucky Statutes, section 2132.) The latter act, however, provides that after the death of either the husband or wife the survivor shall have an absolute estate in one-half of the surplus personalty left by such decedent.

It also provides that all acts inconsistent with it are thereby repealed. One of the purposes of the act was to place the husband and wife on equality, and to give the surviving wife the same share in the husband's estate as the husband would have in her estate if he had survived her. The provision of the act is in conflict with the provision of section 1403, Kentucky Statutes, which had previously been in force, and repealed subsection 4 as well as subsection 3, substituting for them the rule that the surviving husband or wife should in all cases take one-half of the surplus personalty. It is also urged that the statute in force at the death of the intestate does not control. We held otherwise as to a widow's dower in *Helm v. Board*, 24 Ky. Law Rep., 1037. The authorities are also to this effect as to her rights in the personalty. (*Sneed v. Ewing*, 5 J. J. Marshall, 459; *Townes v. Durbin*, 3 Met., 352;

Temple v. Brittan, 11 Ky. Law Rep., 467; Swearingen v. Nash, 14 Ky. Law Rep., 735; 2 Bishop on the Law of Married Women, section 49; Cooley's Constitutional Limitations, 440.)

Judgment affirmed.

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STONE v. BURGE.

(Filed May 12, 1908—Not to be reported.)

Personal representatives—Conversion of funds—Appellant qualified as administrator of H., who died leaving appellee as one of three heirs, she being an infant at her father's death. A tract of land was afterwards conveyed to appellant, and appellee upon arriving at twenty-one years of age instituted this action to recover one-third of said land, alleging that appellant had either purchased same with funds belonging to her, or for her benefit. Appellant, in defense, claims that he purchased the land with his own money. The lower court being satisfied from the evidence that appellant had collected large sums of money belonging to his intestate which he failed to account for, and evidently invested the same in said land, taking the title to himself in violation of his trust and in violation of section 2353, Kentucky Statutes.

Thomas W. Thomas for appellant.

Wright & McElroy for appellee.

Jas. A. McKenzie for Nellie Moore.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Paynter.

Arch Howard died in 1895 intestate, leaving as his only heirs at law his daughter, Nannie H. Burge, a son, Ed. Howard, and a granddaughter, the only child of his deceased daughter, Virgie Moore. The appellant qualified as his personal representative. The intestate left some personal estate, choses in action and also a tract of land containing about fourteen acres. This land descended to the appellee, Ed. Howard and Nellie Moore. After the appellant had qualified as the personal representative Ed. Howard conveyed his one-third interest in the land to him. This took place while the appellee was an infant. She afterwards married H. H. Burge. After reaching the age of twenty-one she instituted this suit to compel the appellant to convey to her the one-third interest which had been conveyed to him.

The appellant defended the action upon the ground that he had used his own money in paying for the land. On the other hand, it is insisted that he used the money belonging to her to pay for it. The appellant claims that no estate had come into his hands except about \$200, which was to the credit of the decedent in bank, which was used in paying funeral expenses, for a tombstone, etc. The appellee claims that about \$2,800 went into his hands for her benefit. On cross-examination he admitted that he had collected two notes due the estate for \$400 each. He also admitted that decedent a short time before his death assigned a certificate of deposit of \$1,000 to him, which he afterwards collected and placed the proceeds to his own credit in bank.

The \$1,000 certificate was placed in the hands of the appellant for the ben-



efit of the appellee, or it was placed there for the benefit of the decedent.

As there is no issue here between the heirs of the decedent on this question, we forbear to express any opinion except to say that, in either event, a part of it belonged to the appellee. The appellant fails to show that he distributed any of the \$1,000 and the \$800 collected by him, except one hundred and thirty odd dollars, which he paid appellee. It is true he said that he paid her all her interest in it, but he fails to show how and wherein he did so. Besides, his conduct, as appears in this record, is not calculated to make us accept his statement without vouchers or satisfactory evidence of payment. There is no testimony in the record to show that the appellant had any money at the time this estate was placed in his hands. We are of the opinion that he paid for the one-third interest out of the money which came into his hands as proceeds of the certificates or notes, or both. In either state of the case he had in his hands belonging to the appellee a sufficient amount of money to pay for the land. Besides, the testimony is perfectly satisfactory that he bought the land for the appellee. He had the land conveyed to himself upon the statement that it could not be conveyed to the appellee because she was a minor, but said he would do so on her arrival at the age of twenty-one.

Section 2353, Kentucky Statutes, reads as follows: "When a deed shall be made to one person and the consideration shall be paid by another, no use or trust shall result in favor of the latter, but this shall not extend to any case in which the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or where the grantee, in violation of some trust, shall have purchased the lands deeded with the effects of another person."

It is insisted that, although it was the money of the appellee which appellant used in the purchase of the land, no trust resulted in her favor. She could not consent to the use of her money in the purchase of the land as she was a minor, therefore, she did not pay the consideration in the meaning of the statute. The statute expressly provides that it does not apply where the grantee in violation of some trust shall have purchased the land deeded with the effects of another person. The land was deeded to the appellant in violation of a trust, and he can not shield himself from a just demand of the appellee under the foregoing section of the statute. The guardian briefs the case for Nellie Moore, claiming that the trust resulted in her favor as well as the appellee. No appeal has been prosecuted in her behalf, therefore, there is no issue here for the disposition of the court.

The judgment is affirmed.

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BANK OF MOREHEAD v. ELAM, &c.

(Filed May 12, 1908—Not to be reported.)

Bills and notes—Sureties—Indulgence to principal—This action was brought on a note which appellees had signed as sureties. In defense they pleaded that they were released by indulgence to their principal for a valuable consideration received. Held—That the evidence fails to show that any indulgence was given the principal on account of any consideration received, and the sureties were not released thereby.

B. F. Day & Son for appellant.

W. W. McGuire and Finley E. Fogg for appellees.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Paynter.

On the 16th of July, 1900, S. J. Maxey & Son borrowed from the appellant \$500, for which they executed their note, payable four months after date, with J. M. Cottle and R. F. Elam as sureties. Including the days of grace the note matured November 19, 1900. After the note matured the appellant sent Maxey & Son a blank note to be signed by them and sureties for the purpose of renewing the note, and also a check drawn upon the appellant bank, to be signed by them (they having an account in bank) to pay the discount. Maxey & Son never asked the sureties to sign the note, nor did they send one to the bank in renewal of the one past due, or pay anything to have the time of payment extended unless the facts stated amount to that. Long after the note matured a check was sent to the bank and returned, because a stamp had not been placed upon it and cancelled. In returning the check the bank requested a stamp to be put upon the check and cancelled and returned.

The sureties endeavored to avoid a recovery upon the note upon the ground that the bank for a consideration had extended the time for the payment of the note without their consent. If this was not done, the sureties are liable upon the note. To show that this was done one of the members of the firm of Maxey & Son was introduced as a witness on the behalf of the defendant, who testified that he never had an interview with the officials of the bank in regard to the payment of the note or its renewal. He admitted writing a certain letter to the bank which shows that he did not send the check for the interest until March 1, 1901, and in which letter he said: "I have not been able to see the sureties on note. I will attend to it as soon as I am able to go and see the parties." He also admitted he wrote the bank a letter on February 14, 1901, in which he said that "he would reduce the note to \$250," and said "If you want to, you can fill out a blank check for the interest and I will sign and return, so that you can have the use of that." These letters show that Maxey & Son did not regard that they had any agreement with the bank to extend the payment of the note on account of the payment of interest, or otherwise. They were promising to reduce the amount of the note or renew it. The uncontradicted testimony of the cashier of the bank is that the check was never charged to Maxey & Son, and the time for the payment of the note was never extended. The letter which the bank wrote to Elam on March 15 shows that they were expecting a renewal of the note, and that Elam and Cottle would again sign. The statement made in that letter was not at all inconsistent with the bank's position in the case, because when the letter is read in the light of the facts proven it is clear that the check was returned to pay discount on the renewal note. There is no evidence that the bank ever agreed to accept a check as a consideration for the extending of the time of the payment of the past-due note. But Maxey's letter shows that he was expecting to renew the note, and the check which he sent was to be used for that purpose. We think that the defendants wholly failed to sustain their defense, and the court should have given peremptory instructions to find for the appellant.

The judgment is reversed for proceedings consistent with this opinion.

## HIGGINS v. STOKES, &amp;c.

(Filed May 12, 1903.)

Husband and wife—Statutes of limitation—In 1876 appellant, a married woman, owned the fee-simple title to a tract of land which her husband sold and conveyed to appellee, but appellant did not unite in said conveyance. The husband and wife at that time removed from the land, and appellee took possession thereof and has held it continuously since. The husband died in 1900, and appellant instituted this action in 1902 to recover possession of said land. Appellant pleaded as a defense the thirty years' statute of limitation; also the fact that plaintiff's cause of action accrued more than fifteen years prior to the 15th of March, 1894; and that her disability as a married woman was removed by the act of the 15th of March, 1894, and that under section 2506, Kentucky Statutes, her right to recover the land in controversy has been lost. Held—That said statute did not have the effect to deprive a married woman of the benefit of the statutes of limitation. No limitation runs against a feme covert by reason of a sale of her land by her husband until after three years after the removal of her disability, except under the thirty years' statute. The statute did not run against appellant until the death of her husband, and the answer was insufficient to prevent a recovery.

Robertson & Thomas for appellant.

D. G. Park and W. H. Hester for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action at law was instituted on the 4th of January, 1902, by the appellant, Martha Higgins, against the appellees, S. J. Mathews and Clint Stokes, to recover possession of the north half of lot No. 18 in the city of Mayfield, which she alleges was conveyed to her by the executors of her deceased father, John M. Gardner, in the division of his real estate among his heirs at law on the 14th day of April, 1868. She further alleges that at the date of this conveyance she was a married woman with several children; and that she and her husband immediately took possession of the property and lived upon it until December, 1876, when he, without her consent, and against her will, conveyed the lot to T. J. Reynolds by general warranty deed, in which she did not unite; and that shortly after the conveyance to Reynolds her husband moved her and her children from the property and surrendered the possession thereof to Reynolds, and that she continued to live with her husband as his wife until his death on the 18th of January, 1900; that the title to the property is still in her, and asked that she be adjudged the possession thereof. The defendants in the first paragraph of their answer deny that plaintiff is the owner of the lot sued for. In the second paragraph they plead and rely upon the thirty years' statute of limitation. In the third paragraph they allege that they and those under whom they claim have had and held the actual, adverse possession of the property described in the petition continually for more than fifteen years prior to the 15th day of March, 1894, and for more than three years thereafter; that plaintiff's cause of action accrued more than fifteen years prior to the 15th of March, 1894; and that her disability as a married woman was removed by the act of the 15th of March, 1894; and that under section 2506 of the Kentucky Statutes her right to recover the land in controversy has been lost.

The plaintiff filed a general demurrer to the third paragraph of the defendant's answer, which was overruled. Thereupon she filed a reply, in which she denied that her cause of action accrued more than thirty years before the filing of her suit. The defendants thereupon filed a general demurrer to the reply, which was sustained, and the plaintiff declining to amend, it was ordered that her petition be dismissed and plaintiff has appealed.

Section 2128, relied on to defeat recovery in this action, is as follows: "A married woman may take, acquire and hold property, real and personal, by gift, devise or descent, or by purchase; and she may in her own name, as if she were unmarried, sell and dispose of her personal property. She may make contracts, and sue and be sued, as a single woman, except that she may not make any executory contract to sell or convey or mortgage her real estate unless her husband join in such contract; but she shall have the power and right to rent out her real estate, and collect, receive and recover in her own name the rents thereof, and make contracts for the improvement thereof."

It is very earnestly insisted for appellees that as this statute clothes married women with the right to make contracts and sue and be sued as single women, that by necessary implication it repealed the statutes of limitation exempting women from its operation in three years after the removal of such disability. To support this contention we are referred to pages 239 and 240 of the 19th volume of the A. & E. Ency. of Law, 2d edition, and the cases there cited. The text referred to is as follows: "While there seems to be some conflict of opinion on the subject, the decided weight of authority is in favor of the view that the married woman's acts removing all the disabilities of married woman, and enabling them to sue and be sued, and to contract as if they were not married, repealed by implication the clauses in the statutes of limitations exempting such women from its operation, and causes the statutes to run against them as if they were single."

Numerous decisions from various courts are cited to support the text, but the following significant note by the annotator follows the citation of these cases: "The foregoing cases all deal with the proposition that the mere fact that a married woman could have brought her suit during coverture does not deprive her of the benefit of the exception in her favor in the statute of limitation. And this is the correct rule. There are few, if any, jurisdictions in which a married woman is not able to sue during coverture by her next friend, yet this power has never been held to affect the general exception, if the text, however, relates to a general and complete removal of disabilities not only as to suit but in other respects. In such a case there is room for the application of the maxim *cessante ratione lege, cessat ipsa lex*."

The statute relied on in this case does not remove all the disabilities of married women in the disposal of their real property. On the contrary, it expressly provides that "she may not make an executory contract to sell, convey or mortgage her real estate unless her husband join in such contract." Prior to the passage of the act of February 23, 1846 (Acts of 1845-46), it had been uniformly held that a husband could sell and convey the land of the wife so as to be operative during the life of the husband; and that consequently in such cases the wife's right of action did not accrue until the death of the husband. (Miller v. Shackelford, 38 Ky., 292; Butler &c. v. McMillan, 88 Ky., 41.) And whilst the effect of that act was to take

from the husband the power to sell his wife's real estate, it secured to him the power to rent it out for three years at a time and to receive the rents therefrom. It was held in *Rose, By, &c. v. Rose*, 20 Ky. Law Rep., 417, that in marriages occurring before the passage of the act the husband was not deprived of that right by the act of 1894, declaring that marriage should give to the husband no interest in the wife's property. Under this decision appellant's husband would have had the right to rent out and receive the profits of her real estate for not more than three years at a time during his life. Under section 84, which was one of the provisions of the Civil Code long prior to the passage of the married woman's act, a married woman could sue alone for the possession of her property, if her husband refused to unite with her. And section 2525 of the Kentucky Statutes, which has been a provision of the statute law of this State for many years, provides: "If a person entitled to bring any of the actions mentioned in the third article of this chapter, except for a penalty or forfeiture, was at the time the cause of action accrued an infant, married woman or of unsound mind, the action may be brought within a like number of years after the removal of such disability or the death of the person, which happens first, which is allowed to a person having no impediment after the right accrued."

In *Onions v. Covington and Cincinnati Elevated Railroad, Transfer and Bridge Co.*, 21 Ky. Law Rep., 820, was an action to recover damages alleged to have been sustained by the plaintiff from the operation of railroad trains in front of her property, the defendant plead the statute of five years' limitation, to which she replied that she was a married woman when the railroad track was located, and that her coverture continued until December 19, 1894. In that case, after a full consideration of the question, the court said: "Although a married woman, after 1876, might sue alone as to her general estate, she was by no means relieved of the disability of coverture; she was not only under the dominion of her husband, but he owned absolutely all her personal property. He might reduce to possession her choses in action, and he had the right to the use of her real estate, with power to rent it out for not more than three years at a time, and receive the rent. \* \* \* And that it would be contrary to the entire spirit of our laws to allow limitation to run against her during her husband's lifetime; that the legislature did not intend to do so is apparent from the broad language of the exception and the fact that it was brought over into both the revised and general statutes after the adoption of the Code, which empowered the wife to sue in her own name in certain cases."

And in *Branson v. Thompson*, 81 Ky., 387, it was held that no limitation ran against a feme covert by reason of a sale of her land by the husband until after three years after the removal of her disability, except under the thirty years' statute. We are, therefore, of the opinion that the statute did not run against appellant until the death of her husband, and that the court erred in overruling her demurrer to the third paragraph of the defendant's answer and in dismissing her action.

The judgment is, therefore, reversed and cause remanded, with direction to sustain the demurrer to the third paragraph of defendant's answer and for further proceedings not inconsistent with this opinion.

2430 CAMPBELLSVILLE L. CO. V. SPOTSWOOD & SON.

CAMPBELLSVILLE LUMBER CO. v. SPOTSWOOD & SON.

(Filed May 12, 1908—Not to be reported.)

\* Contracts—Agents—This action was brought by appellant to recover of appellee the price of a carload of lumber which was purchased by appellee subject to inspection by P., his agent. Appellant claims that P., the agent of appellee, waived the right to make the inspection and permitted the agent of appellant to load the car under his own inspection. Held—That there was no sale of the lumber to appellee as it did not come up to the terms of the contract, and P., as the agent of appellee, had no authority to waive the right of inspection.

Denton & Robinson for appellant.

O. H. Waddle for appellees.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the appellant for the purpose of recovering the sum of \$241.66, being the contract price of a carload of lumber which it claims to have sold and delivered to appellee at the agreed price of \$18 per thousand feet. The answer of appellee put in issue the sale of the lumber to them. The negotiations concerning the matter in controversy are contained in the following correspondence between the parties:

"Lexington, Ky., October 1, 1901.

"Campbellsville Lumber Co.,

"Campbellsville, Ky.:

"Gentlemen—Name us price on 4x4 common poplar; also 4x4 clear saps from your stock on the Southern Railway. Make price F. O. B. shipping point, and give us the name of the point.

"Yours very truly,

"E. R. SPOTSWOOD & SON,

"By ——— MILLER."

To which the following reply was made:

"Campbellsville, Ky., 10-2, 1901.

"E. R. Spottswood & Son,

"Lexington, Ky.:

"Gentlemen—In reply to yours 10-1 we quote you 4x4 com. poplar at \$18 per M. F. O. B. Somerset and Moreland.

"Yours respt.,

"THE CAMPBELLSVILLE LUMBER CO."

Appellee's second letter is as follows:

"Lexington, Ky., October 3, 1901.

"Campbellsville Lumber Co.,

"Campbellsville, Ky.:

"Dear Sirs—If you will notify me when it will be convenient for your man to load two or three cars of 4x4 com. poplar at Moreland, we will instruct our man there to take it up with him, so there will be no dispute about the lumber after it is loaded. Price to be \$18 F. O. B. cars at that point, as per your quotation of the 2d. Let us know when it will be convenient to take it up.

"Yours very truly,

"E. R. SPOTSWOOD & SON,

"By ——— MILLER."

CAMPBELLSVILLE L. CO. V. SPOTSWOOD & SON. 2431

• To which the following reply was made:

"E. R. Spottswood & Son,  
"Campbellsville, Ky., 10-4, 1901.  
"Lexington, Ky.:  
"Gentlemen—Yours 10-8 rec'd. We can load common at Moreland next week, and will so instruct our man to load as long as your man and our man can agree; we have no trouble elsewhere with our common.  
"Yours respect,

"THE CAMPBELLSVILLE LUMBER CO."

On October 7, 1901, appellee wrote the following letter:

"David Peyton,  
"Moreland, Ky.:

"Dear Sir—I am in receipt of a letter from the Campbellsville Lumber Co., stating they can load some of the common at Moreland this week, so long as our man and their man agree. See their inspector and load up two or three cars, and be certain and tally every board with their man, and do not let him get the best of you. Take nothing but a good grade of lumber. Let me know after seeing him when you can load it.

(Signed) "E. R. SPOTTSWOOD & SON,  
"By ——— MILLER."

Appellant instructed its agent, J. J. Watson, to have the cars placed upon the switch at Moreland, and to proceed with loading the lumber as long as he and the agent of appellee, David Peyton, could agree.

It appears that upon the morning when the loading of the lumber was to begin appellee's agent went to the lumber yard, and there had an interview with J. J. Watson; as to what was said in this interview the evidence is contradictory. Peyton states that he said to Watson that he would be unable to assist him in the inspection of the lumber on that day, as he had business which would prevent, but that if the loading was deferred until the next day he could take part in the inspection to be done. Watson, with several corroborating witnesses, states that Peyton told him to go on with the loading; that he could not be present, but that it would be all right, and he would accept the lumber as loaded by Watson.

After this conversation Peyton left, and performed no duty in inspecting the lumber. Only one car was loaded by the agent of appellant, and this was billed to appellee at Lexington. After this shipment appellant wrote the following letter to appellee:

"Campbellsville, Ky., 10-12-1901.  
"E. R. Spottswood & Son,  
"Lexington, Ky.:

"Gentlemen—Our man at Moreland writes us that he had the cars placed to load the com. poplar at Moreland, and Mr. Peyton told him to go ahead and load it. He loaded one car, and is waiting further orders. Will you accept his inspection on the balance, or send a wire to him on receipt of this whether to load the rest of it? His address is: J. J. Watson, Moreland, Ky.

"Yours truly,  
"THE CAMPBELLSVILLE LUMBER CO."

In the meantime, however, the car which had been shipped arrived at Lexington, and in the opinion of appellee fell far short of coming up to the grade

known as common; whereupon they wrote to appellant, declining to receive it at the contract price, but offered to receive and pay for it at its market value, this to be established by disinterested inspection. This proposition having been declined, appellee notified appellant that the carload of lumber was subject to their order.

The pleadings present the simple issue as to whether or not the carload of lumber shipped from Moreland to Lexington was purchased of appellant by appellees. For the purposes of this case it may be admitted that Watson's testimony as to what took place between him and Peyton, concerning the loading of the lumber at Moreland, is true. The evidence shows that Peyton was only the special agent of appellee, to inspect the lumber contracted for in the correspondence herein set out; he had no general authority to represent them in the matter of the inspection of lumber, and he had no power to waive inspecting the lumber in question, or to delegate to Watson the authority given to him in the premises.

While appellant may not have known the private instructions given to Peyton in his letter of employment, they did know that he was there to inspect the lumber, and not to waive its inspection for his principal. The very object of his employment, as shown by the correspondence between the parties hereto, was to protect his principal from injury arising from the loading of lumber inferior in grade to that contracted for; in other words, his employment, as appellant well knew, was for the purpose of preventing any after controversy in regard to the lumber purchased, and this could only be done by an inspection on his part as the lumber was loaded. That appellant realized that Peyton had no authority to waive the inspection of the lumber is shown by their letter of October 12, 1901, in which they recite to appellees Watson's conversation with Peyton, and that he had loaded one car, and ask whether they would accept his (Watson's) inspection of the balance. Had appellant not been aware of Peyton's want of authority to waive the inspection of the lumber this letter of inquiry would not have been necessary. The contract of purchase was based upon the inspection by Peyton, and as this did not take place, there was no sale. The shipment of the car to appellees was unauthorized, and they were not bound to receive it.

In the trial below a jury was waived, and the law and facts submitted to the court. As the conclusions reached by the judge are in harmony with the views of this opinion, the judgment is affirmed.

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ALBIN CO. V. FIRTH CARPET CO.

(Filed May 12, 1908—Not to be reported.)

Contracts—Compromise—In 1899 appellant purchased from appellee 100 rolls of carpet, to be delivered in installments of twenty-five rolls each. Appellee delivered twenty-five rolls, and failed to comply with its contract by delivering the remainder. A compromise was made, by which appellant released appellee from the delivery of seventy-five rolls of carpet, and appellee agreed to furnish appellant twenty-five rolls of carpet at the same price as the year previous. Part of these goods were delivered, but appellant refused



to receive or pay for them. Suit was then brought to recover the price for the first twenty-five rolls delivered, when appellant set up a counterclaim for damages for failure to comply with the first contract, claiming that the compromise was without consideration. Held—That appellant can recover nothing on its counterclaim as the compromise was based on a sufficient consideration.

Forcht & Field and O'Neal & O'Neal for appellant.

W. W. & J. R. Watts for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hobson.

Appellee, the Firth Carpet Co., is a manufacturer of carpets, and appellant, the Albin Co., is a dealer in Louisville. On June, 15, 1899, appellant signed an order for 100 rolls of carpet. The order was taken by appellee's drummer subject to approval. By the terms of the order twenty-five rolls of the carpet were to be delivered immediately, and the rest in installments of twenty-five rolls on the 15th day of September, October and November, 1899, respectively. When the order reached appellee it at once wrote appellant that it had accepted that portion calling for immediate shipment, and appellee, a few days later, replied, asking it to forward the carpet ordered for immediate shipment. This shipment was made. The other installments were not shipped, and appellant having failed to pay for the carpets shipped, in March, 1900, appellee's drummer again visited Louisville, and a compromise agreement in writing was made, by which, in consideration that the Albin Co. agreed to let off the Firth Co. from filling all of the order given the year before, the Firth Co. agreed to send twenty-five rolls of carpet designated by the Albin Co. at the prices at which they were sold in 1899. A part of these goods were shipped by the Firth Co. according to the contract, but the Albin Co. declined to receive and pay for them as agreed, and thereupon this suit was filed to recover for the twenty-five rolls of carpet which had already been shipped and received. By way of defense to the suit the Albin Co. pleaded as a counterclaim damages for the nonfulfillment of the original order as to the seventy-five rolls of carpet to be shipped in September, October and November, 1899. The case was tried before a jury, who found for the plaintiff.

The chief contention on the appeal is that the compromise agreement made in March, 1900, was without consideration. The original order was expressly taken subject to approval. While the Firth Co. had no right to accept the order in part and reject it in part without the consent of the Albin Co., still it might do so with its consent. The letter which the Firth Co. wrote expressly stated only that it had entered that portion of the order calling for immediate shipment. The Albin Co. made no objection to this, but, on the contrary, wrote the Firth Co. to forward the carpets ordered for immediate shipment. This correspondence left open the question whether the Firth Co. was to fill the order as to the other installments, and when it did not do so, there was at least ground for a difference in good faith between the parties as to their legal rights, and a compromise of such a dispute is based upon a sufficient consideration. Besides, the Albin Co. was under no obligation by the terms of the original contract to receive any rolls

of carpet in March, 1900, and the Firth Co. was under no obligation to ship any at that time at the original price. The compromise, therefore, upon the basis of the shipment of twenty-five rolls at that time at the original price was based upon a sufficient consideration, as it substituted for the original contract one of different legal effect; and after that contract was made, if the Firth Co. had broken it, the Albin Co. could have recovered damages only for the breach of that agreement, and not damages for the breach of the original contract, for that agreement was substituted by the parties for the original contract.

The instructions of the court were more favorable to appellant than the facts of the case warranted. Under the proof the court might properly have told the jury that the contract of March, 1900, was based upon a sufficient consideration.

Judgment affirmed.

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BELL v. CITY OF HENDERSON.

(Filed May 12, 1908—Not to be reported.)

Municipal government—Negligence—Appellee having permitted a citizen to construct a platform over a gutter in front of his place of business is bound to exercise the same degree of care towards keeping it in a safe condition for pedestrians as if it had constructed it, but it is not the insurer of its safe condition. In the present case a hole having existed in the platform for such a short time that the authorities did not know of its existence, and could not have known it by the exercise of reasonable diligence, the city was not liable for personal injuries that occurred by reason thereof.

John T. Handley and M. C. Givens for appellant.

John F. Lockett for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Burnam.

Appellant brought this action against the city of Henderson to recover damages for a personal injury alleged to be due to the negligence of the defendant, in that they permitted Norris & Lockett, hardware merchants, to erect and maintain a rotten and unsafe platform in front of their business house on First street, in the city of Henderson, extending from the curbing of the pavement across the gutter to the street beyond. Plaintiff alleged that on the night of April 3, 1902, as he was passing over this bridge or platform for the purpose of boarding a street car, his foot went through a hole in the platform, which resulted in spraining his ankle and permanently injuring him. The defendant, the city of Henderson, for answer, denied that they knew that the bridge or platform complained of was rotten or unsafe in any particular, or that it was in fact so, and say that it was erected and maintained by Norris & Lockett for their own convenience, without having asked or obtained the consent of the city authorities that it should be erected. They further allege that the hole in the platform, which occasioned the injury to plaintiff, had only existed for one day prior to the accident, and that they had no notice thereof.

The testimony is to the effect that the gutter in front of the business house

of Norris & Lockett was unusually deep, and that some time prior to the accident, with the full knowledge of the city authorities, they placed the platform across the gutter to enable them to receive and deliver goods from their storehouse; that on Friday evening, before plaintiff was hurt on Saturday night, a plank in the platform was broken; that the firm immediately ordered lumber to repair the break; that the city authorities did not know of this hole in the platform; that it was behind a stack of wire, and could not be seen by one passing along the pavement, but was visible from the street. Defendant's mayor and engineer, whose business it was to see after the streets, testify that they had no notice of the hole until after the accident. The circuit judge gave the jury a peremptory instruction to find for the defendant, and plaintiff has appealed.

It was the duty of the defendant to use ordinary care to keep its streets and alleys free from obstructions and in safe condition for persons traveling in the usual modes by day and night. When they permitted Norris & Lockett to erect and maintain a platform in the street, which was liable to be used by pedestrians passing from the pavement to the street, it was as much bound to see that it was kept in good condition as if they had erected it themselves. And their liability for defects in the platform is exactly the same as their liability for defects in any other part of the street. But a municipality is not an insurer against accidents to persons using its thoroughfares. It is not liable for injuries caused by defective streets in the absence of actual notice of such defect, or unless they have existed so long that notice or knowledge thereof should be imputed to them. And notice should not be imputed where the defects are of recent origin, and particularly where they are conceded in anywise. Whilst generally the jury should determine as a question of fact whether a city has such notice, yet where the facts are undisputed, and but one reasonable inference can be drawn from them, it becomes a question for the court to decide. (Smith's Modern Law of Municipal Corporations, sections 1545-1546; Elliott on Roads and Streets, sections 626-627; City of Covington v. Assman, 24 Ky. Law Rep., 415; Canfield v. City of Newport, 24 Ky. Law Rep., 2218.)

In the absence of actual notice of the defect in the platform which occasioned the injury, and the obscure nature of this defect, and the short time which it had been in existence, we are of the opinion that the city authorities can not be charged with lack of diligence in failing to discover it in time to have prevented the accident complained of, and that the trial court properly instructed the jury to find for the defendant.

Judgment affirmed.

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PORTER, &c. v. CITY OF CLINTON.

(Filed May 12, 1903—Not to be reported.)

Municipal government—Lien for improvement of sidewalks—This action was brought against appellants to enforce a lien for the reconstruction of a sidewalk in front of their property on Washington street in obedience to an ordinance of the city passed under authority of section 3643, Kentucky Statutes. The defense interposed is a denial that the sidewalk is one of the highways of the city. Held—That the evidence shows that Washington street

had been used and claimed as a highway by the public under a claim of right for more than fifteen years prior to the making of the sidewalk in question, and this in itself is sufficient to establish a public highway.

E. T. Bullock for appellants.

J. H. Shelton for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Parker.

This action was instituted by the city of Clinton, in the Hickman Circuit Court, for the purpose of enforcing a lien claimed by it for the sum of \$18, being appellants' proportion of the cost of making a sidewalk along the highway in front of their property.

Appellee is a city of the fifth class, and the law upon which it based its right to improve the highways within its boundaries is contained in section 3643 of the Kentucky Statutes, which is as follows: "The city council is hereby authorized and empowered to order any work they deem necessary to be done upon the sidewalks, curbing, sewers, streets, avenues, highways and public places of such city. The cost and expense incurred in constructing or repairing streets, avenues, highways, sewers and public places shall be paid out of the general fund of the city. The expenses incurred in making and repairing sidewalks and curbing shall be paid by the owners of the land fronting and abutting thereon, each lot, or a portion of a lot, being separately assessed for the full value thereof, in proportion to the frontage thereof to the entire length of the whole improvement, not exceeding a square, sufficient to cover the total expense of the work; but the owners of such property shall have the right to make such improvements, if they prefer doing so, instead of paying for same. Whenever any expense or cost of work shall have been assessed on any lands as herein provided, the amount of said expense shall become a lien upon said lands, which shall take precedence of all other liens, and which may be enforced by the contractor or city in accordance with the provisions of the Code of Practice."

In pursuance of this authority the city council of Clinton passed an ordinance, No. 32, which is as follows:

"The city council of the city of Clinton do ordain as follows:

"Section 1. That all sidewalks hereafter built in the city of Clinton shall be according to the following specifications:

"Those made of wood shall be built on three oak stringers, 2x5, not less than twelve feet long, the floor to be made of oak boards 1x6, to be fastened by two tenpenny nails in each and one in the middle of each board; that all brick walks hereafter built around the public square shall be made ten feet wide. At other places any property holder desiring to build brick instead of wood walk has the privilege of so doing. All brick walks to be made of hard red brick, laid herring bone on four inches of sand, sloping one-half inch to the foot."

In order that the special work involved in this case should be constructed, it is alleged in the petition that general order No. 2 was passed at a regular meeting of the city council of Clinton, by which the marshal was ordered to build new sidewalks along the highway in front of appellants' property, from the county jail to the top of the hill south of the town, and the mayor

HOLLINGSWORTH, BY, &C. V. PINEVILLE COAL CO. 2437

was directed to give the necessary legal notices to all parties living, or owning property, along the route of the proposed sidewalk. In pursuance of this order the improvement was duly and legally made, being about six hundred and sixty feet of sidewalk, at a cost of \$90, of which appellants' proportion amounted to the sum of \$18, for which appellee prayed a judgment awarding it a lien upon the property of appellants, which was described in the petition. The answer denied that the sidewalk in question was upon the highway, and alleged that it was wrongfully placed upon appellants' property without their consent, and denied the lien claimed by appellee. Without going into a minute analysis of the pleadings it is sufficient to say that they aptly presented for adjudication the issue of fact as to whether or not the sidewalk made was a part of one of the public highways of the city of Clinton. Upon this issue a good deal of evidence was adduced by both sides, and the chancellor decided it adversely to appellants. In this conclusion we concur.

A great preponderance of the evidence shows that Washington street, in front of appellant's property, had been used, and claimed, as a highway by the public, under a claim of right, for more than fifteen years prior to the making of the sidewalk in question, and this in itself is sufficient to establish a public highway; indeed it seems that the sidewalk involved in this litigation is a successor to the one along the same route, which had been there so long that it had become worn out, and required renewal. No objection seems to have been made by the appellants to the work being done during its progress, and we are of opinion that the testimony on this issue fully sustains the finding of the chancellor.

Wherefore, the judgment is affirmed.

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HOLLINGSWORTH, BY, &c. v. PINEVILLE COAL CO.

(Filed May 12, 1903—Not to be reported.)

Negligence—Master and servant—Appellant, a boy about fourteen or fifteen years of age, was employed by appellee as a trapper in one of its mines. He had just opened the doors to permit cars of coal to pass through when the draft put out his lamp, and being without matches to relight it climbed on the rear of a car to get one from the driver, and while passing over the car fell between two cars and was run over and seriously injured. In this action to recover damages from appellee the court gave a peremptory instruction to find for appellee. On appeal, Held—That the instruction given was proper as appellee was not liable for the injury, as appellant had left his post of duty and was not engaged in any duty required of him when injured. It was his duty to keep supplies of matches on hand to relight his lamp, and appellee owed him no duty when he was injured, and it does not appear that the driver knew of his presence on the car.

Jesse D. Tuggle for appellants.

J. R. Sampson and W. E. Cabell for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the appellant in the Bell Circuit Court for the purpose of recovering damages against the appellee for injuries received by him while in its employ, acting in the capacity of trapper. Upon the trial of the case, at the conclusion of appellants' testimony, the court, upon motion of appellee, instructed the jury peremptorily to find in its favor. From this judgment the case has been appealed to this court. The facts are these: Charlie Hollingsworth, a boy some fourteen or fifteen years of age, was engaged in the work of trapping for appellee. Appellee is a corporation operating a coal mine in Bell county, Kentucky. The traps of a coal mine are airtight doors across its shafts and entries for the purpose of regulating its ventilation. A trapper's duty is to stand at these airgates, and to open them when a train of cars passes, and to at once close them after the necessity of their being open has ceased to exist.

At the time of the injury complained of appellant was on duty at one of the traps in appellee's mine; a train of cars, loaded with coal, was coming out, and appellant, as was his duty, opened the door and permitted it to pass through. It seems that the opening of the trap produced a strong current of air, which, upon this occasion, blew out appellant's lamp, as it had frequently done before. Appellant, it appears, was without a match with which to relight it, and as the train of cars passed by him on its way to the mouth of the mine he climbed upon it from the rear, for the purpose of obtaining a light from the driver. While passing along on top of the cars, from the rear to the front, in order to reach the driver, he lost his balance, fell between the cars, was run over and badly injured. It was appellant's business to keep himself supplied with lamp, oil and matches, and he was not in the discharge of any duty he owed to appellee when he was hurt; on the contrary, he had left his post, in violation of the trust for which he was employed, and was engaged in doing a dangerous act, against which he had been warned. It was not contended that the driver knew of his presence on the cars, or that any act of his in any way tended to cause the accident which occurred. Appellant was out of matches, by reason of his own neglect to furnish himself with a supply sufficient to meet the contingencies of his duties as trapper.

There is no evidence in the record showing that appellee failed in any duty it owed to appellant; he had been engaged in the work of trapping for some time, and thoroughly understood it; he was not hurt in the performance of his work, but received the injuries complained of in doing an unauthorized act, entirely apart from his employment. This state of fact being shown on the trial by appellant's own evidence, the court correctly instructed the jury, at the close of his testimony, to find for appellee.

Wherefore, the judgment is affirmed.

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REED, &c. v. REED, &c. (No. 1).

SAME v. SAME (No. 2).

SAME v. SAME (No. 3).

SAME v. SAME (No. 4).

(Filed May 12, 1903—Not to be reported.)

1. Personal representative—Allowance to attorney—Contempt—Appellant, as executor, having administered a large estate, retained a balance of \$2,100

in his hands to await the termination of a contest of the will then pending. After the termination of the will contest he asked the court for an allowance to his attorney for services rendered in probating the will. The court made an allowance of \$300 attorney's fees, and gave the executor credit for only one-half of it. On appeal it is insisted that no attorney's fee should be allowed appellant as three of the heirs employed attorneys of their own. Held—That it was the duty of appellant to employ counsel to probate the will, and he can not be deprived of this right by the heirs employing counsel. They can employ additional counsel at their own expense. Five hundred dollars should have been allowed as a reasonable attorney's fee, and should have been allowed as a charge against the estate. Pending the litigation \$400 was paid into court which belonged to the executor individually, which the court refused to order paid over to him as he was in contempt for refusing to produce a picture of his father to enable copies to be made therefrom as directed by the court. Held—That as he was in contempt of court in not producing the picture, or giving a sufficient account of its absence, the court properly refused to grant any relief to him while thus in contempt of its orders. The chancellor will never hear a litigant who is in contempt of court or grant relief to him. He can renew his motion upon relieving himself of contempt.

2. Payment of money into court—The court erred in requiring the executor to pay into court a sum of money in his hands before distribution of same as he was amply solvent.

Bodley, Baskin & Morancy for appellants.

W. W. Thum and J. D. Reed for appellees.

Appeals from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hobson.

These four appeals are heard together. On the former appeal it was held that the executor was entitled to an additional allowance of \$500 over and above the amount allowed him in the circuit court, but in all other respects the judgment of the circuit court was approved. (Reed v. Reed, 23 Ky. Law Rep., 2186.) By that judgment the entire personal estate was settled, except about \$2,100, which had been held back by the executor, as an appeal had been taken from the order probating the will and was then pending in the Jefferson Circuit Court. On November 16, 1901, the will contest ended. The executor moved the court to make an allowance to him for his necessary expenses, including attorney's fee in the will contest; also to allow him commission on the sum received by him since the former judgment or then remaining in his hands. The court allowed him his commissions, but fixed the amount of his attorney's fee at \$300; and only allowed him credit for one-half of it. The court also, on March 4, 1902, entered an order requiring the executor to pay into court the amount in his hands, \$2,100.38. He superseded this order, and thereafter, on March 25, the court entered a personal judgment against him in favor of appellees for \$457.74 each.

The ground for requiring the executor to pay the money into court appears to have been that he was leaving the city for a trip to Texas, and it was apprehended that he might not pay over the money promptly, if ordered to do so before his return. He had distributed an estate of something like \$80,000. He was abundantly solvent, and we see nothing in the record to warrant the court in taking the estate out of his hands. An executor is entitled to

discharge the duties of his trust, and he should not be required to surrender the estate committed to him before a distribution is ordered unless for grave reasons.

It was the duty of the executor to defend the will contest and to employ counsel to maintain the will under which he was appointed. His counsel fees in this respect stand on precisely the same plane as any other necessary cost incurred by the executor. It is true the other three devisees served a written notice on him that they would employ their own counsel, and would pay no part of the fee of his counsel. If this was a case where contribution was sought by one devisee of another, then the case of *Thirwell v. Campbell*, 74 Ky., 168, would be in point. (*Sinms v. Birdsong*, 22 Ky. Law Rep., 1049; 21 Ky. Law Rep., 75.) But it was the duty of the executor to probate the will, and when an appeal was taken and the case was to be tried de novo it was his duty to employ counsel, and see that the will was probated. This duty the law imposed upon him, and he could not delegate it to the devisees. They could employ additional counsel if they saw fit, but the law required of him the exercise of ordinary care in the preparation of the case. His counsel fees, therefore, are as essentially a part of the cost of the settlement of the estate as the expenses he incurred in securing testimony. As to the amount of the fee a number of lawyers were introduced. Two fixed the amount of the fee at \$1,000, two at \$700 and two at \$500. No disinterested witness put it lower, and in view of all the facts and considering the amount of the estate, we can not, without disregarding the evidence, put the fee at less than \$500. We, therefore, conclude that the allowance to the executor for his counsel fees should be fixed at \$500, and should be paid out of the estate in his hands. (*Taylor v. Minor*, 90 Ky., 49.)

During the progress of the case \$400 belonging to the executor was paid into court. There was a picture of his father which was claimed by appellant as his own property. The circuit court, adopting the conclusion of his commissioner, held that this picture was not the property of appellant, but a part of the estate of his testatrix. Appellant and his three brothers all showed a great desire to have the picture of their father, and so the circuit court being unable to divide the picture between them and desiring to gratify them in the possession of the picture of their father, in view of their conflicting statements as to the ownership of this picture, directed three copies of it to be made, and that the four pictures should then be divided among the four brothers by lot, the cost of making the three copies to be paid out of the estate. To have sold the picture would have been to delay the settlement of the estate, and we did not see anything to be gained by this, and, therefore, on the former appeal we affirmed this part of the judgment, not perceiving that the rights of the parties were substantially prejudiced, as each of them would thus get his father's picture, which he seemed especially anxious to have. After the return of the case to the circuit court a rule was taken on appellant to produce the picture, so that the copies might be made. In answer to this rule he responded that the picture had been lost; how, he did not know, and he could not find it. The court sustained a demurrer to the response, and he failed to plead further, and being in contempt of court in not producing the picture, refused to grant his motion for leave to withdraw the \$400 in court coming to him.



The response of appellant to the rule was insufficient. He did not show that the picture had been lost without his fault, or that he had taken the proper care of it, nor did he show what he had done with the picture, or how it became lost, or why he was unable to state specifically about this. As he was in contempt of court in not producing the picture, or giving a sufficient account of its absence, the court properly refused to grant any relief to him while thus in contempt of its orders. The chancellor will never hear a litigant who is in contempt of court, or grant relief to him. He can renew his motion upon relieving himself of contempt.

The judgment requiring the executor to pay money in his hands into court and the personal judgment against him in favor of appellees are reversed and the cause remanded for further proceedings not inconsistent with this opinion. Appellants recover cost in first two appeals and appellees recover cost in the other two. The judgment on the third and fourth appeals is affirmed.

Judge Barker not sitting.

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BEELER v. CITY OF CLINTON.

(Filed May 12, 1902—Not to be reported.)

E. T. Bullock for appellant.

J. H. Shelton for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Barker.

This case being identical with the case of Mamie Porter, &c. v. City of Clinton, ante, 2435, decided May 12, 1902, except as to amount of claim, the judgment is affirmed for the reasons given in the opinion therein.

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EIDSON, CLERK v. FLOUNLACKER.

(Filed May 13, 1903.)

Municipal government—Mandamus—Appellee was a laundry agent holding a license from the city of Bardstown for one year, commencing on the 1st day of April, 1901, and running until the 1st day of April, 1902, and that on the 11th day of March, 1902, he paid to the treasurer of the city \$10, the license then prescribed by ordinance for transacting his business, and demanded that the clerk should issue to him a license for one year. The clerk refused to issue the license, whereupon appellee instituted this action for a mandamus to compel him to issue it. In the second paragraph of his answer appellant alleges the fact that appellee was transacting business under a license which had not expired, and in the third paragraph he states that the council had by ordinance changed the license fee from \$10 to \$25, and that the demand for the issue of the license on the payment of the \$10 fee was made for the purpose of defrauding the city of the amount to which it was entitled. Demurrers were sustained to the second and third paragraphs of the answer, and the mandamus was granted, from which this appeal is prosecuted. Held—That the court erred in sustaining a demurrer to the

second and third paragraphs of the answer, and in granting the mandamus. On the 28th of March, 1902, when this action was instituted, the ordinance imposing the license tax of \$25 was in operation, and the court had no authority under section 477, Civil Code of Practice, to issue the mandamus compelling a purely ministerial officer to issue to him a license in defiance of a law of the city, and the express orders of his superiors. Besides, he could not compel appellant to issue a new license to him before the expiration of the old one, as it was within the rights of the city to change the rate and increase the charge for licenses of this character.

R. C. Cherry and Geo. S. and John A. Fulton for appellant.

John D. Wickliffe for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, Lewis Flounlacker, asked in this suit that a writ of mandamus should issue against the defendant, W. T. Eidson, city clerk of Bardstown, to compel him to issue to him a license to do business as a laundry agent in the city. He states that on the 11th day of March, 1902, he paid the city treasurer \$10, the license tax imposed upon laundry agents by the city ordinances for one year, and took his receipt therefor, which he presented to Eidson and demanded that he should forthwith issue to him a license as a laundry agent, running from the 11th day of March, 1902, to the 11th day of March, 1903, but which he had without right refused to do. The appellant in the second paragraph of his answer to appellee's petition alleged that on the 1st day of April, 1901, a license as a laundry agent had been regularly issued to appellee for a term of one year from that date; and that this license was in full force and effect on the 11th day of March, 1902, when he demanded that a new license should be issued to him covering a part of the time for which he already held a license. And in the third paragraph of his answer he alleges that on the 11th day of February, 1902, at a regular meeting of the city council of Bardstown, there was offered and read an ordinance increasing the license tax upon laundry agents to \$25 per annum, and which was passed to the next meeting of the city council on the 9th day of March, 1902; that on that date the ordinance was passed and it was in full force and effect more than fifteen days before the expiration of appellee's license as a laundry agent, which had theretofore been issued to him; that appellee knew of the proposed pending ordinance and sought to renew his license on the afternoon of the day when it became effective to avoid the effect of this new ordinance and to defraud the city out of its proper and legitimate revenue; that he called the attention of the city council to the demand of appellee, and was directed by an order regularly entered upon the city records by the council not to issue the license, and also directed the city treasurer to return to appellee the \$10 which he had received from him through mistake; and that the treasurer did, before the institution of this suit, tender to appellee the \$10, which he refused to accept. Appellee demurred generally to the second and third paragraphs of the answer, which was sustained, and defendant declining to plead further, judgment was entered requiring appellant to issue the appellee a license to do business as a laundry agent from the 11th day of March, 1902, to the 11th day of March, 1903, and to reverse that judgment this appeal is prosecuted. Section 477 of the Civil Code de-

fines the writ of mandamus: "As an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law, and is granted on the motion of the party aggrieved or the Commonwealth when the public interest is affected."

When this action was instituted by the appellee, on the 28th day of March, 1902, the new ordinance increasing the license fee had become effective, and appellant had been notified by the city council, the governing authority of the city, not to issue licenses to laundry agents, and to appellant in particular, unless he paid a license fee of \$25 in compliance with the new ordinance.

"The remedy by mandamus rests upon the legal rights of the relator on the one hand, and on the legal obligations and duties of the respondent on the other, and can not be predicated solely upon the equitable rights and obligations existing between the parties.

"And will not lie to compel the performance of an act which is forbidden by, or contrary to, the provisions of a statute or ordinance, or to compel an inferior officer to do a particular thing which his superior in authority has lawfully ordered him not to do." (A. & E. Ency. of Law, volume 19, page 730.)

Whatever may have been the rights of appellee in the premises previous to the passage of the new ordinance on the 11th day of March, 1902, if he had in good faith complied with the conditions of the existing ordinance, it is clear that after the new ordinance became effective he could not, under the express language of the Code, resort to the writ of mandamus to compel appellant, a purely ministerial officer, to issue a license to him in defiance of the law of the city and the express orders of his superiors. At the date of the institution of this suit appellant had no power or authority to issue a license to appellee without there had been previously paid into the city treasury the sum named in the ordinance. And we are inclined to the opinion that as appellee at the date of his application for a new license already had a license authorizing him to do business as a laundry agent in the city to the 1st of April, 1902, he could not compel appellant to issue a new license to him before the expiration of the old one, as it was within the rights of the city authorities to change the rate and increase the charge for licenses of this character, and they could not, at the instance of a party who was already enjoying the privilege, be compelled to anticipate the expiration of his license and grant him a new one to do the same thing. (Weeder v. Arnold, 5 Okla., 588.)

The lower court erred in sustaining a demurrer to the second and third paragraphs of appellant's answer, and the judgment is reversed and cause remanded, with instruction to overrule the demurrer and for further proceedings not inconsistent with this opinion.

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FRANK v. FRANK, &c.

(Filed May 18, 1903—Not to be reported.)

Burnett & Burnett and Wallace Coulter for appellant.

Harris & Marshall for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Extension of response filed April 23, 1903.

We are asked by the appellant, Katie Frank (Bollinger), to extend the response filed on the 23d of April, 1903, to the petition of appellee (Clara B. Frank), for an extension of the opinion delivered herein on February 26, 1903, on the ground that counsel for appellee insist that there is no longer a valid judgment in favor of appellant for \$2,707.90; and that all that the appellant is entitled to, or can legally collect, is the uncollected balance of the pendent lite allowance, which was in arrears at the date of the original judgment. We have heretofore decided that the order of the Jefferson Circuit Court, dated December 1, 1900, and which vacated the judgment originally entered therein on the 15th of May, 1879, did not affect subsequently the judgment entered on the 17th day of May, 1897, in favor of appellant, Katie Frank (Bollinger), for \$2,707.90, with interest from May 17, 1897, and cost; and that this last judgment was still in full force and unaffected by the opinions of this court. That there may be no mistake as to what was decided, this addition is made to the response of April 23, 1903.

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GARDNER v. WHITE.

(Filed May 18, 1903—Not to be reported.)

Boundary—Agreement to establish—Appellant and appellee were neighbors owning adjoining farms, and disagreeing as to the location of the boundary line, agreed that a surveyor should locate and mark the line, which was done in the presence of the parties, and the agreement accepting it was executed by both parties and placed on the record. Afterwards appellant objected to it, and refused to permit appellee to place his fence on the agreed line. In this action to enforce the agreement, Held—That the disputed question as to the correct location of the line was a sufficient consideration to uphold the agreement entered into by the parties, and after the agreement had been fully executed it was binding upon the parties, and appellee is entitled to place his fence on the agreed line and take possession of the land up to that line.

E. T. Bullock for appellant.

R. T. Tyler for appellee.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant and appellee were neighbors, owning adjoining farms. They disagreed as to the correct location of the division line between their lands. To settle the dispute they agreed upon a surveyor, A. E. Brevard, to locate the true line, which he undertook to do. With both parties present, with such title papers as appear to have been necessary, he established and marked a division line between them, with which they then expressed themselves as satisfied. Thereupon they reduced to writing an agreement adopting the line so fixed as the true division line between them, which they signed, acknowledged and caused to be recorded in the proper county clerk's office. Later appellant undertook to retract his action, and to reject that of the

surveyor in fixing the agreed division line, and refused to permit appellee to place his fence thereon, hence this suit.

We are of opinion that the disputed question as to the correct location of the line was a sufficient consideration to uphold the agreement entered into by the parties fixing the line as a definite one, and that after the agreement had been executed fully, it was binding upon the parties to it.

Appellant's defense seems to be that there was a mistake made by the surveyor in locating the line, but we are unable to find that this is so.

The judgment of the circuit court adjudging the true line to be that fixed by Brevard, and requiring appellant to remove his fence and to suffer appellee to take possession of the land in dispute up to that line, is affirmed.

#### CINCINNATI TOBACCO WAREHOUSE CO. v. MATTHEWS, &c.

(Filed May 13, 1903—Not to be reported.)

Fraudulent conveyances—Husband and wife—Curtesy—Homestead—Appellant having a return of no property found on judgments against appellee, instituted this action in equity to set aside as fraudulent a deed of conveyance to his son and son-in-law of his interest as tenant by curtesy in a large tract of land which belonged to his wife, then deceased, for the recited consideration of \$500. The court refused to set aside said conveyance, from which this appeal is prosecuted. Held—That as appellee had married his wife before the present statute affecting the property rights of married women, his right by curtesy existed, which was worth about \$1,500, and the proof shows that said conveyance was made to those who were members of his own family, and was evidently made with the intent to defraud creditors. The appellee should be permitted to set up his claim of homestead, and the property sold and appellee paid \$1,000 as the value of his homestead, and the overplus applied to appellant's debts.

J. T. Simon and Simon & Bailey for appellant.

Berry & Webster for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Settle.

Appellant having obtained judgments in the Harrison Circuit Court against appellee, W. N. Matthews, one for \$694.50, with 6 per cent. interest from November 13, 1895, and costs, subject to credits of \$50, paid May 18, 1897, and \$64.65, paid January 5, 1898, the other for \$200, with 6 per cent. interest from October 8, 1894, and costs, and having caused executions to issue thereon, which were returned wholly unsatisfied, instituted this action in equity in the same court to set aside a deed made by appellee, W. N. Matthews, to his son and son-in-law, the appellees, Geo. C. Matthews and W. H. Daugherty, whereby he conveyed to them, for the recited consideration of \$500, his interest as tenant by curtesy in the several tracts of land described in the deed, aggregating 290 acres, situated in Harrison county.

The conveyance was attacked upon the ground of fraud, it being alleged in the petition that the deed was without consideration, and that it was executed with the fraudulent intent upon the part of both grantor and grantees to hinder, delay and prevent the former's creditors, and especially

the appellant, from collecting their debts held against him. The separate answers of appellees deny the fraud alleged, and upon the issue thus formed depositions were taken by the parties, and upon the submission of the case judgment was rendered by the chancellor sustaining the conveyance and dismissing the petition, and this court is now asked to reverse that judgment. Though loath to reverse the chancellor upon a mere question of fact in an equitable action, this court has never refused to do so when satisfied that the judgment sought to be reversed is not sustained by the evidence, or is found to be against the weight of the evidence. The only question presented by the record in this case for our decision is as to the genuineness of the conveyance attacked. A conveyance from a failing or insolvent debtor to one who sustains to him a near relationship of blood or interest must necessarily be regarded with suspicion, and especially is this true if the consideration appears to be inadequate, or the possession and control of the property embraced by the deed of conveyance remains with the debtor. In *City National Bank v. Gardner*, 5 Ky. Law Rep., 689, this court declared that "where on the eve of insolvency of a debtor his entire estate or a greater part of it, is found in the name of his son, it requires proof of the most satisfactory character to establish the fairness of the transaction."

The 290 acres of land described in the deed from W. N. Matthews to his son and son-in-law seems to have been owned by the wife of the former, who died June 28, 1901. Their marriage took place long before the enactment of the present statute fixing the property rights of the husband in the estate of his deceased wife, and consequently the appellant, W. N. Matthews, took under the statute in force at the time of the marriage, and as there was issue born alive of the marriage, he became, upon the death of the wife, owner of an interest in the land as tenant by curtesy, and such was the interest attempted to be conveyed by the deed in controversy.

It appears from the evidence that one S. K. Lee, agent of appellant and entrusted with the collection of the notes upon which judgments were subsequently rendered against appellee, W. N. Matthews, went to see him about the notes a few days after the death of his wife, that is, about July 1, 1901, and asked him to pay them, but appellee said he did not know when he could pay them, and would fix no time for doing so; indeed he seemed to be wholly indifferent as to their payment. Lee, upon leaving, informed him that appellant would probably sue him on the notes, and suit was brought thereon July 12, 1901.

Lee says that appellee, W. N. Matthews, informed him that he then had thirty acres of tobacco growing on the farm, one-half of which was his. It will be observed from the reading of the deposition of W. N. Matthews that the statements of Lee are undenied by him except as to the quantity of the tobacco, Matthews saying that he told Lee that there were twenty instead of thirty acres of that crop; but whatever the quantity, he refused Lee's request to mortgage it to secure appellant's debt. An examination of the deed will show that it bears date July 10, 1901, and was acknowledged by the grantor before the clerk of the Harrison County Court July 19, 1901. So we find from the record that the debtor five days after being threatened with suit by appellant's agent, and two days before the suit was instituted, rid himself of all of his property by a conveyance thereof to his son and son-in-

law, the latter then living with him on the land conveyed. In addition it is shown by the evidence that the consideration named in the deed is grossly inadequate, for the interest conveyed is probably worth \$1,500, or, in any event, much more than \$500. Besides, there was no change of the possession or use of the land following the execution of the deed. It still remains, to all appearances, as much in the control and use of the grantor as if no deed had been made.

The tobacco grown on the place was all sold, and its proceeds, except a small amount paid to the son-in-law, Daugherty, seems to have been appropriated by W. N. Matthews. It is true he claims to have paid a few small debts, but from the personal estate of his deceased wife, and the sale of the tobacco, to say nothing of the proceeds of his interest in the land, if the sale thereof could be regarded as genuine, there apparently came to his hands a considerable sum of money, the disposition of which he has not satisfactorily accounted for, and certainly none of it was paid on appellant's debt. From his rapidly approaching insolvency, the great haste with which the land and personal property of the appellee, W. N. Matthews, was attempted to be disposed of after he received notice of appellant's purpose to sue him, the near relationship to him of the parties to whom the conveyance was made, his continued control of and use of the land after the date of the conveyance, and the gross inadequacy of the consideration recited in the deed, we are of opinion that the deed to his son and son-in-law was made with the fraudulent intent on his part to hinder and delay his creditors in the collection of their demands against him, and that the especial purpose thereof was to prevent the collection of appellant's judgment debts against him.

We are further of opinion that the grantees named in the deed, by reason of their acquaintance with the financial condition of W. N. Matthews, and of the circumstances attending the execution of the deed of conveyance, must be presumed to have known of his fraudulent purpose in making the conveyance to them. In any event the proof of fraud furnished by the record is of such a character as to place upon the transferees the burden of showing that the conveyance was without knowledge on their part of the fraud intended by the transferrer, and this they have failed to do. (*Harrison v. Calvert*, 23 Ky. Law Rep., 890; *Warden v. Cohen*, 23 Ky. Law Rep., 1149; *Huffman v. Leslie*, 23 Ky. Law Rep., 1981.)

The appellee, W. N. Matthews, does not set up claim to a homestead in this case, but as under section 1703, Kentucky Statutes, his right thereto is provided for because of his having survived the wife, it will be proper, if he so requests, to permit him to amend his answer to the extent of making good his right to such homestead, in which event his interest in the land in controversy may be sold, and if the price realized exceeds \$1,000, he will be entitled to that sum in lieu of the homestead, and only the excess over that sum should be subjected to the payment of appellant's debt.

For the reasons herein indicated the judgment of the lower court is reversed and cause remanded for further proceedings consistent with the opinion herein.

## CITY OF MIDWAY v. LLOYD.

(Filed May 13, 1903—Not to be reported.)

Municipal government—Negligence—Instructions—Appellee recovered a judgment for \$350 damages against appellant for negligence of the city in permitting an obstruction to remain on a sidewalk in said city, viz., a disc plow, against the beam of which appellee ran one night and sustained severe and painful injuries. On appeal errors in instructions given are relied on for a reversal. Held—That it was prejudicial error to instruct the jury that it was the duty of the city to use ordinary care to keep its pavements "safe" for the use of pedestrians, as the duty of the city goes no further than to use such ordinary care to keep its pavements in a reasonably safe condition for use. The second instruction is incorrect as it assumes that the projecting of the plow beam over the pavement was an obstruction per se. The jury should have been permitted to decide the fact as to whether the extent to which the plow beam projected over the pavement, under all the circumstances, did or did not leave the street at the time and at the place of appellee's receiving his injuries reasonably safe for pedestrians using the street with ordinary care. The court should have given to the jury an instruction offered, to the effect that if they believed from the evidence that the sidewalk at the time and place of the accident complained of was in a condition to be reasonably safe for pedestrians traveling thereon and exercising reasonable care, they ought to find for the defendant.

D. L. Thornton for appellant.

D. T. Edwards for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Settle.

The appellant, city of Midway, was sued by the appellee, James Lloyd, in the Woodford Circuit Court for \$5,075 in damages on account of a personal injury sustained by coming in contact with an obstruction, alleged to have been negligently permitted by the appellant to be, and remain, on one of the public streets of the city.

Appellant's general demurrer to the petition was overruled by the lower court whereupon it filed answer, traversing the averments of the petition, and in addition pleaded contributory negligence on the part of appellee, which latter plea was denied by reply. The trial by jury resulted in a verdict in appellee's favor for \$350 in damages, and appellant's motion for a new trial having been overruled it prosecutes this appeal to reverse the judgment of the lower court.

The injury to appellee occurred on the evening of the November election, 1901, about dark. He and a companion were hurrying, perhaps running, along one of the streets of the town of Midway, to obtain the election returns then about to be announced, when he ran against the iron beam of a disc plow, which stood in the street near the curbing, with the beam extended from twelve to eighteen inches over and upon the pavement, thereby bruising and injuring his leg to such an extent as to cause him to be confined to his bed for several weeks. At the point of the accident stone steps leading from a building there located projected into the pavement two feet and eleven inches opposite the plow beam, and as the pavement at that point was only about eight feet wide, there was left a space of from three and one-



half to four feet between the stone steps and the end of the plow beam for the travel of pedestrians. It further appears that there was a coal oil lamp on either side of the point of the accident, each being at a distance of thirty or forty feet therefrom, and both of which were giving light at the time appellee received his injury.

It appears from the evidence that this plow, or one like it, had been allowed to thus project over the pavement for several weeks, in the exact spot where it was located when appellee received his injury, and the evidence conduces to show that it constituted an obstruction, the existence of which had continued long enough for the officers of the town of Midway to have been informed of its presence, and if so, it was their duty to have required its removal by the owner. Upon the other hand, the officers, or such of them as were introduced as witnesses, testified that the plow did not obstruct the street, and that they did not know of its presence on the sidewalk. Though appellee's place of business was but a short distance from the plow, and he doubtless knew in a general way of its projecting over the pavement, he could hardly be expected to appreciate the danger of coming in contact with it, in passing it under such circumstances as attended his haste to receive the election returns. At any rate, the question of whether he was guilty of contributory negligence on the occasion of receiving his injuries, and also of whether the authorities of the town of Midway were guilty of negligence in permitting such an obstruction to be and remain upon the sidewalk, and the further question of whether the presence of the obstruction rendered the pavement at that point unsafe for travel, were matters which the jury had the right to determine from all the facts before them, under proper instructions from the court, and the only question presented by the motion and grounds for a new trial, which we regard it necessary to consider, is as to the propriety of the action of the lower court in the matter of giving and refusing instructions.

The clearest statement of the doctrine upon which municipal corporations may be held liable for such injuries as are here complained of is found in Dillon on Municipal Corporations, section 1006, where it is said: "The law does not require a municipal corporation to respond in damages for every injury that may be received on a public street. The corporation is not required to have its streets or sidewalks so constructed as to secure absolute immunity from danger in using them, nor is it bound to employ the utmost care and exertion to that end. Its duty, generally stated, is only to use due and proper care to see that its sidewalks are reasonably safe for persons exercising ordinary care and prudence."

Briefly stated, this rule only requires the municipality to use ordinary care to keep its streets in such a condition as will make them reasonably safe for persons traveling over them; it is also required of those using the streets that they shall exercise ordinary care, to avoid any and all obstructions that may be encountered by them upon the streets.

The following are the instructions given by the lower court in this case over the objection of the appellant:

"No. 1. The court instructs the jury that it was the duty of the defendant city to use ordinary care to keep its pavements safe for the use of pedestrians traveling thereon, and the jury are further instructed that it is the duty of

those using said pavements to use ordinary care to prevent injury to themselves while using the same.

"No. 2. If the jury believe from the evidence that the defendant negligently suffered and permitted the pavement on Gratz street, in Midway, to become and remain obstructed by the projection of the iron beam of a disc plow over a portion of said pavement, and shall further believe from the evidence that the plaintiff while using ordinary care for his own protection, came in contact with said iron beam, and was injured thereby, the jury ought to find for plaintiff in such damages as he has sustained thereby, not exceeding \$5,075, the amount claimed in the petition, and in fixing such damages, if any, they may take into consideration his mental and physical suffering, his loss of time, his expense for medical attention, and the diminution of his power to labor or earn money, if any; and unless the jury believe from the evidence that the plaintiff was injured by and through the negligence of the defendant, they ought to find for the defendant."

Other instructions were given which we think free of error, though formal objection was made to all the instructions by appellant at the time they were given. The two copied in the opinion are the only ones of which it now seriously complains. The first of these instructions is, in our opinion, incorrect because it told the jury that it was the duty of the appellant to use ordinary care to keep its pavements safe for the use of pedestrians, when its duty goes no further than to use such care (ordinary) to keep its pavements in a reasonably safe condition for use.

The second instruction is likewise incorrect, in that it assumes as a fact that the projecting of the plow beam over a part of the pavement was an obstruction per se, and such as would render the appellant liable whether the extension of such projection was one inch, a half inch, or eighteen inches, and without regard to whether or not it had continued long enough to charge appellant with notice of its presence. In other words, it eliminates altogether from the consideration of the jury the fact as to whether the extent to which the plow beam projected over the pavement, under all the circumstances, did, or did not, leave the street at the time and at the place of appellee's receiving his injuries reasonably safe for pedestrians using the street with ordinary care. It is not too much to say that appellant was entitled to have submitted to the jury the question of whether the pavement, notwithstanding the projection over it of the plow beam, at the time and place of the injury to appellee, was in a reasonably safe condition for the use of pedestrians passing thereon with ordinary care.

This court has in repeated decisions passed on this question. In the *City of Covington v. Asmon*, 24 Ky. Law Rep., 415, in which damages were sought to be recovered by Asmon of the city of Covington for injuries sustained from the stepping into a hole in the pavement caused by a missing brick, the court said: "In instruction No. 1, given to the jury, they were told that if a hole or depression existed in the sidewalk, with loose bricks lying about, and that appellee's injuries were received in consequence of such depression, that they should find in her favor, if they believe from the evidence that the defendant knew, or by the exercise of ordinary care could have known, of the existence of such hole or depression in the sidewalk long enough to enable them to have had it repaired before the date of appellee's

alleged injury, if they also believe that at the time of such injury appellee was exercising ordinary care in walking along the sidewalk. This instruction was erroneous and prejudicial because it did not submit to the jury for their determination whether the sidewalk at the time and place where the injury occurred was in a reasonably safe condition for the use of persons of ordinary care and prudence."

In the case of the City of Wickliffe v. Moring, 24 Ky. Law Rep., 419, the plaintiff recovered damages for injuries received by reason of a fall caused by a loose plank in the sidewalk. The following instructions given to the jury by the lower court were expressly approved by this court as containing the law on this subject: "If the jury believe from the evidence that the defendant's sidewalk, at the time and place at which plaintiff claims to have been hurt, was not in a reasonably safe condition and repair for use by the public, and that she was injured by reason thereof, and that the defendant, City of Wickliffe, through its mayor, councilmen, or street commissioner, had knowledge or notice of such unsafe condition of the sidewalk, or might have had knowledge, or notice thereof, by the use of ordinary diligence on the part of such officers, and that a reasonable length of time had elapsed in which it could have repaired said sidewalk after it received such knowledge, or notice, and before the injury occurred to the plaintiff, then the law is for her," etc.

"No. 2. Before the jury are authorized to find for the plaintiff in this case they must believe from the evidence not only that the sidewalk where she claims to have been hurt was in an unsafe and dangerous condition, and that she was thereby injured, but they must further believe from the evidence that the defendant had notice thereof, and failed to exercise ordinary diligence in making repairs."

To the same effect are the following additional authorities, all emanating from this court: City of Covington v. Johnson, 24 Ky. Law Rep., 602; City of Louisville v. Johnson, 24 Ky. Law Rep., 685.

Tested by the foregoing authorities, we are constrained to hold that instructions 1 and 2, given the jury by the lower court, were not only erroneous, but prejudicial as well. We are, however, unable to find any error in the court's refusal to give instructions asked by appellant, except that instruction "F," which was as follows, should have been given: "If the jury believe from the evidence that the sidewalk in the city of Midway, at the time and place of the accident complained of in the petition, was in a condition to be reasonably safe for pedestrians traveling thereon, and exercising reasonable care, they ought to find for the defendant."

This instruction, we think, presents an aspect of the law applicable to the case bearing upon the defense relied on.

We find no error in the admission or rejection of evidence by the lower court, but on account of error in the instructions specifically indicated herein the judgment is reversed and cause remanded, with directions to the lower court to set aside the verdict of the jury, the judgment entered thereon, and to grant appellant a new trial, and for further proceedings consistent with the opinion herein.

2452 GALVIN, &C. v. UNION CENTRAL LIFE INS. CO.

GALVIN, &c. v. UNION CENTRAL LIFE INS. CO.

(Filed May 13, 1903.)

Insurance—Forfeiture of policy—Payment of premium—On the 1st of February, 1900, S. made application to an agent of appellee for a policy for \$1,000 on her life, payable to her child. At the same time the agent accepted the note of her husband for the premium, payable four months after date, without any conditions whatever attached to same. At the same time there was delivered to the assured a receipt, denominated a "binding receipt," and on the 23d of February, 1900, a regular receipt was executed for same. In November following S. died, and the appellee refused to pay the policy, claiming that as the note was not paid at maturity the policy was, according to its terms, forfeited. In this action to recover the amount of said policy, Held—The clause in the policy providing for the forfeiture of the policy for nonpayment of any premium notes only applies to notes executed by the assured, and not to notes executed by third persons and accepted by the company for the premium. It was not intended that the assured should become guarantor for the payment of notes so accepted, and appellee can not avoid its liability on this ground.

W. W. Thum and Forcht & Field for appellants.

Burnett & Burnett and Robert Ramsey for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Nunn.

On the 1st day of February, 1900, Sallie E. Galvin made application to appellee's agent for a policy on her life, payable to her child, W. T. Galvin. When the application was signed by her the agent (Huggins) asked J. W. Galvin for his note, the amount of the first premium. Mrs. Galvin told him at the time that she had the money with which to pay it, but the agent took her husband's note for it, which is as follows:

"Louisville, Ky., February 1, 1900.

"Four months after date I promise to pay to the order of C. C. Early, State Superintendent Union Central Life Insurance Co., \$22.07, without discount or defalcation, value received, negotiable and payable at First National Bank, Louisville, Ky., with interest at 6 per cent. per annum. For premium on policy in said company.

(Signed) "J. W. GALVIN."

At the time of the execution of this note there was delivered to the assured a receipt, denominated on its margin "binding receipt."

When the policy was delivered the following receipt was also delivered to her:

"Premium, \$22.07. Union Central Life Insurance Co., Cincinnati, O.

"Received \$22.07, being the first premium upon policy No. 202,723, issued upon the life of Sallie E. Galvin, continuing said policy in force to the 30th day of January, 1901, at noon. This receipt is subject to the conditions of any and all notes which have been given, or may be given, for the amount of the said premium, or any part thereof. This receipt is not valid unless paid; also countersigned and dated the day of payment by C. C. Early, agent.

"C. W. HUGGINS, Agt.

"Paid at Louisville, Ky., this 23d day of February, 1900.

"E. P. MARSHALL, Secretary.

"CLEM W. HUGGINS, Agt."

On the left-hand margin of this receipt appears the following: "Agents are not authorized to grant permits, make or order contracts or waive forfeitures."

The assured, Sallie E. Galvin, died during the month of November, 1900.

The appellant, J. W. Galvin, as guardian for W. T. Galvin, brought this action against appellee to recover the amount of the policy, to wit, \$1,000. The appellee answered, denying that the first premium was ever paid, and averring that the policy lapsed, or was forfeited, by reason of the failure to pay the note, copied above, at its maturity, June 1, 1900. Issues were formed by the pleadings, a trial was had, and when the evidence was heard the court, on motion of the appellee, peremptorily instructed the jury to find for it. To all of which appellant objected and excepted, and the case is here on appeal.

The facts in addition to those stated are in substance as follows: "Doctor J. W. Galvin failed to pay the note at its maturity, and the appellee then treated the policy as void from that date, but some time in the month of July, 1900, J. W. Galvin entered the office of appellee in Louisville, Ky., and found one Rodman, the assistant superintendent, and one Reich, the bookkeeper, and called for his note, which was produced and paid, with interest to that date; when Early, the superintendent, entered and ascertained that the note had been paid he sent Rodman and Reich at once to the office of Dr. Galvin with the money, and offered to return it, and asked for the note; Galvin refused to accept the money or return the note. Appellee afterwards registered a letter to Galvin containing the money, and he refused to receive the letter. Before this payment of note by Galvin, and after it became due, and the policy forfeited, as claimed by appellee, Dr. Hood, the examining physician, had called on Sallie E. Galvin, at the instance of appellee, as claimed by appellant, and at the instance of appellant, as claimed by appellee, and made an examination of her with a view to the reinstatement of the policy. This examination or certificate was forwarded to the company at its home office, and the company refused to reinstate the policy and reported the fact to Early, its superintendent at Louisville, Ky. If the policy had been forfeited by the nonpayment of the note by J. W. Galvin when it became due, then the company had the right, under its contract, to refuse to reinstate the policy unless a certificate of health was furnished.

The record shows that between the issue of the policy and the last examination the assured, Sallie E. Galvin, had an operation performed and her uterus removed, and this fact was stated in the certificate, and it is presumed that this fact caused the company to refuse a reinstatement of the policy, but it was shown that she had recovered and was in good health at that time. This court is of the opinion that if the policy was forfeited by the failure of J. W. Galvin to pay the note when due, then the payment of it by him in July, under the circumstances stated, did not have the effect to revive or reinstate the policy. The money received by Rodman and Reich under a misapprehension of the facts, did not have the effect to bind the appellee. The question arises, was the policy forfeited by reason of the failure of J. W. Galvin to pay the note when due? The receipt copied contains this provision: "This receipt is subject to the conditions of any and all notes which have been given, etc."

From an inspection of the note it will be seen there is not a condition of any kind in it. The policy contains this provision: "The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes or interest upon notes given to the company for any premium on or before the days upon which they become due, shall avoid and nullify, etc."

We are of the opinion that the words "pay any notes, interest, etc.," refer to notes executed by the assured. Certainly the words can not be construed to refer to notes executed by third parties taken by the company and accepted in satisfaction of the liabilities of the assured. The appellee's counsel refer to two cases decided by this court which they claim are like this one, and settles this case in favor of the appellee. The cases are *Moreland v. Union Central Life*, 104 Ky., 129, and *Crutchfield v. Union Central Life*, 23 Ky. Law Rep., 2300. We can not accept the conclusion of appellee's counsel. In both of the cases referred to the notes were executed by the assured, and not by a third party. The note and receipt in this case and the note and receipt in the *Moreland* case are identical, except the note in this case was executed by a third party. In the *Moreland* case it was executed by the assured. The receipt in the *Moreland* case shows that the premium was paid by a note; in this case the receipt does not show that the premium was paid by a note. It is not reasonable to construe this contract as referring to notes executed by third parties making the assured guarantor for their prompt payment, and that the company will not be derelict in the collection of such notes, and if it should be the forfeiture of the assured's policy.

In this case the company took the note of J. W. Galvin for the first premium, bearing interest from its date, February 1, 1900, and on February 23 delivered the policy to the assured and the receipt herein copied, showing that the premium had been paid, which appears from this record to have been paid by the note of J. W. Galvin which had been drawing interest from the first of the month. This appears to have been beneficial to the company. By the acceptance of the note it made interest which it would not otherwise have made. On the facts as they appear in this record we are of opinion that the court erred in giving the peremptory instruction. There are other questions of minor importance appearing in the record, but we consider it unnecessary to discuss them.

For the reasons stated this cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

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ÆTNA LIFE INS. CO. V. KAISER.

(Filed May 13, 1903.)

Insurance—Suicide—Instructions—Appellee's husband held a policy of life insurance in appellant company, which contained the following clause: "If the insured shall, within one year from the date hereof, commit suicide, while sane or insane, \* \* \* this policy shall be null and void." Within about a month after the issuance of the policy the insured died from the effects of a pistol shot wound through the heart. This suit was brought on the policy, and appellant relied alone upon the defense of suicide. Appellant had the burden of proof, and introduced evidence showing that the deceased

had come to his mother's home, gone to the room he had formerly occupied, partly disrobed himself, called his sister to go for his mother and tell her to come to him. After his sister had gone but a few feet from the room she heard a pistol shot and returned, and found him lying across the bed with a mortal wound, from which he died. It further proved that the deceased's undershirt was powder burnt, and that when found lying across the bed the revolver was lying not far from his right hand, with one chamber empty and the other four loaded. Appellee declined to introduce any evidence when appellant asked for a peremptory instruction in its behalf, which was refused. The court gave an instruction to the effect that the jury should find for the plaintiff unless they believed that the insured shot himself with the purpose of taking his own life; but that if they believed from the evidence that he shot himself with the purpose and intention of taking his own life, then the law is for the defendant, and they should so find whether the insured at the time he shot himself was sane or insane. A verdict and judgment resulted for plaintiff, from which this appeal is prosecuted. Held—That the court properly refused to give said peremptory instruction. The rule is settled that where the circumstances are such as that they may well admit of two or more conclusions, either of which may be true, it can not be said that there is not a conflict of evidence within the proper significance of the term, for while the evidence might produce one conclusion in the mind of the judge as to the truth of the disputed fact, it might as well produce another and different one in the minds of the jury, and the instructions given fairly submitted the question at issue.

2. Evidence—The court properly refused to permit the coroner, who was a physician, to testify as to whether, in his opinion, the death of the insured was self-inflicted or not. The opinion of the witness as to the manner of the death of the insured is not a relevant fact. Expert evidence is not admissible to decide disputed questions of fact. A copy of the coroner's inquest offered was not competent evidence, nor were the proofs of death prepared and presented to the company competent as substantive evidence. Had any person who had made a statement in said proof been introduced as a witness the proofs might have been used to contradict him, or if the issue had been raised as to whether proper proofs had been furnished the company, the proofs filed would be competent on this issue.

Grubbs & Grubbs for appellant.

Harris & Marshall for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge O'Rear.

Appellee's husband, John A. Kaiser, Jr., effected an insurance upon his life with appellant in the sum of \$1,000 payable to appellee within sixty days after proof of death of the insured. The policy contained this provision: "If the insured shall, within one year from the date hereof, commit suicide, while sane or insane, \* \* \* this policy shall be null and void."

Within about a month after the issuance of the policy the insured died from the effects of a pistol shot wound through the heart. He was a young man, about twenty-two years old, had been married about six weeks, was apparently in good health, with no evidence of morbidity or insanity. He had recently lost his employment as a laborer in a printing establishment, but his employer had told him that he could return when he desired. He was shown to be indebted in an inconsiderable amount. His domestic relations

were shown to be pleasant. In the morning of the day of his death he borrowed a revolver from a friend with the statement that he was going to certain quarters of the city that evening to make collections. Directly afterward he went to his mother's home where he was in the habit of going about that hour every morning, passed his sister, and went to the room that he had occupied before his marriage. He removed a part of his clothing, called his sister to go for his mother, and tell her to come to him. After his sister had gone but a few feet from the room she heard the pistol shot, and upon immediately returning found him lying across the bed with a mortal wound, from which he died within a few minutes. There was no witness to the shooting.

In this suit by appellee upon the policy appellant relied alone upon the defense that the insured had, within twelve months from the issue of the policy, committed suicide while sane or insane. The issue was joined upon this defense, and was the sole issue in the case. Appellant had the burden of proof in the case, which consisted in showing the foregoing facts, with the additional detail that the deceased's undershirt was powder burnt, and that when found lying across the bed the revolver was lying not far from his right hand, with one chamber empty, and the other four loaded.

Appellee declined to introduce any evidence, when appellant asked for a peremptory instruction in its behalf, which was refused. The court gave in lieu the following instruction:

"Gentlemen of the jury: In this case you should find for the plaintiff in the sum of \$1,000, with interest from the 4th of May, 1901, unless you shall believe from the evidence that the assured, John A. Kaiser, Jr., shot himself with the purpose of taking his own life.

"But, if you shall believe from the evidence that he shot himself with the purpose and intention of taking his own life, then the law is for the defendant, and you shall so find, whether the said John A. Kaiser, Jr., at the time he shot himself was sane or insane."

The jury returned a verdict for the plaintiff. Appellant's principal contention upon this appeal is that upon the close of its evidence, which was the only evidence offered in the case, the court should have peremptorily directed a verdict for it. This argument is based upon the idea that the evidence showed conclusively that the death of the insured was self-inflicted, and that the attending circumstances with equal clearness indicated a suicidal intent. A very reasonable inference from the circumstances detailed in evidence is that the injury was self-inflicted, nor would it be unreasonable to further infer that the purpose was self-destruction. But these conclusions or inferences rather are by no means necessary from the proof and circumstances. They are at best but allowable.

The rule in this State governing the granting of peremptory instructions is that where there is any evidence tending to support the contrary side, or where there is a conflict of evidence upon the issue to be determined, such an instruction will not be given. As the evidence in this case was wholly circumstantial, it was clearly within the province of the jury to deduce from it such rational conclusions as might, in their judgments, be in harmony with the probabilities of the matter. Where the circumstances are such as



that they may well admit of two or more conclusions, either of which may be true, it can not be said that there is not a conflict of evidence within the proper significance of the term, for while the evidence might produce one conclusion in the mind of the judge as to the truth concerning the disputed fact, it might as well produce another and different one in the minds of the jury.

Here the defense, and the sole defense, was the affirmative plea that the insured had committed suicide. It was a plea in confession and avoidance. Unless it was sustained by proof sufficiently preponderating to convince the judgments of the triers of the fact, appellant must fail. The jury were not required to believe from the evidence that the death of the insured was caused from the accident or from his negligence, nor were they required to believe from the evidence that it had been inflicted by another. Unless the evidence was sufficient to satisfy them that the death was suicidal, their verdict must have been for appellee, for it was not material to her right of recovery that the jury should have been able to determine from the evidence, and satisfactorily to themselves say, what was the cause of his death. The insurer, the appellant, agreed to pay the sum insured in the event of the death of Kaiser while the policy was in force, unless within a year of its date his death was caused by suicide. Therefore, when appellee had shown the death of the insured during the time the policy was in force, she was entitled, as a matter of law, to recover the amount of the policy unless appellant could show that it was not liable because of one of the exceptions mentioned in the policy which relieved it from liability. Its mere failure, therefore, to satisfactorily show the existence of the exception was a failure of its defense, and justified appellee's recovery. (Jones on Law of Evidence, page 379, section 177.) In *May on Insurance*, section 325, it is said: "When the dead body of the insured is found under such circumstances and with such injuries that the death may have resulted from negligence, accident, or suicide, the presumption is against suicide, as contrary to the general conduct of mankind, a gross moral turpitude, not to be presumed in a sane man; and whether it was from one or the other, if there is any evidence bearing upon the point, is for the jury." (Supreme Lodge, &c. v. Beck, 94 Fed. Rep., 752; *Home Benefit Association v. Sargent*, 142 U. S., 697; *Phillips v. Louisiana Equitable Life Insurance Co.*, 26 La. A. R., 404.)

Where the evidence is circumstantial alone, and admits of more than one reasonable conclusion, it proves nothing. The court is of opinion that the peremptory instruction was properly refused, and that those given fairly submitted the question at issue.

The following questions of evidence are presented also on the appeal: The coroner, who was a physician, was introduced as a witness, and after detailing the appearance of the body as found by him, was asked by appellant whether, in his opinion, the death of the insured was self-inflicted or not. We hold that the opinion of the witness as to the manner of the death of the insured was not a relevant fact. Expert evidence is not admissible to decide disputed questions of fact, to establish by the opinion of expert witnesses whether the act under investigation occurred in this way or that. That was the exact question to be determined by the jury from all the facts and cir-

cumstances. (Jones on Law of Evidence, section 374; Manhattan Life Ins. Co. v. Beard.)

Appellant also offered in evidence a copy of the coroner's inquest, which it argues was relevant as tending to show the cause of the death of the insured. The verdict of the coroner's jury was that the deceased came to his death by suicide. We are of opinion that this was clearly incompetent, and was properly rejected. Another proposition was: Appellant offered the proofs of death made out by appellee, or on her behalf, and submitted to the company under the terms of the policy as a condition precedent to her right to claim payment. We are of opinion that this was not relevant as substantive evidence as to the cause or manner of the insured's death. Had any witness who had testified in the case been one of those who had made the statement in the proofs of death contrary to his testimony, it would have been relevant for the purpose alone of contradicting the witness and as affecting his credibility; but such was not the case; or if the issue had been made in the case that the requisite proofs of death had not been submitted as required by the policy, then of course these documents would have been relevant. They were properly rejected.

Failing to perceive any error in the record the judgment is affirmed, with damages.

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WHITE, &c. v. IRVINE.

(Filed May 14, 1903—Not to be reported.)

Wills—Trust—Where the testator devised a farm to his son, and in the provision giving same requests that his son, at his death without issue, should give same to his sister, the son could sell same and vest the purchaser with a perfect title without requiring the purchaser to look to the application of the purchase money. The will does not create a precatory trust.

D. J. White for appellants.

R. W. Miller for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hobson.

The only question in this case is whether I. Shelby Irvine takes an estate in the land devised to him by his father, David Irvine, which he can sell and pass a good title thereto to the purchaser, so that the purchaser will not be bound to see to the application of the purchase money. In *Igo v. Irvine*, 24 Ky. Law Rep., 1165, we had under consideration the construction of the same will. The words there construed are as follows: "I make it as a request of my children that if any of them should die without issue, in so far as they may have received any estate from me, at their death they will the same to my surviving children, or the issue of those that may be dead. I think this is but a reasonable request, and I have confidence that it will be complied with by my children."

It was held that these words did not create a precatory trust, and that the children took an absolute estate in the property devised to them. The case now before us turns on a different provision of the will, which is in these words: "I will and bequeath to my son, I Shelby Irvine, 305 acres of land

lying and being in Madison county, Kentucky, on the Richmond and Lexington Turnpike Road, lying south and adjoining the sixty four acres herein willed to my daughter, Sarah I. White, and being all the land conveyed to me by John Newland, except sixty-four acres hereafter willed to my son, David W. Irvine, and more fully described in that bequest to him. I make it as an earnest request of my said son, I. Shelby Irvine, that if he should die without having issue, that he give said 805 acres of land, or its value, to my daughter, Sarah I. White, if living; if not, then to her children. If any of her children should be dead having issue, in that event said issue is to receive one equal share."

It will be observed that the testator makes it an earnest request of the devisee that if he should die without having issue he should give the 805 acres of land, or its value, to his sister, Sarah I. White, if living; or if dead, to her children. The language of the testator is not as strong as that heretofore construed by this court and held not to create a precatory trust in the land, because the request is that the devisee give the land or its value, which recognizes the right in the devisee to dispose of the land if he sees proper. Besides, from an inspection of the entire will, it is evident that the testator's leading purpose was to place all his four children upon equality, and we are satisfied that the request made of I. Shelby Irvine was not intended to impose upon him any greater restriction as to selling the land than was imposed upon the other children by the words of the will relating to them, heretofore construed.

Judgment affirmed.

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JONES v. WALTER, &c.

(Filed May 14, 1908.)

Injunction—Execution—Bankruptcy—Appellant filed this action to enjoin an execution issued against him on a debt which he claims he was released from by a discharge in bankruptcy; that said claim was provable in bankruptcy, but was not scheduled in time for proof and allowance for the reason that he did not at the time of making out his schedule in bankruptcy remember its existence, but that the appellee, the creditor, had notice or actual knowledge of the bankruptcy proceeding. A demurrer was sustained to the petition and the petition dismissed, from which this appeal is prosecuted. Held—That in addition to notice required by the statute to be given creditors, section 17 of the act evidently contemplates that the creditor may have actual knowledge of the proceedings in bankruptcy derived from other sources than either of the modes pointed out in the statute. Actual knowledge of the claim in time to have asserted it in the bankruptcy proceedings will bar any proceedings to collect it after the discharge.

John G. Winn for appellant.

Lewis Apperson for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was brought by the appellant, John W. Jones, against the appellees, Edmond Walter, &c., to enjoin the collection of an execution which had issued against him in favor of the appellees upon a judgment for \$819.49,

with interest from the 17th day of December, 1889, in the name of Albert Berger & Co., of which firm appellees are now the sole surviving partners, upon the ground that he had on the — day of January, 1900, been duly adjudged a bankrupt, and released from all debts provable in bankruptcy existing on that day, from which he could be discharged and which included the debt of the defendants; and that the discharge had been granted to him by the district court of the United States for the District of Kentucky; and that his discharge had never been revoked or set aside, but was still alive and in full force; that the debt evidenced by the judgment was for merchandise sold and delivered to him by the defendants and was provable in bankruptcy; that the defendant's debt was not duly scheduled in time for proof and allowance with the name of the creditor for the reason that he did not at the time of making out his schedule in bankruptcy remember its existence, but that the defendant, Edmond Walter and Alphonse Walter, who are now claiming the right to collect said judgment, had notice or actual knowledge of the proceedings in bankruptcy, in course of which his discharge was granted, and prays for a perpetual injunction against further proceedings looking to the collection of the debt.

The defendants filed a general demurrer to plaintiff's petition, which was sustained, and plaintiff declining to plead further, his petition was dismissed, and he has appealed. The sole question for decision is the sufficiency of the petition. So much of section 17 of the National Bankruptcy Act of 1898 as is important for us to consider in the determination of this question reads as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except \* \* \* (3) have not been scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."

It is conceded that defendant's debt was provable against the bankrupt estate, and plaintiff admits that it was not scheduled in time for proof and allowance, with the name of the creditor. It, therefore, follows that his discharge affords no protection against the collection of defendants' debt unless they had notice or actual knowledge of the proceedings in bankruptcy. It was held by the Federal courts that under the bankrupt act of 1867 a discharge was a bar, even though the creditor owning the debt was omitted from the schedule and received no notice of the proceedings, provided such omission was not willful or fraudulent, and the notice required by the statute had been duly published. (Loveland on Bankruptcy, page 624.) But the jurisdiction of the creditor under the present act depends not on the petition and adjudication, but on the facts either that the debt was duly scheduled in time for proof and allowance, or if not, that the creditor had notice or actual knowledge of the proceedings in bankruptcy. There is evidently a difference between the words "notice" and "actual knowledge" of the proceedings in bankruptcy, as used in the statute. Section 58 of the act provides that creditors shall have at least ten days' notice by mail to their addresses as they appear in the list of the creditors of the bankrupt, or as afterwards filed with the paper in the case by the creditors, unless they have waived notice of any right of all examinations of the bankrupt; all hearings upon application for the confirmation of compositions or discharge of bankruptcy; all meetings

of creditors; all proposed sales of property, or declarations and time of dividends; the filing of final accounts with the trustee, etc. The notice contemplated by this statute is evidently a written notice by mail. Note B provides that notice to creditors to the first meeting shall be published at least once, and may be published such number of additional times as the court may direct; that all notices shall be given by the referee unless otherwise ordered. The notice contemplated by this section of the statute is a written or printed notice to the creditors. But section 17 evidently contemplates that the creditor may have actual knowledge of the proceedings in bankruptcy derived from other sources than either of the modes pointed out in the statutes. If it be clearly shown that the creditor has actual knowledge of the application for a discharge in bankruptcy by the debtor and the pendency of the proceedings in time to have asserted his claim in the proceedings, no difference how this knowledge may be acquired, it would be an effectual bar to the assertion of his claim against the bankrupt after discharge. Plaintiff's allegation on this point is in the language of the statute and upon demurrer must be taken as true, and, in our opinion, is sufficient to support a cause of action. The chancellor, therefore, erred in sustaining the demurrer thereto.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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THOMPSON, &c. v. MELTON & CO.

(Filed May 14, 1908—Not to be reported.)

1. Damages—Breach of contract—Instructions—Appellants, through S., their agent, bought of appellee about fifty or sixty hogsheads of filler strips tobacco at the price of  $4\frac{1}{2}$  cents per pound, which was guaranteed to be sound and prized in "good English order." Afterwards appellants transferred this contract to C., and an addition was made to the contract, to the effect that appellees guaranteed the weights of the tobacco sold to appellants now sold to C. Forty hogsheads of the tobacco contracted for were delivered to C., who shipped it to Liverpool, England, where it was inspected and claimed not to be sound or prized in "good English condition," and C. was compelled to sell it at a loss of \$748.50, to recover which this action was brought and a judgment resulted for defendant, from which this appeal is prosecuted. The defendant denied that the tobacco was unsound, or not prized in good English condition; also that S., as the agent of appellants, had superintended the prizing of same, and C. had an opportunity to inspect same, and approved it. Issue was joined on this defense and appellants contend that appellees, by their agreement of transfer of the purchase to C., made a new contract, and were not bound by the acts of S., as agent of appellants. Held—That there was no new contract made which changed appellee's duty as to the condition of the tobacco prized, and the proof showing that the greater part of the tobacco was prized under the supervision and inspection of S., before the transfer of the contract, the jury were authorized under proper instructions to find the verdict rendered.

2. Evidence—C. can not complain that he was surprised at the testimony that appellants had authorized S. to act for and represent him in looking after the tobacco, as he was apprised by the answer that the tobacco was

prized for shipment under direction of appellants, their authorized agents, and employes, and the reply denied this allegation.

R. H. Cunningham for appellants.

S. W. Dixon and A. O. Stanley for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 5th of June, 1900, the appellants, James P. Thompson & Co., bought of appellees, T. J. Melton & Co., through their agent, G. G. Slaughter, fifty or sixty hogsheads of "filler strips" tobacco, by written contract, which reads as follows: "We have this day sold to J. P. Thompson & Co. our entire lot of trash strips or 'filler strips,' fifty or sixty hogsheads, for which we agree to take  $4\frac{1}{2}$  cents, F. O. B. at Robards or Corydon, at Thompson & Co.'s option which place. We bind ourselves to prize these strips in 'good English order,' and guarantee them sound, and we agree to not ship any before the 1st day of July without the consent of Thompson & Co."

On the 12th day of July, 1900, Thompson & Co. transferred and assigned the benefit of this purchase to the appellants, Clark & Clark, and at the same time the appellee added to the original contract these words: "In addition to the above contract, we agree and bind ourselves to guarantee weights of all the filler strips sold to Thompson & Co., and now sold to Clark & Clark."

Pursuant to this contract appellees delivered to Clark & Clark forty hogsheads of tobacco contracted for at Robards, which weighed 49,900 pounds, and for which appellants paid the contract price of  $4\frac{1}{2}$  cents per pound. In due time all of the tobacco was shipped by Clark & Clark to their factors in Liverpool, Eng., for sale, and it is alleged that upon receipt and inspection of the tobacco at Liverpool, on October 1, 1900, that it was not prized in "good English order," but, on the contrary, was moist, damp and mouldy; and that in consequence of the tobacco being improperly prized appellants were compelled to sell it at a loss of \$748.50. They thereupon instituted this suit to recover damages for the breach of the written contract of guaranty. Appellees, in their answer, deny that the tobacco was not prized in "good English order," as required by their contract; and further allege that the tobacco was prized and prepared for shipment under the direction and supervision of Thompson & Co., their agents and employes; and that Clark & Clark, after their purchase from Thompson & Co., and before the shipment of the tobacco, inspected it and approved of its condition, and the balance of the tobacco which had not already been prized was prized under the direction of Clark & Clark; and that if the tobacco was not prized in good English order, as required by their contract, Thompson & Co. and Clark & Clark were responsible therefor, as it was prized at the time and in obedience to their express direction. Appellants, in their reply, deny that the tobacco was inspected by Thompson & Co., their agents or employes, and that after such inspection it was prized for shipment under the direction of Thompson & Co., their agents or employes; and they further deny that Clark & Clark had any opportunity to inspect the tobacco or know its condition previous to its shipment, or that it was prized under their direction, or that of their agents or employes. A jury trial resulted in a verdict for the defendant,

and plaintiffs have appealed. The first and main ground relied on for a reversal is that the court erred in the third instruction given to the jury. The instructions are as follows:

"1st. It was the duty of the defendants, T. J. Melton & Co., to prize the tobacco in question in 'good English order,' and sound, and if you believe from the evidence they so prized said tobacco, you will find for the defendants, Melton & Co. But if you believe from the evidence that said Melton & Co. failed to prize said tobacco in good English order, and sound, and the plaintiffs, Clark & Clark, suffered a loss by reason of such failure, you will find for said plaintiffs such amount in damages as will reasonably compensate them for their said loss, not to exceed, however, the sum of \$748.50.

"2d. If you find for the plaintiffs, the criterion of their recovery will be the difference in value, at Robards, or the tobacco as it was in fact prized and the value of such tobacco at Robards if it had been prized in 'good English order,' and sound. But if at the time of making the contract in question it was agreed, or contemplated, between Gus Slaughter, the agent of Thompson & Son., and the defendants, that said tobacco should be shipped to the English market, and it was to be put up and prized for that purpose, then the criterion of recovery will be the difference in the values aforesaid in the English market instead of at Robards.

"3d. If you believe from the evidence that Gus Slaughter was authorized by the said Thompson & Co. to represent or act for them in looking after the prizing of the tobacco in question, and that said Melton & Co. prized said tobacco, or any portion of same, in such condition or order as was directed, or approved by the said Slaughter, or by the plaintiff, Clark & Clark, after their purchase from Thompson & Co., then as to such of said tobacco so prized you can allow the plaintiffs no damages, even though such tobacco was not prized in 'good English order,' and sound."

It is insisted that the third instruction is erroneous for the reason that Clark & Clark were not bound by any direction or instruction which Slaughter may have given to the appellees as to the prizing of the tobacco prior to the assignment of Thompson & Co.'s contract to them on the 12th of July, 1900. The alleged basis for this contention is that appellees consented to the transfer of the contract from Thompson & Co. to Clark & Clark, and by the addition made by them to the contract guaranteeing the weights of the strips that they had at that time made a new contract, in which they expressly warranted that the tobacco had been prized in "good English order," and that they were, therefore, bound on this warranty without regard to any previous direction or inspections with reference thereto by Thompson & Co.

The testimony conduces to show that at the date of the original contract with Slaughter seven or eight hogsheads of the tobacco had already been prized, and that at that time appellees showed him the bulk of the tobacco, and represented to him that they thought it was too damp to prize, but that he directed them to lay aside the top and sides of the bulk and go ahead and prize the dry tobacco from the middle; and that about twenty-five hogsheads of the tobacco were prized in this condition under his direction before the transfer of the benefit of the contract of Clark & Clark; that J. W. Clark, a member of the firm of Clark & Clark, came to their warehouse with Slaughter while they were prizing the tobacco and had three hogsheads under

screw; that Clark examined the tobacco that was being prized and made no complaint. There was a good deal of conflict in the testimony as to what was meant by the words "in good English order." The testimony for the appellant was to the effect that this meant that the tobacco contained from 10 to 12 per cent. of water, while the witnesses for appellee testified that it meant that the tobacco contained not more than 16 per cent. of water. There is no pretense that any additional consideration passed to appellees from Clark & Clark at the time they succeeded to the contract of Thompson & Co., or that any change was made in the weight of the hogsheads, or that there was any complaint growing out of this addition. We are, therefore, of the opinion that the addition of these words did not materially change the written contract of sale previously entered into between Thompson & Co. and appellees; and that they were bound by any directions as to the pricing of the tobacco which had been previously made by Thompson & Co., or their authorized agent, to the extent that the tobacco was already prized and in hogsheads. It follows, therefore, that the court did not err in admitting testimony as to the directions given by Slaughter to appellees as to the time and manner of pricing the tobacco, and in submitting the question to the jury in the third instruction.

Appellants also insist that they are entitled to a reversal of the judgment on the ground that they were surprised by the admission of testimony that Thompson had authorized Slaughter to act for and represent him in looking after the tobacco, and give directions as to the condition in which it should be prized; that before the trial they had been advised that Slaughter had no authority to give any directions in this matter, and that appellees had never claimed that he had such right; and that consequently they had failed to have Thompson present as a witness, or take his deposition. As the answer of appellees expressly alleged that the tobacco was prized and prepared for shipment under the direction of Thompson & Co., their authorized agents and employes, and this averment was expressly denied in the reply, it is hard to see how plaintiffs were surprised by the introduction of testimony to prove the express allegation. Appellant also contends that the verdict is palpably against the weight of evidence. It is true that several witnesses in Liverpool testify that the hogsheads of tobacco were not prized in "good English order;" but it is also true that several witnesses for the defendant, who claim to have had experience and to know what was meant by the words "good English order," proved that it was prized in that condition. In this conflict of testimony the question was for the jury.

The first instruction treated the contract as an express guaranty, and authorized a recovery if there had been a breach of its covenants by appellant, and it is, therefore, unnecessary for us to follow counsel in their learned discussion as to the respective rights of the vendor and vendee where a breach of warranty was relied on in an action for damages.

It seems to us that there has been a fair trial of this controversy under proper instructions, and that there is no ground for disturbing the verdict of the jury and the judgment rendered pursuant thereto.



## WHITNEY v. WHITNEY.

(Filed May 14, 1908.)

Dissolution of partnership—Sale of expirations of insurance—Appellant and appellee were for many years partners, conducting an insurance agency. Upon a dissolution of the partnership a suit for settlement of accounts was filed, and by agreement a special commissioner was appointed to take charge of the partnership effects, including books and accounts, and make a settlement. On motion of appellee the court ordered the special commissioner to sell the office, daily reports, expirations and records as assets of the firm, from which this appeal is prosecuted. Held—That the list of expirations is not an asset of the firm which is capable of sale. This is not a sale of the good will of the firm, but the sale merely of the information shown by the books. The court could not prevent any member from soliciting business from their former patrons. The business agency, as a whole, including the good will of the firm, leasehold of the office, furniture and books and along with it the information sought to be sold in the order complained of, could be sold as a whole.

Byrne & Read for appellant.

B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

John Whitney and H. A. Whitney, as partners, for many years conducted an insurance agency under the firm name of John Whitney & Co., in Covington, Ky. For reasons satisfactory to themselves they dissolved the partnership, and each instituted an action in the Kenton Circuit Court against the other for a settlement of the partnership affairs. Subsequently these two actions were consolidated, and by agreement an order was entered whereby George M. Kelfer was appointed special commissioner in the consolidated actions, with the following powers and directions concerning the partnership assets: "The said special commissioner will forthwith take possession of the office, furniture and fixtures of the firm of John Whitney & Co. He will take possession of the office of said firm and retain possession of said office until further orders. He will take possession of the horse, buggy and harness belonging to said firm, and will sell said horse, buggy and harness at private or public sale, for cash or on credit, as may seem best to him. He will take possession of all the books, accounts and papers of said firm, and will allow the parties hereto to inspect said books at reasonable times and at his convenience. He will take and retain possession of all other properties and assets of said firm. The said firm has funds on deposit at the Farmers and Traders National Bank, and at the Citizens National Bank, Covington, Ky. The said commissioner will take possession of these funds, and the said banks will pay same to him, and this order shall be their warrant for so doing. Said commissioner will proceed to collect all debts and accounts due and become due to said firm. These causes are now referred to said special commissioner. He will ascertain and report the assets and liabilities of the firm; the state of the accounts of said firm and each of the members thereof, and the amount due to each member of said firm from the net assets of said firm. He will fully settle all accounts

and affairs of the partnership. This order and each, and every particular of the same, is agreed to by the parties, and is entered with their consent and on their motion."

After the entry of this order George M. Keifer executed bond as special commissioner, and took possession of the partnership assets of the firm of John Whitney & Co. On the 20th day of March, 1902, the following motion was made: "Now comes the plaintiff, H. A. Whitney, and the defendant in suit No. 5,985, of John Whitney, and moves the court for an immediate order of sale of the office, daily reports, expirations and records of same of John Whitney & Co."

This motion having been submitted to the court on the 14th day of April, 1902, the following judgment was rendered: "The office expirations of the firm of John Whitney & Co. constitute an asset of the firm; John Whitney and H. A. Whitney have an equal interest therein. A motion for an order of sale of these expirations is sustained, and the order of sale thereof will be entered."

In pursuance of this judgment, on the 18th day of April, 1902, the office expirations of the firm of John Whitney & Co. were ordered to be sold by the special commissioner, at public sale, upon the terms and conditions set forth in the order; to all of which John Whitney excepted and prayed an appeal. The office expirations, directed to be sold by the special commissioner, are no more or less than a list of the names of the customers of the firm of John Whitney & Co. who have insured property through the agency of the firm, with the date of expiration of the policy of each customer. It is not pretended that the firm, or any member thereof, has any beneficial interest, or property right, in the contracts of insurance held by these customers. They have no control over the policies, nor any right to demand that they shall be renewed at the date of their expiration; nor have they any power or authority to demand that the insurance company issuing the policies shall renew them at the date of expiration. These expirations, then, which the order of the court seeks to sell, amount to no more than information as to what the firm has done in the past; the court can neither guarantee nor convey any right with regard to it; it can neither require the patrons to renew their policies nor the insurance companies to accept the business, should the patrons desire to renew. All that the purchaser of this list of names and dates could possibly secure would be the opportunity to solicit business from the old customers of the dissolved firm.

We do not think that this list of names and dates amounts to an asset of the firm which is capable of sale. The court could not prevent either member of the firm from soliciting business from their former patrons. It seems to us that the members of the dissolved firm have equal right to possession of the list of expirations, as well as equal right and opportunity to solicit the patronage of their former customers. This is not the sale of the good will of the firm, but the sale, merely, of the information shown by the books. We have been cited to no case which upholds the principle that the list of names of a firm's customers may, upon dissolution, be sold as an asset. We have no doubt that the business agency, as a whole, including the good will of the firm, leasehold of the office, furniture and books, and along with it the information sought to be sold in the order complained of, constitutes an

asset which may be sold and conveyed to a purchaser by the court; but to detach the list of names of the firm's customers, with the dates of expiration of their respective policies, and sell it separately, would be the doing of a vain and useless thing.

Wherefore, the judgment is reversed.

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EDMONDS v. HUGHES.

(Filed May 14, 1903.)

Breach of contract of marriage—Appellant brought this action to recover damages for breach of promise of marriage. In defense appellee pleaded that he made the promise of marriage on condition that appellant would then and there have illicit intercourse with him; that at the time he made the promise he believed appellant to be a virtuous woman, but that since he had discovered that she was immoral and unchaste. He further stated that, at the time he promised to marry her she was a woman in full possession of the power of procreation and was able to bear children; that thereafter she voluntarily submitted to and permitted an unnecessary operation to be performed on her body by which she was rendered unable to procreate or bear children, and will forever remain so. Held—That each of said defenses constitute a valid defense to the action, and a judgment in favor of defendant, will not be disturbed.

Perkins & Trimble for appellants.

S. Walton Forgy for appellee.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Barker.

The appellee, Flora Edmonds, instituted this action in the Todd Circuit Court to recover damages of the appellant for a breach of his contract to marry her. The facts stated in the petition constitute a valid cause of action.

Appellee, in his answer, admits his promise to marry appellant, as alleged in the petition, but pleads as a defense, first, that the consideration for the contract was the agreement by appellant to then and there have illicit intercourse with him, and that his promise was made upon no other consideration; second, that at the time the promise was made by him he believed the appellant to be a virtuous woman; that he did not at that time, or prior thereto, know that she was, or had been, an immoral or unchaste woman, or that she had been guilty of lewd or lascivious conduct with other men, but since his promise he has learned, and now charges it to be true, that she was, prior thereto, then and now, unchaste, and that she has been guilty of adultery with other men; third, that at the time he promised to marry her she was a woman in full possession of the power of procreation, and was able to bear children; that after the promise was made she voluntarily submitted to and permitted an unnecessary surgical operation to be performed upon her body, by which she was rendered unable to procreate or bear children, and will forever remain so. Without examining the pleadings minutely it is sufficient to say that the issues were made upon these three defenses of appellee.

In Beach on the Modern Law of Contracts, section 1553, it is said: "A

contract made in consideration of future illicit sexual intercourse is void, and the woman can not recover under such contract, although it has been performed on her part."

In *Parsons on Contracts*, star page 68, the rule is thus stated: "But it would seem, on general principles, to be a good defense (to an action for breach of promise to marry) that the promise was made on condition that the plaintiff would commit fornication with the defendant; for such a promise might be void as founded upon an illegal consideration."

In *Baldy v. Stratton*, 11 Pa. St., 306, the court say: "A promise to marry on condition of illicit intercourse is illegal, and a consideration that will not support a promise; a promise to marry, on an illegal consideration, is virtually void."

In the case of *Judy v. Sterrett*, 52 Ill. App., 265, it was held that "a promise of marriage in consideration of illicit sexual intercourse is void."

In the case of *Hanks v. Neglee*, 54 Cal., 52, it is said: "Upon well-settled principles, the plaintiff should not have recovered upon a contract of this character (to marry) as, being a contract for illicit cohabitation, it is tainted with immorality. \* \* \* It was confessedly not a case in which the defendant, taking advantage of the trust and confidence which may be fairly supposed to exist between parties who have in apparent good faith made mutual promises of marriage, has abused the confidence of the female and induced her to yield him favors which she might have otherwise withheld. The agreement to yield her person to him was one appearing to have been deliberately made in advance, and when there had been no promise of marriage."

In *Addison on Contracts*, volume 2, star pages 838-839, it is said: "If subsequent to the making of the contract to marry one of the parties, being bodily diseased, becomes unfit for the performance of the most important duty of marriage, the party so unfit is not thereby entitled to treat the contract as dissolved, the other party still desiring its performance; but the latter may break off the engagement, for, if a man, by disease, accident or mutilation, becomes impotent, he can never maintain an action against a lady for refusing to marry him."

In the case of *Berry v. Bakeman*, 44 Me., 164, it is said: "Proof that the plaintiff is a loose and immodest woman, and that the defendant broke his promise on that account, is a bar to the action, unless it should also appear that the defendant was aware of this when he made the promise, in which case it is no defense."

In *Addison on Contracts*, volume 2, star pages 838-839, it is said: "If the woman, at the time of her betrothment, was of loose and immodest character, and this was unknown at the time to the man who promised to marry her, the latter is entitled, as soon as he discovers her real character, to break off the engagement. General reputation of want of chastity must be established in such actions; or, if particular instances of misconduct are relied upon, they must be fully proved. If the circumstances, whatever they may be, were known to the other contracting party, there is then no fraud or deceit in the matter, and he has no ground for refusing to complete his engagement." \* \* \*

In *Parsons on Contracts*, volume 2, star page 65, in enumerating the de-

fenses to action of breach of promise to marry, it is said: "So the bad character of the plaintiff, or his or her lascivious conduct. The cases generally exhibit this defense where the woman is plaintiff; but it ought with equal justice, and on moral as well as on public grounds, to be permitted to the woman when she is defendant. It was so held in the case of *Braddeley v. Mortlock*, and undoubtedly would be so held in this country. If the defense be general bad character, evidence of reputation is receivable; for, says Lord Kenyon, 'character is the only point in issue; public opinion, founded on the conduct of the party, is a fair subject of inquiry.' If the defense rests on specific allegations of misconduct, these must be strictly proved; and if the defendant knew the general bad character, or the specific misconduct, before making the promise, they constitute no defense."

We conclude, then, from these authorities, that each of the three defenses set up by the appellee in his answer, if true, constituted a valid bar to the cause of action contained in the petition. These principles of law were all fairly presented to the jury in the instructions, which, after a careful examination, we think were as liberal to the appellant's interest as she was entitled, and that the evidence justified the verdict rendered by the jury.

Wherefore, the judgment is affirmed.

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MERCER'S TRUSTEE v. MERCER, &c.

(Filed May 14, 1903—Not to be reported.)

Fraudulent conveyances—M. borrowed \$500 from D. and executed to him a note therefor, in which he stipulated that in case he failed to pay same at maturity he would convey to D. one-fourth interest in a tract of land. Some time after maturity of the note M. filed his petition in bankruptcy, but a few days before doing so he conveyed said land to D. This action was instituted by his trustee to set aside said conveyance with a view to subjecting same to M.'s debts. It being alleged that this conveyance having been made within four months before he filed his petition in bankruptcy, was in fraud of his creditors. Held—That the transaction was genuine and in good faith, and was but a compliance with the agreement entered into when the note was executed. The paper was valid as a title bond or mortgage, and his creditors can not complain because he executed the conveyance pursuant to same.

Jonson & Wickliffe and Arthur Y. Martin for appellant.

R. Y. Thomas for appellee and cross appellant.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, Mercer, sought to be discharged in bankruptcy, and appellant, A. Y. Martin, was appointed trustee. Within a few days before the petition was filed in bankruptcy Mercer conveyed certain land in Muhlenberg county to appellee, S. H. Danks. This suit was instituted to set aside the conveyance with a view to subjecting the land to the payment of Mercer's creditors. It is sought to be set aside upon the ground that it was made within four months before he filed his petition in bankruptcy, with the intent and purpose to hinder, delay and defraud his creditors, etc. On July 5,

1898, Danks loaned Mercer \$500, and for which a note bearing that date was executed, which reads as follows:

"One year after date I promise to pay to S. H. Danks the sum of \$500 for cash received.

"I further promise in case of failure to pay said amount when due to give said S. H. Danks a deed for my one-fourth interest in Mercer & Co. property located at Mercer, Ky., in Muhlenberg county, on I. C. R. R., between Dovey Mines and Hillside Mines.

"A. E. MERCER."

Mercer failed to pay the note and interest. In July, 1899, he expressed a desire that Danks should take the land according to the contract for the amount of the debt and interest. They went upon the land and looked over it, whereupon Danks agreed to take it. However, a deed was not made until the 17th of the following December, when it was tendered to and accepted by Danks.

The court is convinced that the transaction was genuine, and in the utmost good faith. The writing which Mercer executed required him to convey this property to Danks in the event he failed to pay the money. As between the parties, the provision in the note with reference to the conveyance of the property was enforceable, either as a title bond or as a mortgage upon the land to secure the payment of the debt and interest. If it only created a lien upon the land, he had the right to convey the property for a fair cash value in payment of the debt, and in doing which it did not operate to defraud his creditors.

Section 67, subsection E of the bankrupt act of 1898, reads as follows: "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be, and remain, a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings, or otherwise, for the benefit of the creditors. And all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory or District in which said property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

Under this act, if the land was purchased in good faith and for present fair consideration, the transaction is valid. At the time the note was executed Mercer was not insolvent, and the money was not borrowed in contemplation

of insolvency. The deed was the completion of a contract previously made. It certainly was not a fraud upon the rights of the creditors to do that which the court would have required him to do in a proceeding to enforce the lien upon the property. The rights of the creditors could only have been affected if the property was of greater value than the amount of the debt and interest. The proof does not make it clear that the appellee sold the land for less than its actual value, and the sale and conveyance was valid. The court below erred in setting aside the deed and in giving a lien upon the land for Danks' debt and interest.

The judgment is affirmed on the original and reversed on cross appeal, with the direction to dismiss the petition and for proceedings consistent with this opinion.

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CURRIE FERTILIZER CO. v. KRISH.

(Filed May 15, 1908—Not to be reported.)

1. Damages for breach of contract—Process—Jurisdiction—Appellee made a contract to act as agent of appellant in selling fertilizer of its manufacture in Jericho and its vicinity for one year commencing February, 1901. His compensation was to be the profits he would realize from sales he would make, being the difference between the purchase price and the price received from his customers. After advertising the fertilizer for several months and making sales to sundry parties, appellant, after filling only a part of his orders, withdrew the agency from him, and failed to furnish him with fertilizers to fill the greater part of the orders he had received, and prevented him from receiving further orders and realizing a profit on same. He instituted this action to recover damages for said breach of contract and recovered \$210, from which this appeal is prosecuted. Motion was made to quash the process on the ground that it was served on J., who was not an officer or agent of appellant, while he was attending court at New Castle as a witness for appellant in another case. It is further contended that service on him was improper as he was exempt from service by section 542, Civil Code of Practice, as he was attending court as a witness. Held—That as the lower court after hearing evidence decided that J. was appellant's agent, this court will not disturb that finding. J. was not exempt from the service of process under the section of the Code as he was not the "party" sued, nor was attending as a witness "in obedience to a subpoena." Furthermore, this court has adopted the rule that after a motion to quash process has been improperly overruled and an answer filed to the merits, it will be treated as an appearance in this court and in the lower court on the return of the case. Appellant contends that the Henry Circuit Court had no jurisdiction as the contract was made in Jefferson county, and partially performed there, and under section 72, Civil Code, the suit should have been brought in said county. Held—That as the petition does not disclose that the contract was made in Jefferson county, this objection can not be raised by demurrer. On the other hand, the proof shows that the contract was made in Henry county.

2. Pleading—It would have been proper for the lower court to have required plaintiff to have made his petition more specific by stating the names of parties to whom he made sales, but its failure to so rule was not prejudicial to defendant.

3. Pleading—Instructions—The petition claimed damages on the proper

basis, and the instructions properly defined the measure of damages recoverable. The quantity of fertilizers which appellee could, and doubtless would, have sold and the profits he would manifestly have made but for the withdrawal of appellant from the contract has been fairly approximated and fixed by the evidence, and they are such as must have been contemplated by the parties in making the contract.

4. Evidence—It was not error to refuse to permit an agent at New Castle to testify to the amount of profits he realized from making sales of the same fertilizer during the same year. What profits were realized in one community is no criterion by which to fix the profits in another community in the absence of proof showing the existence of similar conditions in the two communities.

Grubbs & Grubbs, W. D. Crabb and H. K. Bourne for appellant.

Moody & Gordon for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted in the Henry Circuit Court by appellee to recover of the appellant damages for an alleged violation of contract. The petition sets out in substance the following cause of action: That appellant, a corporation engaged in the business of manufacturing and selling fertilizers, by contract of February 4, 1901, employed appellee to act for it as its agent at Jericho, Ky., for one year from that date, in selling its fertilizers, and agreed to furnish him fertilizers at certain agreed prices to fill all orders he might get, or sales he could make during the year in the country around him, appellee to be compensated for his services as such agent by receiving all moneys realized for the fertilizers sold by him over and above the agreed price at which the orders were to be filled by appellant; that pursuant to this contract he proceeded to advertise appellant's fertilizers, and succeeded in making numerous sales thereof, but that appellant, after filling only a part of the orders for the sales made by appellee, in August, 1901, without fault on appellee's part, withdrew its agency from him, and failed to furnish him with fertilizers to fill the greater part of the orders he had received, and prevented him from receiving orders and making other and numerous sales, which he would have done, and was about to do, but for the act of appellant in withdrawing from the contract; and further, that by the loss of his commissions on the orders appellant refused to fill, and on the sales he would have made during the remainder of the year, he was damaged in the sum of \$310, for which sum he prayed judgment against appellant.

Appellant, after entering motions to quash the summons and to require the petition to be made more specific, and filing general and special demurrers thereto, which motion and demurrers were each and all overruled by the court, filed answer, the first paragraph of which contained a traverse of the material averments of the petition. In the second paragraph of the answer it is alleged that appellant only agreed with appellee to furnish him quotations upon its various brands of fertilizers, but that the quotations were not for one year, or for any specified time, but were merely quotations at will, or subject to be withdrawn at its pleasure; that on August 2, 1901, before the opening of the fall trade and before it had received any fall orders from appellee, it withdrew its quotations, and so notified him in writing on



August 2, in acknowledging the receipt of which appellee informed the appellant that he had sold some goods, whereupon appellant offered to fill any orders received by appellee before its withdrawal of the quotations, but that he failed to furnish or send in such orders, and so they were not filled.

Reply was filed to the answer controverting its material averments, and upon the issues thus formed the case went to trial before a jury, with the result that appellee received a verdict and judgment for the full amount sued for. Appellant then filed motion and grounds for a new trial, which was refused by the lower court, and this appeal presents the case to this court for final adjudication. The grounds urged for reversal are: First, that the lower court erred in overruling the motion to quash the summons; second, that it erred in overruling the special demurrer to the petition; third, that it likewise erred in refusing to require the petition to be made more specific; fourth, that it also erred in overruling the general demurrer to the petition; and, fifth, that it further erred in instructing the jury.

As to the first ground of alleged error, it appears that the summons was served on one John M. Jenson, who is named in the sheriff's return on the summons as the chief officer of appellant found in Henry county. Jenson, at the time of the service of the summons upon him, was in New Castle attending the quarterly court as a witness for appellant in a suit then upon trial between it and one Mitchell. It is contended for appellant that Jenson was not its officer or agent, and consequently that the service of the summons upon him in this action was void. The lower court upon the proof introduced on that point found that he was an officer of appellant upon whom the service of summons was proper, and we are not disposed to disagree with that finding, or to say that it is not sustained by the evidence.

It is further contended that the service of summons upon Jenson did not have the effect to bring appellant before the court, because he, at the time of such service, was exempt therefrom for the alleged reason that he was a resident of Jefferson county, and was in Henry county and in attendance upon the quarterly court as a witness. Section 542, Civil Code, provides that "a witness shall not be liable to be sued in a county in which he does not reside by being served with a summons in such county while going and returning, or attending, in obedience to a subpoena." We are of opinion that the privilege claimed for Jenson can not be successfully asserted by virtue of the section supra, as he is not the party sued, but only the officer or agent of that party, and consequently was served with summons as such officer or agent. Furthermore, it does not appear from the record that a subpoena was issued or served upon him as a witness in the quarterly court, therefore, his presence there as a witness was voluntary, and not in obedience to a subpoena. The privilege accorded by the Code is for the benefit of a witness who is sued in a county in which he does not reside while there in obedience to a subpoena.

In addition to what has been said in approval of the action of the lower court in overruling the motion to quash the summons, it may be remarked that this court has held that where a motion is made in the lower court to quash a summons upon the ground that it was served upon the wrong person, or one of whose person the court did not thereby acquire jurisdiction, and such motion is overruled by that court, the filing of an answer to the

merits and an appeal of the case to this court by the party aggrieved has the effect to enter his appearance to the action in this court, and in the court below upon the return of the case thereto, although the judgment of the latter court in refusing to quash the summons may have been erroneous. *L. & N. R. R. Co. v. Chestnut, &c.*, 24 Ky. Law Rep., 1846, and cases therein cited.)

The second contention of appellant is that the lower court erred in overruling its special demurrer to the petition. The demurrer in question is to the jurisdiction of the court, for it is argued by counsel for appellant that the lower court had no jurisdiction of the appellant, or of the subject-matter of the action, for the alleged reason that the contract between appellee and appellant, out of the alleged violation of which this action arose, was made in Jefferson county, and was to be performed in that county as well, and that under the provisions of section 72, Civil Code, the action should have been brought in Jefferson county, and that only the circuit court of that county had jurisdiction of the case. It is sufficient to say in response to this contention that it is not disclosed by the petition that the contract out of which this action grew was made, or to be performed in Jefferson county, consequently the alleged want of jurisdiction could not be reached by demurrer. Upon the other hand, the proof shows that the contract was made at Jericho, by appellee with J. A. Logan, traveling agent of appellant, and that the former was to sell the appellant's fertilizers in the community surrounding Jericho and contiguous territory.

Appellant's third ground of complaint is that the court erred in overruling its motion to require appellee to make his petition more specific, by giving the names of persons to whom sales of fertilizers were alleged to have been made, and the date and amount of each sale. It would not have been improper for the court to have sustained the motion, for though the appellee may not have been able to set forth the date of each sale, he ought to have been able to give the name of each person to whom he made a sale. But we are unable to say that the failure of the lower court to require a more specific statement of the appellee in his petition upon these matters was prejudicial to appellant, for after all they were facts necessary to be proved in evidence, and were so proved by appellee in making good his claim to damages by reason of appellant's violation of the contract.

The main complaint of appellant's counsel is as to the overruling of its general demurrer by the lower court. We find from the language of the demurrer that it goes to only so much of the petition as seeks the recovery of damages for the loss of profits on sales which appellee avers he could and would have made but for appellant's withdrawal from the contract. The ground of the demurrer is that the damages claimed are remote and altogether speculative.

"Damages which are the natural and proximate consequence of the act complained of may undoubtedly be recovered. So with damages that can be readily determined, and are such as may reasonably be inferred to have been contemplated by the parties. Profits which are the direct and immediate fruits of the contract alleged to have been violated are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into." (*E. & P. R. R. Co. v. Pottinger, &c.*, 10 Bush, 188.)

In *Smith & Nixon v. Perry*, 18 Ky. Law Rep., 683, the appellants, who were wholesale piano dealers, made appellee, a retail dealer, their agent to sell pianos. The contract between them was violated by the appellants, for which they were sued by the appellee in damages. This case in point of fact is almost identical with the one at bar, the only difference being in the character of the property involved; in this case it is fertilizer, in that pianos. The opinion in *Smith & Nixon v. Perry* was written by Judge Barbour, of the Superior Court, in which it is said that "where one party to a contract has deprived the other of the gains and profits of the contract by refusing to perform it, this loss constitutes a proper item in estimating the damages. When it is certain the damages have been caused by a breach of the contract, and the only uncertainty is as to the amount, there is no reason for refusing, on account of such uncertainty, any damages whatever. Where the books speak of the profits anticipated from a good bargain as too remote and uncertain to be taken into account in ascertaining the true measure of damages, they have reference to collateral engagements entered into on the faith of the principal contract. \* \* \* Appellants, wholesale dealers in pianos, having entered into a contract with appellee, a retail dealer, by which they made him their agent for the sale of pianos of a certain kind, in the action by appellee to recover damages for a breach of the contract the measure of damages is the appellee's share of the profits upon the number of pianos which he could have sold by reasonable efforts at the prices agreed upon."

In the case at bar the evidence tends to show that appellant made appellee its agent to sell during the year 1901 certain brands of its fertilizers; for his services he was to have all the moneys realized by him from sales over and above the prices fixed by appellant upon the fertilizers furnished on appellee's orders. The latter spent time and labor in advertising appellant's brands, which were popular and salable; his profits depended on the sales made by him during the existence of the agency, that is, the time fixed by the contract, which was one year. The fall of the year, wheat sowing time, the most profitable season for the sale of fertilizers, was still before appellee when his appointment as appellant's agent was revoked without previous notice, and as the letters of its chief officer found in the record show, without apparent reason or excuse.

The quantity of fertilizers which appellee could, and doubtless would, have sold, and the profits he would manifestly have made but for the withdrawal of appellant from the contract, have, we think, been fairly approximated and fixed by the evidence, and they are such as must have been contemplated by the parties in making the contract; besides, appellee testified, in which he was uncontradicted, that after the repudiation of the contract by appellant, he was unable to make arrangements with other dealers in fertilizers to obtain goods with which to fill orders and make further sales because their contracts with agents had all been made the first of the year, and other fertilizers would not have supplied the demand for, or take the place of, the particular brands manufactured by appellant, which appellee had already spent much of his time in advertising, and which were more popular than any other fertilizers sold in his territory. So it seems reasonably apparent that it was out of appellee's power to have procured or substituted other fer-

tillizers for those agreed to be furnished him by appellant, and we conclude, therefore, that the jury were authorized from the evidence to find that appellee had such a contract with appellant as he claims was made between them, and that he was damaged by the act of appellant in discharging him as its agent probably to the extent fixed by the verdict; at any rate, we can not say that there was no evidence to support the verdict.

We can not agree with counsel for appellant that the lower court erred in giving to the jury instruction No. 1. It presented the law of the case as herein declared in language that could not mislead or confuse the jury. Nor do we think it was improper for the court to exclude the testimony of H. S. Ellis, offered by appellant, to the effect that he was the agent of appellant at New Castle, and what profit was made by him upon sales of appellant's fertilizers there. New Castle is four miles from the railroad, and not in the same community with Jericho, and the profits realized at one of these places on such goods were not shown by the evidence to be the same as are customary at the other. No effort was made to prove by Ellis, or any one, that the conditions at New Castle with reference to the sale of fertilizers were similar to those that existed at Jericho.

Finding no error in the record that we regard prejudicial to the appellant, the judgment of the lower court is affirmed.

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FALLER, &c. v. TOWN OF LATONIA, &c.

(Filed May 15, 1903—Not to be reported.)

Street improvement—Injunction—This action was instituted by appellants to enjoin the city of Latonia from extending Southern avenue sixty feet in width, passing the appellants' property and taking a strip off their lot thirty by seventy-three feet. The lower court denied the relief sought, from which this appeal is prosecuted. Held—That the appellants failed to show themselves entitled to the injunction.

Dan Thew Wright for appellants.

Orlando P. Schmidt for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

This is a proceeding to enjoin appellees from extending Southern avenue, in the town of Latonia, sixty feet in width, passing the property of appellants, and, as they claim, taking a strip off their lot thirty by seventy-three feet. The record is a large one, and twelve plats filed, covering South Covington, Jones' addition, Mills' addition, Williams' addition, and parts of each and Southern avenue, and many depositions taken by the parties. The manner of preparing the case, and the numerous maps or plats and parts of same on file and the apparent defects in some of them, have had a tendency to confuse rather than enlighten or aid the court in coming to a right conclusion in the case.

In the year 1841 General Taylor conveyed to his daughter, Jane Williamson, over 300 acres of land, the southern boundary line of which is in dispute, that is, that part of the line passing in front of the property of appellants.

Before this deed was recorded General Taylor conveyed sixty-three acres of the same land he had conveyed to his daughter to her husband, George T. Williamson, and he layed out this tract of land into streets and lots; had it platted and recorded as an addition to the town, and in doing so, as appears from his plat, he made Southern avenue a sixty-foot street along by his property, and, as appears on the plat, extended it sixty feet along by his wife's land, in which appellant's lot is situated, but did not open it nearer than two or three hundred feet of the place. Where appellant's property is now situated, according to appellant's contention, there would be an offset of thirty feet in Southern avenue, about 300 feet west of their property on George street.

George T. Williamson layed off his addition in 1849, and extended Southern avenue sixty feet wide to George street, and in 1854 he and his wife made a deed of ten acres of land to one Le Boutillier. On this piece of land is situated the lot of appellants. Le Boutillier conveyed it to Mills with the same reservations, and Mills layed it off into streets and lots and made an addition to the town.

The trouble between these parties has grown out of the meaning of these words in the deeds: "Thence on a line parallel to the southern boundary aforesaid, and fifteen feet northwardly therefrom and with the center of a thirty-foot wide road, lying north of the southern boundary aforesaid, laid out and hereby reserved."

Appellants contend that this "thirty-foot wide road" referred to is the old traveled road thirty feet further south from their lots, in other words, they claim the true southern boundary called for in the Williamson deeds gives them the thirty feet in controversy, and is still thirty feet further south of their property, which includes the old thirty-foot road, and if they give the thirty feet in controversy, then the whole sixty-foot avenue will be on the Jane and George Williamson land. Appellees contend that the old thirty-foot road was not on the Taylor-Williamson land, but was on the land adjoining it, and that the reservation and dedication mentioned in the deeds was, and is, a thirty-foot strip lying just north and parallel with this old road, and that this strip includes the strip of land in controversy. Each of the parties have abundant testimony to support their claims. It is sufficient to say that the lower court was not without evidence to support its findings. Three or four witnesses state that the true southern boundary line of Taylor-Williamson land is in the center of Southern avenue. These witnesses are corroborated by the plat of the Williamson addition made before the sale to Le Boutillier, and also by the plat of Charles Mills, the vendee of Le Boutillier, which shows a straight line on the north side of Southern avenue. According to appellant's contention there would be an offset of thirty feet at George street, a short distance west of their property. The plats of record made by appellants' remote vendors, Williamson and Mills, contradict appellant's theory that there is or should be an offset of thirty feet at George street in the north line of Southern avenue. Granting that the evidence shows that the whole width of Southern avenue is on Williamson's and Mills' land, they had the right to dedicate it to public use when they layed out and platted their addition to the town, and appellants have no right to complain as they are the remote vendees of Williamson and Mills, if

they (Williamson and Mills), by their acts of dedication, would be estopped from recovering this thirty-foot strip, and from this record we think they would, then we are at a loss to understand how appellants can own and hold it. We deem it unnecessary to refer to other matters of contention in the record and briefs.

Whereupon, the judgment of the lower court is affirmed.

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BODLEY, &c. v. FINLEY'S EX'OR, &c.

(Filed May 15, 1903—Not to be reported.)

Street improvements—Dedication—Pleading—Damages—In defense to this action to enforce a lien on appellant's property for the improvement of Floyd street it is urged that the proof does not show a dedication of said street to the public, and that the petition is insufficient. Held—That the proof is sufficient to prove a dedication, and the petition is sufficient. It is urged that the court erred in refusing to allow a counterclaim for damages for failure to complete the work within the specified time. Held—That the counterclaim was properly refused as appellant had received compensation for said failure to complete the work.

J. B. Baskin, Thos. R. Gordon and F. W. Morancy for appellants.

Lane & Harrison for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Nunn.

This appeal is from a judgment enforcing a lien on appellant's property for the improvement of Floyd street in the city of Louisville, Ky.

This case has been in this court before and reversed. The opinion is in 28 Ky. Law Rep., 851. The appellants resist the claim of appellees on three grounds: First, that a part of Floyd street, at the point where Magnolia avenue crosses, it has never been dedicated to public use; second, that plaintiffs' petition and amended petition are defective, and do not authorize the judgment; third, that the court erred in disregarding his offset and counterclaim. In the opinion referred to the court said: "It would seem that the chancellor was misled into treating Ross' testimony as in the record after the exception had been sustained. Upon the return of the case appellees should, under the circumstances, be permitted to amend their petition, and also to make further preparation upon the question of dedication. If a part of the street was not, in fact, dedicated, no lien can arise against the abutting property for the cost of the improvement of that part."

It appears, or is rather indicated from this language of the court in that opinion, that if the testimony of C. C. Roe had been properly in the record the court would have considered the evidence to be sufficient to establish a dedication of the whole of Floyd street. After the case was returned to the lower court the appellees filed an amended petition, and took the deposition of Roe and introduced other deeds and plats, evidencing a dedication of the whole street, and it is also shown that the part claimed by the appellees not to have been dedicated is a small parcel that was covered by what was Rothwell street. This court is of the opinion that there is in the record sufficient

proof to establish a dedication of Floyd street, and also that appellees' petition and amended petition are sufficient to sustain the judgment of the court.

The court in the opinion referred to said that appellants should be allowed to present their set-offs, but while that case was pending in this court Mr. Gleason, the contractor and assignor of appellee, died, and his executor brought a suit to settle his estate, and in that case appellant, Temple Bodley, appeared and presented his claim for note of \$341.40 and \$1,089 as the cost of filling and grading a lot, and these claims were allowed him in that case, and have been collected or secured. The appellants now contend that the court should have allowed his counterclaim for unliquidated damages for \$5,000, caused by alleged injury to adjacent property, by the delay of Gleason in filling and grading the lot within the time he agreed to perform the work; in other words, appellants' contention is that if Gleason had graded the lot within the six months their adjoining property would then have enhanced in value to the amount claimed. We are of the opinion the lower court did not err in this matter. The appellant, Temple Bodley, had a contract with M. Gleason by which he agreed to fill and grade this lot according to specifications in the contract, and in the event he failed he agreed to pay to Temple Bodley 25 cents per cubic yard of earth necessary to make the fill, and it was agreed that H. P. McDonald should make the calculations and ascertain the cubic yards of earth necessary to make the fill according to contract, which was done. The amount was ascertained to be \$1,089, which sum appellant recovered as above stated. In this action appellant is again trying to recover damages for a violation of the same contract. In the contract the parties agreed on the measure of damages, and same have been paid. We are of the opinion that appellant ought not now be allowed in another action to recover again damages for a violation of the same contract, and which damages, according to the pleadings, had accrued before the first action. Appellants have collected the damages, \$1,089, with which to fill and grade the lot, and their adjacent lots can receive this enhancement in value and appellants' loss, if any, can only be by reason of delay in the enhancement, which is at most speculative and uncertain.

For these reasons the judgment of the lower court is affirmed.

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THOMPSON v. MILLEN, &c.

(Filed May 15, 1908—Not to be reported.)

Municipal government—Forfeiture of hogs running at large—Under an ordinance of the town of Elkton hogs belonging to appellant were impounded. After advertisement for ten days were adjudged to be forfeited and ordered sold to pay costs adjudged. This action was instituted to recover the value of the hogs sold, it being contended that the proceedings were illegal as they did not comply with the rules prescribed by the Code of Practice. Held—That the ordinance is sufficient as it is a proper police regulation.

S. Walton Forgy for appellant.

W. C. Davis for appellees.

Appeal from Todd Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted by the appellant, Grant Thompson, against the defendants, J. M. Millen and the city of Elkton, to recover damages for the seizure and sale of certain hogs, which wandered from his premises into the town of Elkton. The defendants, in their answer, justify the seizure and sale of plaintiff's hogs under the following ordinance of the city of Elkton:

"Section 134. It shall be unlawful for any swine to run at large upon the streets of Elkton. Any person voluntarily permitting his hogs to run at large shall be subject to a fine of not less than \$5, nor more than \$10, for each offense for each and every hog and pig.

"Section 135. It shall be the duty of the city marshal to take up and impound any hog found running at large, and report the same to the owner thereof and to the city judge, who shall thereupon summon said owner to appear before him at a stated time within ten days thereafter, and show cause why he or she should not be fined.

"Section 136. The marshal shall make diligent efforts to ascertain the name of the owner of the hog or hogs impounded, and if he shall be unable to do so, he shall advertise the impounding of said hogs and a description of same for ten days by written and printed notices posted at the courthouse door, and also published in some newspaper printed in Elkton, warning the owner of the facts and notifying him to appear before the city judge of Elkton and show cause why said hogs should not be forfeited.

"Section 137. If at any time before the sale of the hog or hogs, as herein provided for, the marshal shall ascertain the name of the owner, he shall, before the making of the sale, summon him as above directed. The owner of such hogs shall have the privilege of redeeming them at any time before the sale by paying the cost and expenses up to the time of the redemption.

"Section 138. After the owner has been summoned and warned as above directed, the city judge shall proceed to a trial as to whether such hog or hogs have run at large within the corporate limits as aforesaid, and if it shall so appear, he shall make an order declaring the same forfeited and directing the marshal to sell them at public outcry, having first advertised said sale by written or printed notices for two days preceding the day of sale. He shall be allowed \$1 for each hog or pig so impounded, and 12½ cents a day for each for feeding and caring for same. Where several belonging to the same owner are impounded at the same time, he shall receive \$1 for one and 25 cents each for the others. The city judge shall be allowed \$1 for holding each trial in which a forfeiture is decreed, all the aforesaid sums to be taxed as costs and deducted from the proceeds of the sale, and the balance, if any, shall be paid to the owner thereof. The marshal is authorized to secure a pound in which to confine hogs taken up under this law."

And in the second paragraph of their answer say that plaintiff's hogs were taken charge of by the marshal of the city of Elkton, while running at large in the corporate limits of the city, and impounded; that they were advertised ten days by written notices posted up at the courthouse door in the city of Elkton, and by a notice published in the Todd County Progress for ten days; that at the expiration of ten days the city police court of the town of Elkton declared the hogs forfeited, and directed them to be sold publicly within two days thereafter for cash; that they were sold pursuant to this order, and the proceeds of the sale were used to pay the cost of the proceed-



ing and the expense of keeping the stock while in pound, and tendered the balance of the purchase money to the plaintiff. A demurrer was interposed to this answer and overruled, and appellant declining to plead further, his petition was dismissed. Upon this appeal appellant does not question the right of the city council of the town of Elkton to pass an ordinance which would prevent the hogs of unknown persons from running at large in the town, nor the right to declare such hogs forfeited; but he earnestly insists that the town council had no authority to prescribe a mode of procedure to accomplish this end, which is in conflict with the provisions of the Civil Code. Section 3637 of the Kentucky Statutes, a section of the charters of cities of the fifth class, to which appellee belongs, provides: "The city council of such city shall have power to pass laws, not in conflict with the Constitution of this State, or the United States."

Subsection 7 of the same section of the statute, in referring to the powers of the town council, says: "It shall have the power to do and perform all acts and things necessary and proper to carry out the provisions of this chapter, and to enact and enforce within the limits of such city all other local, police, sanitary regulations as do not conflict with the general laws."

In several cases this court has held that under similar charter provisions that the city council had authority to pass ordinances authorizing the sale of hogs impounded after a judicial determination by some court that they were running at large in violation of such ordinance. (*McKee v. McKee*, 47 Ky., 433; *Varden v. Mount*, 78 Ky., 86. In the case of *Armstrong v. Brown and Wright v. Clark, &c.*, 20 Ky. Law Rep., 1766, the question was very fully gone into, and the conclusion reached that ordinances similar to those complained of in this action were valid. In the latter case it was held that five days' notice of sale was sufficient, the ordinances being justified as within the proper exercise of the police power which belongs to municipalities of this character. In the case of *Armstrong v. Brown* the opinion uses this language: "If the unknown owner was treated as a nonresident and a warning order made for sixty or ninety days, the cost of keeping them would often equal, if not exceed, the value of the property. So, from the very nature of the case, it is necessary, in the interest of the owner and the city, that the property should be sold as early as may be done, giving reasonable opportunity to the owner to be heard, or, as commonly said, 'to have his day in court.'"

And five days' notice was held reasonable and sufficient time to sustain the jurisdiction of the police court and to render a judgment of sale.

These cases are conclusive of the questions raised by appellant, and an elaborate discussion is, therefore, unnecessary.

Judgment affirmed.

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JONES v. COMMONWEALTH.

(Filed May 20, 1903—Not to be reported.)

Criminal law—Robbery—Instructions—Appellant was tried and convicted under an indictment for robbery. The facts were that appellant took the money from the pocket of another by stealth, and that immediately discovering his loss he saw the hand of the accused a few inches from his pocket and

endeavored to retake the money from accused by force. The court gave an instruction authorizing a conviction for robbery. Held—That said instruction was erroneous and prejudicial as appellant was guilty of larceny if anything, as no force was used until after the commission of the offense, and this was in an effort to regain possession of the property by the person who had lost it.

Julian B. Bourne for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Paynter.

The indictment charges that the appellant \* \* \* "did unlawfully, willfully, feloniously and with force and violence, and by putting in fear one A. B. Tilton, take from his person and presence \$10 in United States currency, bank notes, gold and silver coin, commonly known as money, the personal property of said A. B. Tilton, with the felonious intent to permanently deprive the owner thereof and to permanently convert the same to his own use." \* \* \*

On the trial of the case A. B. Tilton, referred to in the indictment, testified that he was in the betting shed of the Kentucky Trotting Association looking at the pool sellers' bulletin; that he had \$10 in his vest pocket; that the defendant was standing in front of him with his back to him; that while in that position he felt something touch his breast, he immediately grabbed and looked down, when he saw defendant's hand which he had grabbed was twelve or fourteen inches from witness' vest pocket; that defendant pulled and tried to get away, and slipped the money from his right to his left hand. From the facts proven it is evident that the money was taken from Tilton by stealth. The party was not put in fear, neither was violence used in taking the money. This court, in *Commonwealth v. Prewitt*, 82 Ky., 240, defined robbery in the language of the common law, which is: "The felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear." This court, in other cases, has recognized this as the proper definition of robbery. No violence was employed in taking the money. It is true that after Tilton discovered that his money had been taken he sought by force, which the defendant resisted, to regain possession of it and prevent his escape. At the time the defendant was seized he had the money in his possession. The asportation was complete. He had the money as much in his possession when his hand was seized as he would have had had more time elapsed and he had succeeded in placing it in his pocket or in the hands of an accomplice. The force used did not accompany the taking of the money, but in resisting an effort to regain possession of it.

In Blackstone's Commentaries, volume 4, page 242, it is said: "This previous violence or putting in fear is a criterion which distinguishes robbery from other larcenies, for if one privately steals sixpence from the person of another and afterwards keeps it by putting him in fear, this is not robbery, for the fear is subsequent."

It is said in Archibold's Criminal Practice, 508: "It may be observed, with respect to the taking, that it must not, as it should seem, precede the

violence or putting in fear; or, rather, a subsequent violence or putting in fear will not make a precedent taking, effected clandestinely or without either violence or putting in fear, amount to robbery."

The court below evidently tried the case upon the theory that the resistance by the defendant of the force used by Tilton to regain his money made it a case of robbery instead of larceny, therefore, the court gave the following erroneous instruction: "If the defendant, by stealth merely, got and retained or transferred to the possession of another, money, the property of A. B. Tilton, this was not a taking by force. If the defendant, by stealth, got possession of money, the property of A. B. Tilton, by taking said money from the person of said Tilton, and immediately before said defendant had secured the money to himself or transferred to another said Tilton discovered the taking, and then and there, by the use of physical force, attempted to regain possession of the money while said money was in the possession of the defendant, and the defendant then and there, by the use of physical force, prevented said Tilton from retaking said money, and either retained it himself, or fraudulently transferred it to the possession of another, this was a taking by force."

The fact that force was used by defendant after the money had been taken could not relate back to the act of taking so as to be considered force accompanying that act. The taking of the money was larceny.

The judgment is reversed for proceedings consistent with this opinion.

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HOME INSURANCE CO. OF N. Y. v. HOLDER.

(Filed May 19, 1903—Not to be reported.)

Insurance—Waiver of forfeiture of policy—This action was brought to recover for a loss under a policy of fire insurance. A policy of fire insurance was executed on January 31, 1898. The premium was \$25, \$5 of which was paid and four notes for \$5 each, payable annually thereafter, were executed. The last installment became due on January 31, 1902, and was unpaid. The loss occurred on February 12, 1902. The company, in defense, insisted that the policy was forfeited for nonpayment of the last premium note. On the trial evidence was introduced showing that an agent of appellant was applied to before the note became due, and that for special reasons then made known to him waived the forfeiture. A verdict and judgment resulted in favor of plaintiff. On appeal, Held—That the verdict will not be disturbed as the evidence was sufficient to authorize the jury to decide that there was a waiver of the forfeiture.

Shelbourne & Kane for appellant.

J. M. Nichols & Son for appellee.

Appeal from Carlisle Circuit Court.

Opinion of the court by Judge Nunn.

On January 31, 1898, the appellant executed and delivered to appellee its policy of insurance by which it insured him against loss by fire on his residence, household goods and meathouse in the sum of \$500. The premium for this insurance was \$25. Appellee paid \$5 of this at the time, and executed his note for \$20, to be paid in four equal annual installments of \$5 each, to be paid on the 1st day of each February following.

Appellee's property was destroyed by fire on the 12th day of February, 1902.

Appellant refused to pay the policy or any part thereof, claiming that the policy was forfeited or lapsed by reason of appellee's failure to pay the last installment of \$5, when due on February 1, 1902. The policy contains the following clause: "But it is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any installment of the installment note, given for premium upon this policy, remains past due and unpaid."

The facts with reference to the last premium, as appear of record, are as follows, to wit: Some time in the latter part of January, 1902, the appellee received notice from the appellant that his premium would be due February 1, following. The appellee, at that time, had concluded to vacate the premises insured and place his son in the possession thereof as his tenant, and being unable himself to read and write he went to one T. C. Halteman, an insurance agent of Bardwell, but not an agent of appellant company, for information. Halteman advised him not to send the premium to the appellant at that time; that it would be necessary for him to get a tenant's permit from appellant, and that that would cost him something in addition to the premium; that he would, for appellee, write appellant's agent at Clinton, Ky., for the permit, and when he received it, and ascertained the cost of it, he could send the amount with the premium. Halteman then wrote for appellee the following letter:

"Bardwell, Ky., January 31, 1902.

"Mr. Porter, Clinton, Ky.:

"Dear Sir—I am going to move out of my house in a few days; I am carrying insurance in your company and I want you to give me a permit for my son to occupy the building. The premium will be due February 1, and just as soon as I receive the permit I will pay the premium.

"Yours truly,

(Signed) "JOHN HOLDER."

Porter forwarded this letter to the Western home office of appellant at Chicago. The superintendent there wrote a letter stating, in substance, that they would issue the permit when the premium was paid, and also notified appellee that his policy had lapsed by reason of the nonpayment of the premium. This letter was written February 5, and addressed to "John H. Holden," instead of to "John Holder," and appellee never received it. The agent of appellant, Mr. Porter, at Clinton, Ky., was in Bardwell about the 2d of February, and stated to the agent of the appellee, Mr. Halteman, that he had received the letter, copied above, and that he had forwarded it to the company, and that the matter would be attended to. Halteman testified that he told Porter at the time that appellee wanted to pay for the permit and the premium at the same time. Porter denies this. There was other evidence introduced not necessary to mention here.

The court gave three instructions. The first one is as follows: "If the jury believe from the evidence the plaintiff was ready, willing and able to pay the premium at the time it was due, and that he employed T. Halteman to procure for him a permit for his property to be occupied by a tenant; if the jury further believes from the evidence the defendant's agent, J. A. Porter, and said T. Halteman acting for the plaintiff as his agent, entered into a contract or agreement by the terms of which the defendant was to

issue to plaintiff a tenancy permit, and that the payment of premium note was to be deferred until said permit should be issued; and if the jury further believe from the evidence the plaintiff had received no notice from the defendant before the destruction of his property by fire that the permit would not be issued until the premium was first paid, the law is for the plaintiff, and the jury should so find."

The second instruction was the measure of damages, and the third the converse of the first.

In the case of *Blackerby v. Continental Ins. Co.*, 83 Ky., 580, the court said: "While, however, the time of payment of a premium is of the essence of a contract of insurance, and while the conditions of a policy, which the court regards as valid, can not be held to be meaningless or be avoided, save for a sufficient cause, yet forfeitures are not regarded with favor. The belief long prevailed that the insurance business could not be carried on without the power to impose the most stringent conditions for delinquency, owing to the fact that prompt payments constitute its very life; and while this is so, yet more liberal views have properly obtained of late, and the contract will be liberally construed as to the insured. We do not mean by this that the law will not uphold a condition in a policy which is not illegal and contrary to public policy, but that a court will seize hold of a reasonable excuse to avoid forfeiture. If, for instance, the insured can show some reasonable excuse for nonpayment of a premium, based upon the conduct of the insurer, the policy will not be regarded as forfeited."

It is further shown in the proof that one or two of the previous premiums were paid after their maturity without objection or complaint or forfeiture or lapse, and it is shown by the note of appellee to appellant's agent that it was his purpose to retain the premium until he ascertained the additional cost occasioned by the tenancy permit, and to remit it all at one time, and the statement by appellant's agent, Porter, to appellee's agent, Halteman, in effect that this would be all right, this, in our opinion, was sufficient to lull appellee into feeling that he was secure, and that his interests were protected. The instructions of the court were right and proper, and there was at least some evidence authorizing the jury to return a verdict for the plaintiff.

Finding no error prejudicial to the rights of the appellant the judgment of the lower court is affirmed.

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CLEVELAND ORPHAN INSTITUTION, &c. v. HELM, &c.

(Filed May 19, 1903—Not to be reported.)

Probate of wills—Statute of limitation—In 1890 H. died, and no will being found, his mother administered on his estate. The property was sold and proceeds distributed among his heirs as in case of intestacy. More than eleven years after his death a will was found, in which appellants were designated as devisees in remainder after the death of his mother, who was given the life estate. This will was offered for probate, and the county court refused to admit it to probate as the statute of limitation of ten years was interposed as a defense. The action of the lower court was approved on appeal

to the circuit court. On this appeal, Held—That while no section of the Kentucky Statutes fixing a statute of limitation by specific terms applies to probate of wills, yet section 2522, Kentucky Statutes, providing a limitation of ten years for all cases not specifically provided for, applies to this case, and the will was properly refused to be probated.

D. L. Thornton, W. O. Davis and Field McLeod for appellants.

Geo. B. Kinkead for appellees.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Nunn.

On the 16th day of October, 1890, T. Logan Helm, a citizen of Woodford county, Ky., accidentally met his death in the county of Orange and State of Florida, at which place he had certain interests and was temporarily sojourning. No will was found at the time of his death, and it was believed by all who were associated with him, or related to him, that he died intestate. At the time of his death he owned an undivided one-third interest in an estate left by his father, J. D. Helm, which consisted largely of valuable land in Woodford county, Ky. He was also the owner of three small tracts of land, with orange groves on them, in Florida. His mother, believing that he died intestate, administered upon his estate in Florida, and settled his estate there by the sale of his lands and the payment of his debts. This occurred in the year 1891. On the 28th day of July, 1902, eleven years and nine months after the death of Helm, a paper purporting to be the last will and testament of T. Logan Helm was produced by one of the officers of the bank of Woodford, and offered for probate in the Woodford County Court. By this paper, which appeared to have been written by Helm, he devised a life estate in all his property to his mother, Mrs. Mary Helm, with remainder to the appellants, Cleveland Orphan Institution, at Versailles, Ky., the Kentucky Female Orphan School at Midway, Ky., the St. John's Protestant Episcopal Church and the trustees for the common schools of Woodford county, Kentucky. The father of the decedent had died some years before the date of his death, and his mother and only sister survived him as his sole heirs at law. This sister, Miss Margaret Helm, and his mother, Mrs. Mary Helm, appeared in the Woodford County Court, and then on appeal in the Woodford Circuit Court, and interposing the plea of the statute of limitations, resisted the motion to probate the paper as the last will and testament of T. Logan Helm. The lower court sustained their plea and dismissed the proceedings to probate the will. Appellants have appealed from that judgment to this court.

In the case of *Allen, &c. v. Froman*, 96 Ky., 316, the court said: "Indeed there is no provision in chapter 71, the title of which is 'limitation of actions,' that in terms does fix the limit of time within which wills may be probated, and if done at all, it is by section 9, article 3, as follows: 'An action for relief not provided for in this or some other chapter can only be commenced within ten years next after the cause of action accrued.' The language of that section does in fact, and we must consequently hold was intended to, comprehend every case of relief not elsewhere in the General Statutes directly provided for, whether sought by action or proceeding. For section 27, chapter 21, provides that the term 'action,' when used in this revision, shall be

construed to include all proceedings in any court in this Commonwealth. We can see no reason why a period of time should not be fixed for probating wills as well as for instituting or commencing any other action or proceeding for relief, for fraud may be perpetrated in the matter of probating wills by reason of death of witnesses to the transaction, and innocent purchasers disturbed and deprived of property honestly acquired, by setting up false wills after a long lapse of time, as can occur in any other case. So, as held by the court in *Hoffert v. Miller*, 86 Ky., 572, it has become legislative policy of this State to fix in every case a limit of time for beginning every action or proceeding for relief, and section 9, article 3, was intended for that purpose."

These sections of the General Statutes were in force at the time of the death of T. Logan Helm, and the same provisions are in the Kentucky Statutes now in force.

Appellants concede that the case above referred to is in opposition to their claim, and insist that this court overrule the case of *Allen v. Froman*, and claim that section 2522, Kentucky Statutes, which is the same as section 9, article 3, General Statutes, does not apply to the probate of wills, and refers this court to 5 Littell, 274. At the time this case was decided there was no statute in this State similar to section 2522, and consequently that case can have no bearing on the issue here. Since the case of *Allen v. Froman* was decided this court decided and ordered to be reported the case of *Reid's Adm'r v. Bengé*, 23 Ky. Law Rep., 22-3, in which case the case of *Allen v. Froman* was cited and approved, the court using this language: "It is well settled in this State that a will may be probated at any time within ten years after the death of the testator."

We are of the opinion that the principles settled in the cases above referred to are sound and should be upheld for the reason that the public have a great interest in having a known limit fixed by law to litigation for the quiet of the community, and that there may be a certain fixed period after which the possessor may know that his title and right can not be called in question or harassed by stale demands after witnesses of the facts are dead.

We have been unable to find anything in the pleadings which will bring appellants within any of the exceptions to prevent the running of the statute of limitation. Appellants complain of this part of the judgment of the lower court: "And it is adjudged by the court that neither said paper, nor any part thereof, is the last will and testament of T. Logan Helm, deceased." This language is surplusage, and can not have any effect. The only question before the court was whether or not the paper purporting to be the will should be probated. The court properly adjudged that it should not be as it was barred by the statute of limitation.

Finding no error prejudicial to the rights of appellants the judgment of the lower court is affirmed.

#### LOUISVILLE & NASHVILLE R. R. CO. v. HALL.

(Filed May 19, 1903—Not to be reported.)

1. Railroads—Negligence—Statute of limitation—Pleading—Appellee was an employe of appellant, performing duties at coal bins which supplied its engines with coal, and while descending a ladder on the side of a box car

was struck by a portable chute and knocked between the cars and his legs were crushed, which necessitated their amputation. This action was filed, also an answer pleading contributory negligence. Before any reply was filed to same an amended answer was filed, interposing the plea that the action was barred by statute of limitation of one year because the petition was not filed and summons issued thereon within one year after the injury as required by sections 2524, Kentucky Statutes, and section 59, Civil Code of Practice. To the filing of this amendment appellee objected and the court sustained the objection. Appellee to support his objection filed the affidavit of the circuit court clerk, stating that he had received the petition by mail, with instructions to file it and issue summons on it eleven days before the expiration of the year, but the tax not accompanying the petition, and not being acquainted with either the plaintiff or his attorney, he did not file it, but several days before the expiration of the time he met plaintiff's attorney and told him that the suit was filed and summons issued, honestly thinking he had filed it. Upon discovering his mistake he filed it and issued summons on it, but not until after the expiration of one year from the injury. A trial resulted in a verdict and judgment for plaintiff for \$10,000 damages. The failure of the court to permit the amended answer to be filed is relied on as a ground for reversal. Held—That the court erred in refusing to permit the amended answer to be filed as a party has the right to amend an answer at any time without leave before reply is filed to same, and no reply was filed before the amendment was tendered, but same would not have been available if the statements had been true as plaintiff, by filing his petition with the clerk with instructions to issue summons thereon, had done all he could, and could not be prejudiced by the failure of the clerk to perform his duty within proper time.

2. Instructions—It was erroneous to instruct the jury that it was the duty of the railroad company to keep the coal chute far enough from the track to permit a person on a ladder on the side of a car to pass without injury. The company was only required to exercise reasonable care to prevent such injury. It was also erroneous as it only required plaintiff to know that the chute was too close to the car when the instruction should have added that he knew or could, by the exercise of ordinary care, have known.

3. Measure of damages—The court erred in its instruction which fixed the measure of damages. In this case, where death did not ensue, the court should have instructed the jury that compensatory damages should be confined to the expense of cure, value of time lost and fair compensation for physical and mental suffering caused by the injury, and for any permanent reduction of power to earn money. No instruction authorizing punitive damages should have been given as the proof did not show that appellant was guilty of any gross negligence.

4. Verdict flagrantly against the evidence—A new trial should have been granted as the verdict was flagrantly against the evidence.

Fairleigh, Straus & Eagles, B. D. Warfield and E. W. Hines for appellant.

W. S. Pryor and B. F. Cooper for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, W. H. Hall, was one of a gang of laborers employed by the appellant, the Louisville & Nashville R. R. Co., to perform such services as might be necessary about their coal bins from which it supplied its engines with coal at Lebanon Junction. The bins are about eight hundred feet in length and are built along a side track, on which appellant operated three



large portable coal chutes from which the tenders of the engines were loaded. On the 15th of August, 1899, the appellee, Hall, came in contact with one of these coal chutes whilst descending the side ladder from the top of a box car attached to a moving freight train, and was knocked between two cars, and his legs run over and so crushed as to require amputation. On the 16th of August, 1900, he instituted this suit for damages, alleging as a cause of action that he had been directed by the foreman in charge of the coal bins to try to detect certain parties who were stealing coal from the bins, and for this purpose was allowed to board freight trains after they had been supplied with coal and ride along the bins; that on the 15th day of August, 1899, he climbed to the top of a box car of a slowly passing train and remained on the top of the car until it had passed, as he supposed, the three coal chutes on the side track; that he then descended the side ladder of the box car for the purpose of alighting near the far end of the coal bins, when he suddenly came in contact with one of these chutes, which had been moved from its customary place near the other two and without his knowledge, and had been negligently left standing on the side track in such close proximity to the main track that his body could not pass between the chute and the moving train; and that as a result of this negligence he was knocked from the side of the car and run over by the train, sustaining injuries therefrom which resulted in the loss of both of his legs. He charges that these injuries were the result of the defendant's negligence in failing to construct and keep its portable coal chutes at a proper and safe distance from its passing cars.

At the following September term of the Bullitt Circuit Court defendant answered, traversing specifically all the affirmative allegations of plaintiff's petition, and saying further, by way of defense, that the plaintiff had been employed about its coal bins for many months prior to receiving the injuries sued for; that he was familiar with its portable chutes and the construction thereof, and was thoroughly familiar with their proximity to the main track; that he received the injuries sued for whilst he was riding on the side ladder of one of their freight cars in violation of one of the rules of the company, and for his own pleasure and convenience, and not on any business of the company or in obedience to any direction, express or implied, of the foreman of the coal bins; that he was at a place where he had no right to be, and where no duty of his employment called him, and received the injuries complained of as the result of his own contributory negligence. The pleadings were not made up at the September term. At the following March term of the court, before a reply had been filed, the defendant tendered and offered to file an amended answer, in which they alleged that more than one year had elapsed between the 15th day of August, 1899, when plaintiff's right of action accrued, and the 16th of August, 1900, when this suit was filed and summons issued thereon, and relied upon the lapse of time and the statute of limitation, and averred that this plea was omitted from the original answer by oversight and mistake on the part of the attorney. Plaintiff objected to the filing of this amended answer, and filed the affidavit of O. W. Pearl, clerk of the Bullitt Circuit Court, in which he stated that about the 5th of August, 1900, he received the petition in this case in a letter from plaintiff's attorney, requesting that same be filed and summons issued thereon, but that no tax accompanied the petition; and that as he did not

know either the plaintiff or his attorney he did not file the petition, but when asked about the matter by plaintiff's attorney several days prior to the 16th of August, 1900, informed him in good faith that it had been filed; and that he thought so at the time, and did not discover his mistake until the 16th of August, 1900, when he filed the petition and issued summons thereon. The trial court refused to permit the amended answer to be filed. The pleadings being made up by reply, a trial before a jury at the December term, 1901, resulted in a verdict and judgment in favor of the plaintiff for \$10,000.

Grounds and motion for a new trial having been overruled the defendant appeals, relying for a reversal upon numerous alleged errors to their prejudice in the court below. First in order was the refusal of the trial court to permit the plea of limitation set up in the amended answer to go in.

By section 2524 of the Kentucky Statutes it is provided that "an action shall be deemed to have been commenced at the date of the first summons or process issued in good faith from the court or tribunal having jurisdiction of the cause of action."

Section 39 of the Civil Code of Practice is as follows: "An action is commenced by filing in the office of the clerk of the proper court, a petition stating the plaintiff's cause of action; or, in cases wherein written pleadings are not required, by filing in such court the account, or written contract, or a short written statement of the facts on which the action is founded; and, in either case, by causing a summons to be issued or a warning order to be made thereon."

In *Kellar v. Stanley*, 86 Ky., 240, it was held that an action was not commenced until a summons was issued or a warning order made. In *L. & N. R. R. Co. v. Smith's Adm'r*, 87 Ky., 501, which was a suit for damages for personal injuries, the petition was filed and summons issued thereon and served upon the appellant within a year from the accrual of the cause of action, but the summons cited the appellant to appear at the next term of the court, which commenced within ten days from the date of the summons. At the following term of the court the summons, upon defendant's motion, was quashed upon the ground that it was made returnable to a term of court commencing within ten days from its date. Thereafter an alias summons was issued and served, and more than a year having elapsed from the accrual of the cause of action to the issuing of the alias summons, plaintiff plead the statute of one year's limitation as a bar to appellee's right to maintain the action, and it was held that where the plaintiff had filed his petition and caused summons to issue thereon in time to save his right of action he had done all that the law required him to do, as it was the duty of the clerk to issue the summons to the proper term of court, and it was not incumbent upon the plaintiff to see that he did so. The ruling in this case was followed in the case of the *L. & N. R. R. Co. v. Bowen*, 18 Ky. Law Rep., 1099.

In that case the petition was filed in time, but the summons was issued in the name of D. C. Brown instead of D. C. Bowen, and it was held that when plaintiff filed his suit and had summons issued he had a right to believe that the clerk would issue it in his name and that limitation did not run. These cases involved the construction of the Code provisions. In *Clark v. Kellar*, 66 Ky., 223, the court had before it a case arising under section 2524 of the Statutes, and it was held that if five years was permitted to elapse

after the suing out of process, which had been returned unexecuted, until another process was sued out and executed the bar was effectual. In *Hiatt v. Bank of Kentucky*, 71 Ky., 193, it was held that an action was commenced when the first summons thereon was issued in good faith.

In all the cases bearing upon this question which we have been able to find the plaintiff had filed his petition in the clerk's office and caused summons to be issued thereon within the statutory period of limitation, it was held that this was the limit of his duty; that he had a right to rely upon the clerk to issue the summons in proper form and to the proper court. It appears both from the reasoning and decision in each of these cases that the duty on the part of the plaintiff to file his petition and have summons issued thereon within the statutory period was mandatory; and that any negligence in this respect could not be charged to the clerk as an excuse for the plaintiff's failure to perform his duty. But in the case at bar another very serious question arises. The clerk in his affidavit testifies that whilst the petition was mailed to him within the period of limitation, it was not accompanied by the tax on the suit; that he was unacquainted with the plaintiff and his attorney, and for this reason declined to file the petition or issue the process, nor does it appear that this omission was ever supplied. As said in *Wood v. Carpenter*, 100 U. S., 135: "Statutes of limitation are vital to the welfare of society and are favored by the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidences of rights, they supply its place by a presumption which rendered proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and the antidote go together."

Section 132 of the Civil Code provides that the plaintiff may at any time before answer amend his petition without leave. In this case no reply had been filed to defendant's original answer and the amendment was tendered for the purpose of supplying a defense which had been omitted from the original answer by the oversight and mistake of counsel. Section 134 of the Civil Code provides that the court may at any time in furtherance of justice permit a pleading to be amended by correcting a mistake in any respect, and, in our opinion, the trial court erred in refusing to permit the amended answer to be filed, and upon return of the case the amended answer should be filed and plaintiff allowed to reply thereto.

We will next consider alleged errors in the instructions Nos. 1 and 2, given to the jury on plaintiff's motion. No. 1 is as follows: "The court instructs the jury that it was the duty of the defendant to keep its portable chute, when not in use, at such distance from its moving trains as was reasonably necessary to enable its servants to ascend or descend the side ladders of its freight trains in the discharge of their duties, with reasonable safety, without the exercise of more than ordinary care. And if the jury believe from a preponderance of the evidence that the plaintiff was injured whilst discharging in good faith his duty to defendant, under the directions of defendant's employe superior in authority to plaintiff, and that his injuries in controversy were caused by the gross negligence of defendant, its agents or em-

ployes, in failing to keep, if it did so ~~fall~~, its portable chute when not in use at a reasonably safe distance from the side ladders on its moving trains, the law is for the plaintiff, and the jury should so find. If, however, the jury believe the plaintiff knew that the defendant's portable chute was too close for reasonably safe passage on the side ladder of defendant's train at the time and place in controversy, then, in that event, the law is for the defendant, and the jury should so find."

By this instruction the jury are told, as a matter of law, that it was negligence in appellant not to keep its coal chute far enough from the track so as not to injure employes on the side ladders of passing cars. Whether or not it is possible to maintain a portable coal chute used for furnishing coal to passing engines so far away from moving trains that one on the side ladder of a box car may pass safely between the chute and the train was a question of fact for the jury. It may be that it is absolutely necessary to construct coal bins as in the case at bar, and if it be not so, still it may not be negligence to do so.

In the case of *L. & N. R. R. Co. v. Mounce's Adm'r*, ante, 1878, decided January 23, 1903, where damages were sought for the death of a switchman in appellant's yard at Livingston, by reason of the alleged fact that the switch lights were unlighted, the court used this language: "Besides, instruction No. 1 given to the jury is erroneous and prejudicial to the defendant, as in it the court told the jury that it was defendant's duty to have the lights in reasonably good order and condition to show the location of the switch, and if he failed to do so, plaintiff was entitled to recover. Under this instruction, if the jury found that the lights were out, it was bound to find for the plaintiff, however great may have been the care exercised by the defendant. As was said by this court in *Needham v. L. & N. R. R. Co.*, 85 Ky., 425: 'It is the duty of the master to use ordinary care in providing for the use of the servant safe machinery and premises in safe condition. He is not, however, an insurer.' In *Shearman & Redfield on Negligence*, section 189, 4th edition, the principle is stated in these words: 'The master is bound to use ordinary care, diligence and skill, for the purpose of protecting his servants from encountering unnecessary risks in the service; but he is not bound to use any higher degree of care for that purpose.' These citations are in accord with the great weight of authority on this subject. In fact we know of none to the contrary."

This instruction is objectionable for another reason, as it only requires plaintiff "to know" that the chute was too close to the track for reasonably safe passage by it on the side ladder of the car. It should have contained the additional qualification that he knew or could by the exercise of ordinary care have known.

The verbiage of the second instruction is also unusual and calculated to mislead the jury. It tells the jury that "if they find for the plaintiff they should award such damages, if any, as the proof shows he has sustained."

This general expression is followed by the words: "In estimating the amount of damage the jury should take into consideration the age and situation of the plaintiff, his earning capacity, and its probable duration, and his bodily suffering and mental anguish, and the extent to which he is disabled in making a support for himself by reason of the injuries received,

and the jury, in addition to such compensatory damages, may award punitive damages not exceeding in all \$25,000."

This court has frequently announced in actions for personal injuries, where death does not ensue, that compensatory damages were confined to the expense of cure, value of time lost, and fair compensation for physical and mental suffering caused by the injury and for any permanent reduction of the power to earn money. (*Parker v. Jenkins*, 86 Ky., 560; *L. C. & L. R. R. Co. v. Case's Adm'r*, 72 Ky., 736; *C. P. & R. v. Kuhn*, 86 Ky., 578; *Carson v. Singleton*, 23 Ky. Law Rep., 1676.) The instruction is erroneous in that it does not confine the jury to the consideration of these elements of damage. It is also erroneous in telling them that they should take into consideration the situation of the plaintiff, and in authorizing punitive damages. Both for the reason that the jury are not required to find as a condition precedent to awarding such damages that the acts of the defendant which are complained of amounted to gross negligence, and for the reason that the proof discloses no ground for the recovery of punitive damages at all. The plaintiff admitted that he knew the coal chutes were portable and were frequently moved from one place to another; and that they were too close to the track for reasonably safe passage by them of a man riding upon the side ladder of a moving box car; that his injuries resulted solely from the fact that he believed the car on which he was riding had passed beyond the chutes before he attempted to descend the side ladder for the purpose of alighting.

Appellant insists that the overwhelming weight of testimony in the case conduces to show that appellee got upon the car for his own purposes and not in the interest of business of the company; that he had full information as to the relative location of the coal chutes, and that his injuries resulted from his negligence in riding on the side ladder of the box car without proper precautions on his part to avoid being struck by the coal chute; and that a peremptory instruction should have gone. Where there is any conflict in the testimony questions of negligence should be left to the jury; but, in our opinion, there was such a decisive preponderance of the evidence in this case against the finding of the jury that it should have been set aside and a new trial awarded on this ground as well as for errors of the court pointed out in the opinion.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

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MORRISON v. COMMONWEALTH.

(Filed May 19, 1903—Not to be reported.)

1. Criminal law—Evidence—Appellant prosecutes this appeal from a conviction and sentence to confinement in the penitentiary under an indictment for the murder of D. The proof showed that D. was trying to induce his sister to come off the street and away from the company of appellant, with whom she had improper relations, and a slight difficulty took place between brother and sister, when appellant ran up and stabbed D. in the back. It is insisted that the court erred in admitting testimony that the sister and appellant had for some time past been living in improper relations. Held—

That this evidence was properly admitted for it explained the circumstances of the parties and illustrated their motives. The evidence also went to the interest of the sister as a witness. Appellant offered to prove by a number of witnesses that the deceased was by character a violent and dangerous man, who usually carried deadly weapons. He also offered to prove by several witnesses that the deceased had threatened to kill him, and that these threats had been communicated to him. Held—That while this evidence is usually proper to be proved, yet the court properly excluded said testimony, as the proof shows that appellant was the aggressor in the difficulty.

2. Instructions—Appellant could not be excused on the ground that he interfered for the protection of the life of the sister, or to protect her from great bodily harm at the hands of her brother, as the proof fails to show that the trouble between brother and sister was such as to threaten her life or to inflict great bodily harm, and as the assault was not felonious, appellant not standing in any privileged relation to her, had no right to interfere.

Jas. Andrew Scott and B. G. Williams for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hobson.

Appellant, William Morrison, was indicted for the murder of Alex. Dean, and was convicted of manslaughter and his punishment fixed at confinement in the penitentiary for eleven years. The proof shows that Ida Dean, a sister of the deceased, had borrowed an umbrella on the afternoon of the day of the homicide, she promising to return it that evening. About half-past eight o'clock she came up the street with the umbrella, and meeting George Turner, asked him if he had seen Morrison. They went on together and soon met Alex. Dean, who took hold of his sister and told her to go home, upbraiding her for being out looking for Morrison. There is a conflict of evidence as to what followed. The proof for the Commonwealth is that Alex. Dean went along the street with his sister, pushing her along about ninety feet, when she stopped, declining to go any further, and about this time Morrison seeing them, ran down to where they were on his tip-toes and stabbed Dean in the back; that he immediately fell to the ground, uttering no sound, except a groan, and died in a few minutes. The proof for the defendant is that Morrison heard some one say that Alex. Dean was beating his sister, and ran out to where they were, putting his hand on Alex. Dean's shoulder and saying: "You can't beat her where I am;" that Dean immediately drew a pistol and said, with an oath, "I will kill you both;" that Morrison caught the pistol and they clinched, and as they fell he stabbed Dean in the back with his knife. This proof is made by Morrison himself, and also by Ida Dean, who testified in his behalf, and by Turner. No pistol was found on Dean's person, or on the ground where he fell, nor is it shown by any other proof that he had a pistol. The proof shows that Dean was smoking a pipe and that when he and his sister stopped at the place where the homicide took place, and she declined to go any further, she struck him with the umbrella and knocked the fire out of his pipe. This pipe was found on the ground after the homicide, and it may be that this is what Dean had in his hand when Morrison came up. The point at which the difficulty occurred was near the center of the square and not well lighted by the street lamps.

The court allowed the Commonwealth to prove by both Morrison and Ida Dean, on cross-examination, in effect, that Morrison was, and had been for some time past, living in improper relations with Ida Dean. This evidence was objected to, but was properly admitted, for it explained the circumstances of the parties and illustrated their motives. The evidence also went to the interest of the witness, Ida Dean, and to show bias.

Morrison offered to prove by a number of witnesses that the deceased was, by character, a violent and dangerous man, who usually carried deadly weapons. He also offered to show by several witnesses that the deceased had threatened to kill him, and that these threats had been communicated to him. This evidence was excluded by the court.

In Roberson on Criminal Law, section 240, it is said: "If the deceased was a man of violent and dangerous character, more prompt and decisive measures of defense would be justifiable than if he were of a peaceable disposition. Hence in cases of homicide, evidence that the deceased was a violent, quarrelsome, turbulent, dangerous or vindictive man, or was in the habit of carrying concealed weapons, is admissible to show, or as tending to show, that defendant acted in self-defense, or under such circumstances as would have naturally caused a man of ordinary reason to believe that he was, at the time of the killing, in imminent danger of losing his life or of suffering great bodily harm at the hands of deceased. \* \* \* But evidence of the character here spoken of is not admissible where the defendant was the aggressor, nor until a proper foundation is laid by showing an overt act or hostile demonstration toward defendant by deceased before he was killed." (*Payne v. Commonwealth*, 58 Ky., 879; *Riley v. Commonwealth*, 94 Ky., 266; *Commonwealth v. Hoskins*, 18 Ky. Law Rep., 60.)

In Roberson on Criminal Law, section 223, it is also said: "Upon the issue of self-defense, or where there is a doubt concerning the defendant's motive in committing the homicide, whether he was actuated by malice or believed that he was in danger from deceased, he may prove that deceased had made threats against his person or life, as tending to show that he was in peril at the time of the homicide, or that he had reasonable grounds upon which to believe that he was in such peril; provided such threats were communicated to defendant before the killing. \* \* \* But where there is no evidence of an overt act or hostile demonstration on the part of the deceased, evincing a present purpose to carry the threats into execution, nor any doubt that defendant was the aggressor, evidence of previous threats by deceased against the defendant, although they were communicated to defendant, is not admissible." (3 *Rice on Evidence*, 362; *Wharton, Criminal Evidence*, section 757; 9 *Am. & Eng. Ency. of Law*, 673.)

It will thus be seen that the admissibility of the evidence in question depends upon whether the defendant was the aggressor in the difficulty, for if he knew that deceased had threatened his life and was a violent and dangerous man, so much the more reason would there be that the defendant should not be the aggressor in the difficulty. The court, after giving the usual instruction on murder, manslaughter and reasonable doubt, instructed the jury as follows on self-defense: "If the jury believe from the evidence that the defendant at the time he cut and killed the said Alex. Dean, if he did cut and kill him, believed, and had reasonable grounds to believe, that the

said Alex. Dean was then and there about to take his life or inflict on him great bodily harm, and there appeared to him, in the exercise of a reasonable judgment, no other safe means to avert the real, or to him apparent, danger, if any, but to cut the said Dean, then he had the right to do so, and they ought to acquit him on the ground of self-defense."

The Commonwealth complains of this instruction as too favorable to the accused, in that it allows him to rely on self-defense, although he was the aggressor in the difficulty. He, however, insists that the instruction was not as favorable to him as it should have been, and that the court erred in refusing to allow the following instruction which he asked: "The court instructs the jury that if they shall believe from the evidence that just before he was cut and killed the deceased, Alexander Dean, was, without any fault on her part, engaged in an assault upon Ida Dean, within the sight and hearing of the defendant, William Morrison, and that said Morrison had a right to believe, and did in good faith believe, that said Dean was then and there about to inflict upon said Ida Dean either loss of life or great bodily harm, then said Morrison had a right to interfere for her protection and stop said assault by all such reasonable means as appeared to him to be necessary to that end; and if in doing so it became necessary, or apparently necessary, for him to take the life of said Dean, he had the right to do so, and the jury should acquit him, for what a man may do for himself, he may do for another."

The defendant Morrison's testimony as to how the difficulty came up is in these words: "I ran down that way; I did not go very fast, and I went down; why he had her up against the house beating her and I caught him on one shoulder and shoved them apart and told him 'you can't beat her where I am,' and he drew a pistol and said, 'I will kill both of you.' \* \* \* My intention was to keep him from hitting her. \* \* \* He was striking her in the face with his fist when I got to him. \* \* \* It seemed to very near knock her to the ground. The last one knocked her up against the house; she would have fallen if it had not been for the house. \* \* \* He drew his pistol and I grabbed his hand and he struggled. \* \* \* We both went to the ground. \* \* \* I cut him while I was in the fall."

Turner and Ida Dean make in substance the same statement. On the other hand, the Commonwealth's witnesses all say that Dean was simply pushing his sister along the side of the street. They all agree that Morrison ran at least ninety feet on tip-toe before he came up to them. We do not see anything in the evidence to warrant the belief that Alex. Dean was about to kill his sister or do her some great bodily harm. It is true he wanted her to go home, and she declined to go. She struck him with the umbrella, and whether he then struck her or pushed her against the house, it is reasonably clear that no harm would have come of the quarrel between brother and sister if Morrison had not intervened. The proof shows that she was a small, frail woman, and that Alex. Dean only wanted her to get off the street. So the case comes to this: Did Morrison when he saw Alex. Dean committing an assault on his sister, and pushing or striking her against the house, have a right to intervene between the brother and sister for her protection from a simple battery?

In 1 Bishop on Criminal Law, section 877, it is said: "The doctrine here



is that whatever one may do for himself he may do for another. The common case, indeed, is where a father, son, brother, husband, servant, or the like, protects by the stronger arm the feeble. But a guest in a house may defend the house; or the neighbors of the occupant may assemble for its defense; and, on the whole, though distinctions have been taken and doubts expressed, the better view plainly is that one may do for another whatever the other may do for himself."

The statement of the law as applied to simple batteries and breaches of the peace is broader than it is usually put in the authorities. Thus in 8 Blackstone it is said: "The defense of one's self, or the mutual and reciprocal defense of such as stand in relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these, his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace which happens is chargeable upon him only who began the affray."

In a note to this it is added: "When a person does not stand in either of these relations he can not justify an interference on behalf of the party injured, but merely as an indifferent person to preserve the peace." (2 Am. & Eng. Ency. of Law, 981; 2 Roberson's Criminal Law, section 548.)

When a felony is apparently about to be committed, as where there is apparent danger of loss of life by the person assailed or of great bodily harm to him, a different rule prevails, and there any third person may lawfully intervene for his protection, using such means for his defense as the person assaulted himself may lawfully use. But where the assault is not felonious and the person intervening does not stand in any of the relations to the one assaulted excepted out of the common-law rule, then he who intervenes can only act for the preservation of the peace. He can not come into the difficulty for the purpose of taking the place of the person assailed and continuing the fight. This is the common-law rule, as we understand the authorities, and we can not depart from it or extend it.

It is conceded on all hands that Morrison ran down on tip-toe to where Alex. Dean and his sister were, some ninety feet away. If when he got there he at once stabbed Dean in the back, as stated by the witnesses for the Commonwealth, he was the aggressor. The instruction of the court, which submitted to the jury the question whether Morrison believed, or had reasonable grounds to believe, himself in danger of death or great bodily harm at the hands of Dean when he stabbed him, was more favorable to Morrison than the law warranted, as the court did not submit to the jury the question whether Morrison was the aggressor.

Morrison knew that the illicit relations between him and Ida Dean were the foundation of the animosity of Alex. Dean to him. He also knew that this was the cause of the quarrel between the brother and sister. With this knowledge he ran on tip-toe down to where they were, armed with a dirk, and if, as he says, he caught Alex. Dean by the shoulder and shoved them apart, saying to him, "you can't beat her where I am," his interference was not as an indifferent person to preserve the peace; for his first act was to commit a battery on Alex. Dean by taking him by the shoulder, and this was followed up by a declaration which he could but know, under all the circumstances, would make Alex. Dean regard him as an assailant. To hold

that he intervened under the evidence as an indifferent person to preserve the peace would be to give no real effect to the common-law rule allowing greater rights to parent and child, husband and wife, master and servant, or the like, than to other persons in cases of simple batteries or breaches of the peace.

According to his own testimony, the manner of his approach, his conduct on reaching Alex. Dean, and his declaration to him, under the circumstances were not those of one bent on peace, but of one proposing to champion the woman and fight her battles for her. He was, therefore, the aggressor, and the court did not err in refusing to admit the proof as to the bad character of Alex. Dean, or his previous threats; and this evidence, if admitted, could not have been of material service to the defendant under the view of the law which we have indicated, for the jury might have inferred that when he interfered, with knowledge of the previous threats and the character of Dean, he anticipated the result that ensued. The verdict of the jury finding him guilty of manslaughter and fixing his punishment at eleven years in the penitentiary seems to have been due to their accepting the version of the transaction as given by the witnesses for the Commonwealth, and their believing that Morrison acted in sudden heat on seeing the woman assailed by her brother.

Judgment affirmed.

Whole court sitting.

Judge Nunn dissenting.

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TERRY v. HARGIS, JUDGE, &c.

(Filed May 19, 1903—Not to be reported.)

Office and officer—Sheriffs—Vacancies—Constitutional law—C. was elected sheriff of Breathitt county in 1897 for a term of four years, and resigned on January 1, 1900, and appellant was appointed by the county court to fill the vacancy. At the November election, 1901, appellant and appellee Callahan were opposing candidates for sheriff, and Callahan was given the certificate of election. On a contest instituted by appellant, the election was declared void and the county court appointed Callahan to fill the vacancy. Appellant appeared before the county judge and offered to renew his bond as sheriff, which offer was refused. Whereupon he instituted this action for a mandamus compelling the county judge to accept said bond and admit him to qualify as sheriff, claiming the right to same until his successor is legally elected and qualified. The only question presented on this appeal is whether appellant has the right to hold over under his appointment of January, 1900. Held—That it was not the intention of the framers of the Constitution that section 99 should authorize an officer designated therein, who might be appointed to fill a vacancy, to hold over under such appointment during the succeeding term of said office, and the mandamus was properly refused as Callahan is entitled to the office under his appointment.

J. B. Marcum for appellant.

J. J. C. Bach for appellees.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Nunn.

In 1897 J. S. Cope was elected sheriff of Breathitt county for a term of four years, that being the regular time for electing a sheriff. On January 1, 1900, he resigned, and on that day appellant, Charles Terry, was appointed by the county court to fill the vacancy caused by Cope's resignation. At the November election, 1901, appellant and appellee Callahan were opposing candidates for the office of sheriff. Callahan, on the face of the returns, was elected by sixteen majority, and received a certificate of election. Terry at once instituted contest proceedings, and on December 6, 1902, the circuit court decided that the election of 1901 was void, and that neither Callahan nor appellant was entitled to the office of sheriff under that election. On the first Monday in January, 1903, appellant Terry appeared before appellee Hargis, who was county judge, and offered to renew his bond as sheriff for the year 1903 under his appointment of January 1, 1900. Appellee Hargis refused to allow him to execute bond, on the ground that Terry did not hold over under his appointment and that the office was vacant; whereupon he appointed appellee Callahan to fill the vacancy and accepted bond from him. Appellant then instituted this action to compel the county judge to accept his bond and to enjoin Callahan from acting. The circuit court having sustained a demurrer to the petition the same was dismissed, and hence this appeal. The only question raised by the appeal is whether Terry has a right to hold over under his appointment of January, 1900. If there was a vacancy in the office when the county court appointed appellee Callahan the court had the right to fill it, but if Terry has the right to hold over, of course there was no vacancy, and the order appointing Callahan was void.

Appellant claims that Terry was appointed to fill the unexpired term of Cope, which did not end until the election and qualification of Cope's successor; or, in other words, he contends that he not only had the right by his appointment to fill out the unexpired four-year term of Cope, but to hold on during the succeeding four-year term in the event no successor was elected and qualified. This question has been settled by this court by two decisions. The first case is *Campbell v. Dotson*, 23 Ky. Law Rep., 510. In that case A. W. Campbell was elected justice of the peace for magisterial district No. 5 of Pike county, and entered upon the discharge of the duties of the office. At the November election, 1897, the regular election for justices of the peace, J. J. Woolford, was elected to succeed appellant, but failed to qualify as provided by law. After Woolford failed to qualify the county judge entered an order declaring a vacancy to exist in the office of justice of the peace in that district, and appellee, J. L. Dotson, was regularly appointed to fill the vacancy. Appellant Campbell insisted that there was no vacancy to be filled, and that he was still the rightful officer under section 99 of the Constitution, which section reads as follows: "There shall be elected in 1894 in each county a judge of the county court, a county court clerk, a county attorney, sheriff, jailer, coroner, surveyor and assessor, and in each justice's district one justice of the peace and one constable, who shall enter upon the discharge of the duties of their offices on the first Monday in January after their election, and continue in office three years, and until the election and qualification of their successors; and in 1897, and every four years thereafter, there shall be an election in each county of the officers mentioned, who shall hold their offices for four years from (the first Monday in January after their election), and until the election and qualification of their successors."

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Appellant in that case contended that under that section he continued in office for three years, and until the election and qualification of his successor, and that as Woolford was elected and failed to qualify, his right to the office was not interrupted. The court in that case decided against Campbell, and said: "The construction urged by appellant is wholly out of keeping with the spirit and purpose of the constitutional provision. It is true appellant holds until the election and qualification of his successor. His successor was elected at the November election, 1897. The person elected having died before the time for him to take possession of the office, the term for which he was elected became vacant, just as much as if he had died after qualifying, but before the time for entering upon the duties of his office, and when Dotson was appointed to fill this vacancy, gave bond and took the oath, appellant's successor had been elected and qualified, and, therefore, his right to the office ceased.

"At the time the Constitution was formed it had long been a settled rule in this State that where the person elected to an office died before qualification, or for any reason failed to qualify, or there was no election to fill the office at the time appointed by law, a vacancy existed. The Constitution not only aims at short definite terms, but it also aims to vest in the people at the expiration of each term the right to choose the incumbents of the offices for the next term, and section 152 was intended to secure this right in all cases where the remainder of the term, in case of a vacancy, was long enough to justify it. In view of all the provisions of the Constitution and the well-settled rule in the State at the time of its adoption, we have no doubt that its framers intended by section 152 to provide for such a contingency as occurred in this case, and that they did not contemplate that the incumbent of an office, in the case of the death of a successor before qualification, should hold for a second term for which he had not been elected."

The other case is *Olmstead v. Augustus*, 28 Ky. Law Rep., 1773, which is to the same effect, and conclusively settles the issue in this case.

Wherefore, the judgment of the lower court is affirmed.

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DRYE, &c. v. CUNNINGHAM, MEDLEY & CO., &c.

(Filed May 19, 1908—Not to be reported.)

1. Wills—Husband and wife—Trusts—Under the will of G. the testator directed that on the death of his wife his personal estate be divided equally between his three children, and that the share of his daughter be placed in trust for her benefit. She died leaving a husband and children surviving her, and the question involved on this appeal is what the interest of the daughter in said property was. Held—That although said property was held in trust it was evidently the intention of the testator that she was to be the absolute owner of same, and on her death it passed to her husband and was subject to debts incurred during her lifetime, whether they were the debts of the husband or wife, and her children took it subject to those debts.

2. Decedents' estates—Demand—Estoppel—Where heirs have given orders on the executors of an estate for payment of the testator's debts they are estopped to defeat said claims by showing that no demand was made of the executor.

Samuel Avritt for appellants.

I. H. Thurman, J. W. S. Clements and T. Scott Mayes for appellees.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Hobson.

The first question to be determined in this case is, what interest Susan Tucker took in the personalty devised to her by her father, Charles Grundy, in the following clause of his will: "I wish all my money, including cash and cash notes, to be placed at interest for the benefit of my wife, Miranda Grundy, she to use and dispose of the interest as she may see proper, and at her death the whole principal, including cash and cash notes, to be equally divided among my three children, Thomas S. Grundy, Palmer Grundy and Susan Tucker. It is my wish that the one-third portion of my money coming to my daughter, Susan Tucker, shall be placed in the hands of my brother, Samuel R. Grundy, as trustee for her, and he to manage and control the same, and to pay over to her annually the interest on the same. It is my wish that should he at any time think it necessary to use any portion of the principal for the use and benefit of my daughter, Susan Tucker, he shall have the power to do so. I also will to my daughter, Susan Tucker, and her children, all my undeeded lands, with the exception of a small strip which I have promised to my son, Thomas S. Grundy, commencing at the division line between the lands of Susan Tucker and Thomas S. Grundy and running northwest until it intersects the former line, supposed to be one-half acre, more or less. It is also my wish that my brother, Samuel R. Grundy, as trustee for my daughter, Susan Tucker, to have control of all timber and firewood on above-named land, and it is also my wish that no one be allowed to settle on the said land without the approbation of brother as trustee. I also will to my daughter, Susan Tucker, one brown stallion and one black mare by the name of Puss."

The widow, Miranda Grundy, died many years ago. The one-third of the personal property devised in trust for Susan Tucker was \$6,735.76. She was the wife of James H. Tucker, who was insolvent, or practically so. It is insisted that Mrs. Tucker took only a life interest in this fund, on the ground that the trustee was directed to pay over to her annually the interest, and might, in his discretion, use part of the principal if necessary, and stress is laid upon the fact that the next sentence begins with the words, "I also will to my daughter, Susan Tucker, and her children." The testator clearly gave to Miranda Grundy, his wife, only a life estate, because she was authorized to use the interest as she saw proper, and at her death the whole principal was directed to be equally divided between the three children. Thus she was expressly excluded from any interest in the principal of the fund. If the will had stopped here it is clear that Mrs. Tucker and her two brothers would have been put on an equal footing, and that each would have taken absolutely one-third of the principal of the fund at the death of their mother. The next sentence, creating the trust, shows no intention to restrict the estate thus vested in her. The fund was placed in the hands of a trustee for its protection from her improvidence or that of her husband, but nothing further was provided. The daughter was the object of the testator's bounty. The trust was created because she was a married woman, and the testator

thought that it was necessary for her protection. Her children are not mentioned in connection with the personalty. It is true they are mentioned in connection with the land, but the devise there is to Mrs. Tucker and her children, and thus the children were made joint tenants with her in the land. That the testator understood that he had created the trust, not for the benefit of the children, is shown by the words directing the fund coming to Susan Tucker to be placed in the hands of "Samuel R. Grundy, as trustee for her," and also by the words empowering him to use the principal, "for the use and benefit of my daughter, Susan Tucker." It is also shown by the fact that Grundy is again mentioned "as trustee of my daughter, Susan Tucker," in the next sentence, and the last sentence of the clause is in these words: "I also will to my daughter, Susan Tucker, one brown stallion and one black mare by the name of Puss." The horses were not placed under the trust. The only thing in the will devised to the children is an interest in the land, and this they took jointly with their mother. There being no limitation upon the estate devised to the daughter and no devise over, it can not be construed as a life estate merely because the fund was placed in the hands of a trustee. The creation of the trust did not change the character of the estate devised Mrs. Tucker. It was her property held in trust for her. (*Webster v. Webster*, 98 Ky., 632.)

In *Tucker v. Grundy*, 88 Ky., 540, the court said that Susan Tucker was entitled beyond question to the interest, at least, on the fund under her father's will, and to have a settlement of the trust. The court refused to discharge the trust, as the husband was then living, and to do so would have defeated the testator's intention. Mrs. Tucker died in the year 1891, and her husband some months later. Before his death he assigned to the children his interest in the fund. When the case was next before this court, in *Drye v. Grundy*, 18 Ky. Law Rep., 13, the court said: "The personal representative of the deceased husband of Mrs. Tucker should be made a defendant, although it appears his interest was transferred to his children in his lifetime. This he had the power to do. Still his personal representative may contest the transfer, and if he is not a defendant either party may bring him before the court by proper pleading."

On the last appeal of the case (*Grundy v. Drye*, 20 Ky. Law Rep., 970) the court only considered the question whether the executors were responsible for the funds after the death of Mrs. Tucker, and held that they were because they had not discharged the duties imposed on them by the will. There is nothing in any of these cases intimating that Susan took under the will only a life estate. On the contrary the intimations are otherwise.

On the appeal before us the only question to be determined is whether the court properly allowed the claims of appellees to be paid out of the fund. They allege that their claims were the debts of Susan Tucker. Appellants claim that they were the debts of her husband, James H. Tucker. But whether they were the debts of the husband or the wife is not now material as the fund upon the death of the wife passed to the husband, and when it was voluntarily assigned by him to the children they took it subject to his debts. The orders which were given by the children to appellees on the executors for the payment of their claims were not, therefore, without consideration, and these orders having been accepted by appellees and held by

them awaiting a settlement of the accounts of the executors for the accommodation of the estate, the children will not be heard to complain that proper demand was not made of the personal representative of their father, for the giving of the orders they led appellees to understand that no demand need be made on the representative of their father, and they will not be allowed to complain that a demand was not made when they, by their own act, prevented its being made, and agreed that the debts should be paid out of the fund. The clear equity of the case is with the appellees, and the court properly adjudged that their claims should be paid.

Judgment affirmed.

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GALLOWAY v. ROWLETT.

(Filed May 20, 1903—Not to be reported.)

1. Execution—Homestead—The only question presented on this appeal is whether appellant, the owner of a homestead, had abandoned same. The proof shows that appellant was shot through the body and was unable to perform physical labor necessary to the cultivation of the farm, and removed from same to town, ten or twelve miles distant, where he could obtain work which he could perform, and rented out the farm to a tenant for two years before an execution was levied on same. Appellant had not acquired another homestead, nor had he determined to abandon his homestead permanently. Held—That appellant had not lost his homestead by abandonment as his removal therefrom was only temporary.

2. Practice—Setting aside execution sale—A motion is a proper remedy to set aside an execution sale of property exempt as a homestead.

John K. Hendrick and W. F. Peterson for appellant.

J. H. Coleman for appellee.

Appeal from Calloway Circuit Court.

Opinion of the court by Judge Hobson.

The only question in this case is whether appellant has lost the right to his homestead by abandonment. The evidence on the trial was as follows: "Aaron Galloway was sworn, and testified as a witness on his own behalf that he is a housekeeper with a family, and had a wife and others depending upon him for a support, and was a housekeeper and had the same family dependent upon him when he lived upon the land in controversy in this action; that he had resided in this county and upon the land in controversy with his said family for many years, and that the land, as set out and described in his motion herein, was all the land he owned, and that the entire tract of land was not worth exceeding \$250; that he resided on said land with his family and occupied it as a homestead up until a little more than two years ago, and at that time he was shot through the body, the ball, as he was informed by his physician, passing through his liver, after which he was unable to do the necessary work on a farm to support himself and family, and rented his farm out and left the tenant in possession and moved to town to seek employment at which he could labor to support his family; that his said farm was about ten or twelve miles from this town where he now resides; that when he left the farm he intended to return to it and live

on it with his family as soon as he got able to work it; that he never told any one that he did not intend to return to the farm and live on it, and that he yet intends to move back there and live if the court will let him have it."

The defendant, Lee Rowlett, was then sworn, and introduced as a witness on his own behalf, and testified that he had heard the plaintiff, Aaron Galloway, say on two or three occasions that when he moved away from his farm he never aimed to move back to it any more.

"Monroe Hodge was then sworn, and introduced as a witness, and testified that he had heard Aaron Galloway say that he never intended to move back on the land to live. He also said that his sister, Alice Hodge, was now living on the place as the tenant of the defendant, Lee Rowlett."

The land was levied on under execution on March 30, 1900, and was sold on May 28, 1900. The trial at which the above evidence was given was had on August 17, 1901. It will thus be seen that a little before August, 1899, appellant was shot, and after that became unable to do the necessary work on his farm. In consequence of this he rented his farm out and sought employment at which he could work, intending to return to his farm with his family as soon as he got able to work, according to his testimony. On the other hand, he declared to two persons that he did not intend to return to his farm, but had been away from his farm only a short time when it was levied on under the execution, and had acquired no other home. He undoubtedly had a homestead in the land before he left it, and still has it, unless he lost it by abandonment.

In 15 Am. & Eng. Ency. of Law, pages 645-646, it is said: "There is some conflict of judicial opinion as to how conclusively the question of intention to abandon must be established. According to some cases the abandonment of the homestead right by removal should be declared only upon clear and decisive proof of an intention to abandon the right. But, according to another line of cases, a removal from the homestead is taken to be as an abandonment unless it clearly appears that there is an intention to return and occupy the premises as a home. Stronger proof of abandonment is required when the debt to which it is sought to subject the land was contracted during actual occupancy than when it was contracted while the homestead was not in actual possession of the premises. \* \* \* While there is some authority for the proposition that a homestead is not abandoned by a removal of the claimant without acquiring a new homestead, that is not the prevailing view. According to the preponderance of authority an actual removal with no intention to return amounts to an abandonment, even when a new homestead has not been acquired. But the fact that the absent claimant has not acquired a home elsewhere is a circumstance which tends to show an intention to return. It has even been said that a homestead will not be considered abandoned before the acquisition of a new one except upon clear and conclusive proof of a removal with an intention not to return."

Again, on page 649, it is said: "The declarations of the owner of homestead property may be given in evidence to establish the intent with which the removal was made. They may be given in evidence to show either an intention to return or an intention not to return. But such declarations are not conclusive either to establish an abandonment or to show that there existed an intention to return and occupy the premises."



In *Davis v. Pritchard*, 9 Ky. Law Rep., 914, a debtor being in bad health moved from his homestead, intending to return when his health improved, but finding that his health grew worse, sold it to another. In the meantime it had been levied on and sold under execution. It was held that he had not lost his homestead. In *Black v. Black*, 11 Ky. Law Rep., 378, a lawyer removed from his home in town to a farm in the country, intending to return, but died a year or more later on the farm. It was held that the homestead right had not been lost by abandonment. In *McFarland v. Washington*, 12 Ky. Law Rep., 376, the debtor owned a home in Owensboro, from which he removed in the spring of 1884, renting land in the country upon which he farmed in the years 1884, 1885 and 1886, and the same rule was followed.

The homestead is created by law for the benefit of the family. The purpose of the statute is to secure the family in a home and protect it from the improvidence of the husband, or head of the family. While he may lose a homestead which he has once acquired by abandonment, the purpose of the statute would be defeated if the homestead was held to be abandoned on slight and inconclusive evidence. Here the debtor had been shot, and was unable to work on his farm. His removal from the farm was by reason of his personal disability, and when he had been away only a short time it was levied on and sold. The only proof that he intended to abandon his homestead are his declarations, as shown by the evidence for appellee, which he denies, and there being nothing in his conduct or situation to sustain these declarations, they are not sufficient alone to establish an abandonment of the homestead. The reason for his removal was that he was unable to work his farm. He had the right under such circumstances to move from his farm, leaving it in the hands of a tenant; and if, under such facts, without any other proof of the abandonment of the homestead, it could be established by loose declarations of the debtor alone, although there was nothing in his conduct to sustain such proof, that class of persons whom the statute was designated primarily to protect might be often denied its benefits.

In *Hope v. Hillis*, 5 Ky. Law Rep., 319, it was held that a motion was a proper remedy to set aside an execution sale of property exempt as a homestead.

Judgment reversed and cause remanded, with directions to set aside the sale.

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BEVERLY v. WALLER, &c.

(Filed May 20, 1903.)

Dower—Mortgages—Res judicata—B. and P. were joint owners of a large tract of land. B. mortgaged his interest in said land to W., which appellant, his wife, did not sign. Subsequently he executed a second mortgage to Posey. His wife signed this mortgage, but she was not named anywhere in it. Subsequently the heirs of P. executed a deed of partition, conveying to B. and his wife jointly one-half of said lands. Posey subsequently brought this action to enforce his mortgage. W., the former mortgagor, was made a party defendant, who filed a cross petition setting up his mortgage lien. B. and his wife were duly served with process on the petition

and the cross petition. In neither the petition nor the cross petition was any mention made of the inchoate dower interest of appellant. The judgment enforcing the lien of the plaintiff and cross plaintiff upon the land involved in the action does not mention the inchoate dower right of appellant, or in any way seek to sell or bar it. Under this judgment the mortgaged land was sold by the commissioner and appellees are the remote vendees of the purchaser at said sale. Upon the death of B. appellant, his widow, brought this action to recover the value of her vested dower interest therein. The judgment enforcing the mortgage lien was pleaded in bar of said action for dower, which plea was adjudged sufficient on demurrer, and judgment having been rendered against her she has appealed. Held—That said mortgages were insufficient to bar her claim to dower. While the mortgagors could have set up the fact that she was entitled to an inchoate right of dower and the judgment could have provided for same, having failed to do so, she was compelled to set it up. She had only an inchoate right of dower, which might never become vested. If she had set it up in the case it would not have barred the action of the plaintiff and cross plaintiff. They would have been entitled to precisely the same judgment, so far as the sale of the land was concerned, whether her inchoate right of dower was pleaded or not. Said judgment did not bar her claim for dower.

Brown & Vance for appellant.

S. V. Dixon and Yeaman & Yeaman for appellees, M. Young and Lula and Clarence Faulkner.

M. C. & G. D. Givins for appellee Waller.

Montgomery Merritt for appellee, Margaret A. Buckman.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Barker.

On the 15th day of February, 1868, R. G. Beverly and L. W. Powell were the joint owners of a large tract of land in Henderson county, Kentucky. On that day Beverly mortgaged his undivided interest in the land to James White to secure the repayment of \$2,000 in gold. His wife, the appellant, Sarah P. Beverly, did not sign this mortgage, nor is her name in any way mentioned therein.

On the 17th day of July, 1870, R. G. Beverly mortgaged his interest in the land to Thomas Posey, to secure to Posey what he owed him as guardian, and also for the purpose, as recited in the mortgage, of indemnifying W. B. Woodruff and George A. Sugg from liability upon his bond as guardian of Thomas Posey. Appellant's name nowhere appears in the body of this second mortgage, but she signed and acknowledged it before the clerk of the Henderson County Court. On the 16th day of December, 1870, L. W. Powell having died, his heirs entered into deeds of partition with R. G. Beverly of the lands jointly owned by them and him, whereby they conveyed to him, and to his wife, Sarah P. Beverly, one-half of the lands jointly owned.

Afterwards Thomas Posey instituted an action in the Henderson Circuit Court for enforcement of his mortgage lien, making R. G. Beverly and appellant and James White defendants. All were served with process.

White answered, setting up his mortgage, and making his answer a cross petition against Beverly and wife, and prayed for an enforcement of his lien. Both Beverly and appellant were served with process in this cross action.

In neither the original nor the cross petition was any mention made of the inchoate dower interest of appellant. In both of these pleadings it is alleged, in substance, that while in the deed of partition from Powell's heirs the land was conveyed to R. G. Beverly and Sarah P. Beverly, his wife, jointly, yet, as against the mortgagees, the wife had no interest save as the wife of R. G. Beverly, and as to them she was a mere volunteer. Appellant made no answer to these actions, but permitted judgment to go by default. The judgment enforcing the lien of the plaintiff and cross plaintiff upon the land involved [in the action does not mention the inchoate dower right of appellant, or in any way seek to sell or bar it. Under this judgment the mortgaged land was sold by the commissioner of the court, and purchased by Milton Young, and J. W. Buckman, to whom it was conveyed by commissioner's deed, and from whom it has successively devolved by conveyance to the present owners, the appellees in this action.

In 1902 R. G. Beverly died, and his widow, the appellant, Sarah P. Beverly, thereupon instituted this action against the appellees, the owners of the land, to recover of them the value of her now vested dower interest therein. The judgment enforcing the mortgages of Posey and White having been pleaded as a bar to appellant's action for dower, she demurred to the plea, and this having been overruled by the court she declined to plead further, whereupon her petition was dismissed, and she has appealed.

The one question for adjudication on this appeal is whether or not appellant's inchoate right of dower in the land was barred by the judgment rendered, enforcing the mortgage liens of Posey and White. Although appellant signed and acknowledged the mortgage to Posey, as her name does not appear in the body of that instrument she stood toward it as if she had not signed it.

In the case of *Hatcher, &c. v. Andrews*, 5 Bush, 561, this court said: "The deed of Geiger to Elba Holden, of the two town lots, and through which the title of these vendees is derived, purports a conveyance alone by the husband; but Annie, his wife, signed the deed and acknowledged it, together with her husband, before the county clerk, who certified it, without stating what she intended to convey. \* \* \* The deed from Geiger purports no conveyance of anything from his wife, nor even that she was a party to it, therefore, it is as wholly insufficient as to her as though she had never signed it. Holden is the sole grantor in his deed; and though the wife signed with him the attesting clause of the deed, yet it does not purport, by apt language, to convey any interest on her part, and is wholly insufficient to bar her of a dower right."

Appellees contend that, although appellant's inchoate right of dower was not barred or disposed of in any way by the mortgages, yet because she was made a defendant and properly summoned in the action enforcing the liens, and allowed judgment to go by default, she is barred by that judgment from setting up any claim to dower against the land sold in the action. It is true that, as a general proposition, a judgment against a defendant who has been duly summoned is *res adjudicata* as to all defenses which either were, or might have been, set up as a bar to the cause of action set forth in the petition. The cases cited by appellant come within this principle. The case of *Harpending's Ex'or v. Wiley*, 76 Ky., 160, was an action to foreclose a mort-

gage which had been executed by a husband and wife. Judgment by default was rendered, and the property directed to be sold to satisfy the debt. After the death of the husband, a rule having been awarded against the widow and heirs to show cause why judgment should not be revived, the widow responded that at the time of the execution of the mortgage her husband was a bona fide housekeeper with a family; that he then resided with his family on the mortgaged premises, and continued to reside thereon up to his death, and that the family was still residing thereon; that she had not mortgaged, conveyed, relinquished, released, or in any way disposed of the right of herself and infant children to a homestead, and they asked that a homestead be allotted to them in the property. This court held on appeal that the original judgment necessarily passed upon the validity of the mortgage given by the husband and wife, and that question became *res adjudicata*; that the wife derived her claim to the homestead through the husband, and not from the statute, and inasmuch as his right of homestead had been adjudged adversely to him in the suit to foreclose the mortgage, he thereby lost it, and at the time of his death he had no homestead in the property.

It is clear that if the husband had a homestead right in the mortgaged premises it was a defense to the action against him, at least to the extent of \$1,000, and being defendant, he was required by the rule either to set it up or be barred by the judgment in default.

The case of *Hill v. Lancaster*, 88 Ky., 338, is to the same effect. Lancaster joined issue upon the merits of an action brought against him to subject his land to the payment of his debts, without claiming a homestead therein. Upon the issue joined the chancellor decided adversely to him, and rendered a judgment subjecting his entire interest in the real estate to the payment of his debts. At a subsequent term he sought to file a petition, in the nature of an answer, setting up his right to a homestead, but the court said that while it was a fact that as against his creditors he was entitled to a homestead in the land, he had defended the claim upon its merits, and failed to set up his homestead right, which would have been a complete bar to the action if the real estate was not worth more than \$1,000; and if more than \$1,000, then a bar to the extent of \$1,000. Not having set up this defense, after judgment the question of homestead was *res adjudicata*. The same principle is established in the cases of *Ligon v. Triplett*, 12 B. Mon., 283, and *Talbot v. Todd*, 5 Dana, 190.

But these cases are not applicable to the principle here involved. The appellant, at the time she was summoned, had only an inchoate right of dower, which might never become vested. If she had set it up in the case it would not have barred the action of the plaintiff and cross plaintiff. They would have been entitled to precisely the same judgment, so far as the sale of the land was concerned, whether her inchoate right of dower was pleaded or not.

Van Fleet, in his work on *Former Adjudication*, section 191, lays down the rule as follows: "In a suit to foreclose a mortgage signed by the husband alone, the wife was made a party, and the petition alleged that she had an interest in the mortgaged premises, without making any specific reference to dower, and asked that she set out her interest, and prayed for general relief. Other subsequent incumbrances were also made parties. A general decree by default barring all the defendants, but not in terms bar-

ring her dower nor mentioning her name, does not foreclose her dower rights. (Parmenter v. Brinkley, 38 Ohio St., 33.) And in a similar case in Iowa, in which a wife did not join in a mortgage, which made it subject to her right of dower, its foreclosure by default, after her husband's death, in a case in which she is simply made a party without mentioning her dower, does not bar it. The court said that if she had joined in the mortgage, or her right to dower had been put in issue, it would have been barred. (Moomey v. Maas, 22 Iowa, 380.) So a bill having been filed in New York to foreclose a mortgage against the widow, which she had not signed, and it being alleged that she was a devisee and executrix, and also the widow of the mortgagor, and that she claimed some interest in the mortgaged premises, as subsequent purchaser, incumbrance, or otherwise, it was held that a decree of foreclosure pro confesso did not bar her dower." (Lewis v. Smith, 11 Barb., 152.)

In Freeman on Judgments, section 305a, it is said: "It seems that an order to conclude the wife's right of dower it must in all cases be necessarily and specifically put in issue whether the proceeding be to foreclose a mortgage to which the wife was not a party, or to enforce any other claim to which her right of dower was paramount." (Maloney v. Horan, 49 N. Y., 115.)

In the case of Maloney v. Horan, above cited, the court, in discussing a principle similar to the one herein, said: "She is bound by the judgment, whatever may be its legitimate effect. The judgment is final and conclusive upon her as to all matters put in issue and litigated in the action. But, as stated above, the matter of her inchoate right of dower was not put in issue and litigated therein. \* \* \* The plaintiff in this action might have raised in that action the question that she had a right of dower, as yet inchoate, but which might become complete; and might have asked that if it should be found to exist, the judgment should make provision therefor. But was she bound to do so? This would not have been matter in direct opposition to the action in defense to the claim made by plaintiffs therein; it would have been a quasi admission of the cause of action set up, and a seeking for relief in the judgment which must follow. And when the authorities say that a judgment is final and conclusive upon the parties to it as to all matters which might have been litigated and decided in the action, the expression must be limited as applicable to such matters only as might have been used as a defense in that action as against an adverse claim therein, and such matters as if now considered would involve an inquiry into the merits of the former judgment. The existence of an inchoate right of dower in the plaintiff would not have been a defense to the action of the receiver for a sale of the premises and a satisfaction from the avails of the sale of the judgment debt which he represented. It could not, if pleaded and shown, have prevented a judgment substantially that which was rendered. The most which could have been effected would have been to have secured in the judgment an auxiliary provision recognizing and protecting the contingent right. And again, it was a right pre-existent to the claims and defenses there litigated, and paramount to any right of the plaintiff in that action there sought to be enforced. \* \* \* We are of the opinion that the plaintiff is not estopped by the record in the action brought by the receiver."

So in this case the wife might have set up her inchoate dower in the

action to foreclose the mortgages, but this would not have been matter in direct opposition to the cause of action made by the plaintiffs therein. Her dower right, if pleaded and shown, could not have prevented a judgment substantially the same as that which was rendered. When appellant was served with summons, if she examined the petition and cross petition she found that, so far as she was concerned, the only allegations of the pleadings were with reference to the questions of her taking a beneficial interest under the deed of partition from Powell's heirs to her husband and herself. These allegations were that, as to the plaintiff and cross plaintiff, she was a mere volunteer, and had no interest in the land save as wife of R. G. Beverly. It must have been evident to her that the only remedy which was sought against her was the denial of her ownership of a beneficial interest in the land. Her inchoate right of dower was as clearly recognized in the pleadings as her beneficial interest, under the deed of partition, was denied.

If appellant had any claim to a vested interest under the deed of partition, it would have constituted a defense to the causes of action set up in the pleadings against her, and as she failed to set up such interest, she was concluded by the judgment rendered. Not so as to her inchoate right of dower; that was clearly recognized, but no pretense was made by the plaintiff and cross plaintiff that their liens on the land were paramount to her dower, and the very fact that they, with their attention directed to the interest of appellant in the land, set up an adverse claim as to her beneficial interest under the deed of partition, and were silent as to any claim of superiority over her dower right warranted her in concluding that no claim adverse to her dower interest was sought in the pleadings against her.

It was obvious that her claim for dower was paramount to the liens sought to be enforced, and it is not lightly to be concluded that the judge who decided the case committed so plain an error as to adjudge the liens in the mortgage superior to her dower right unless the language used was such as to forbid an opposite conclusion.

We do not think the case of Meriwether v. Sebree, 2 Bush, 232, is applicable to the case at bar. In that case the widow's dower had become vested by the death of her husband, and was inferior to the liens upon the land involved for the unpaid purchase money. The estate of her husband was insolvent, and the holders of the vendors' liens were entitled to have the land sold free of any claim of dower as against them. The widow was not entitled, on the merits of the case, to anything but to have her dower assigned to her out of the proceeds of the sale of the land, after the payment of the vendors' liens, and this is what was adjudged to her in the case by this court. Mrs. Meriwether had no interest in the land sought to be subjected to the payment of the debts of her husband except that of dower, and when she was summoned to answer in the case to settle her husband's estate she was bound to know that the administrator of her husband was seeking to sell the land free from her right of dower. There was no other reason for her being made a party to the action.

Not so in the case at bar. Mrs. Beverly was made a party to the action of Posey and White against her husband for the declared purpose of defeating her claim to a beneficial interest in the land under the deed of partition of Powell's heirs, and this being the only purpose appearing for making her a

party, she was called on to answer the cause of action set up in the pleadings, and not one which might have been set up against her.

Therefore, the judgment is reversed, with directions to sustain appellant's demurrer to so much of the answers of appellees as set up the judgment in the case of Posey and White against her husband as a bar to her claim for dower in the land involved in this litigation, and for other proceedings consistent with this opinion.

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O'BRIEN v. COMMONWEALTH.

(Filed May 20, 1903.)

Criminal law—Accomplices—Evidence—Appellant and his accomplice, Whitney, were jointly indicted for the murder of C., a citizen of Lexington, whose house they had entered with burglarious intent and made demand for his money, and immediately thereafter one or the other of them shot and killed him. Appellant was given a separate trial, and it resulted in his conviction and sentence of death. On appeal he complains of the ruling of the court in admitting evidence showing that two previous burglaries were committed in the neighborhood the same night. Held—That said evidence was competent to show the motive of entering the house of C.; also it was competent to identify the appellant and his accomplice, who made confessions after their arrest, in which they disclosed where pistols stolen by them in the previous burglaries might be found. The officers found the pistols in the places designated in the confession, which were identified by the owners. The conviction was properly found on their confessions as they were corroborated in several particulars, and it was immaterial as to which fired the fatal shot, as the proof showed that they were accomplices.

2. Misconduct of attorney—Appellant complains that his conviction was improper by reason of the court permitting the trial to progress while his attorney was in a state of intoxication. This objection is made for the first time on the motion for a new trial by affidavits filed. This ground can not be considered under section 281, Criminal Code, but had it been properly presented, appellant was not prejudiced by the action of the court, as it did not abuse its discretion in this matter.

W. C. G. Hobbs and J. N. Elliott for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Claude O'Brien, and one Earl Whitney were jointly indicted in the Fayette Circuit Court for the murder of A. B. Chinn, a citizen of Lexington, Ky. A separate trial was accorded the appellant at his request, which resulted in his conviction, and the fixing of his punishment at death by the verdict of the jury. His motion for a new trial was overruled by the lower court, hence this appeal.

The facts and circumstances leading to and surrounding the commission of the murder as shown by the record are few and simple. At two and a half or three o'clock a. m., on October 11, 1902, under cover of darkness, the dwelling house of A. B. Chinn was burglariously entered by the appellant, Claude O'Brien, and his accomplice, Earl Whitney; they proceeded at

once to the bedroom of Chinn and wife; the latter was awakened by the creaking of the screen door as they entered the room, and she in turn awoke her husband as the intruders, lighting a match, approached the bed in which they were lying. O'Brien and Whitney wore masks, and both raised their pistols as they neared the husband, who was on the outer side of the bed and said: "Your money or your life." In reply to the demand for money both Chinn and wife informed them that they had no money, and never kept any in the house, and the husband then said to them to go and get or find what you want. At this juncture the son, Asa Chinn, who occupied an adjoining room, appeared at the bedroom door of his parents and called "Mama." Upon hearing the voice of the son either O'Brien or Whitney immediately fired at the elder Chinn, who was sitting up in the bed, shooting him through the body. The pistol firing then became general between the intruders and young Chinn, who was in the hall near the door and had dropped upon one knee and commenced shooting at the intruders after the firing of the first shot by one of them in the room. Young Chinn received two wounds himself, one in the right arm, the other in the neck, and fell on the hall floor. O'Brien and Whitney, the latter of whom was wounded in the leg by young Chinn, then made their escape from the house, running over his prostrate body in the hall, followed by the elder Chinn, who fell in the hall near the bedroom door, and immediately died. He, however, informed his wife as he got out of the bed, when the firing ceased, that he had been wounded.

The foregoing facts were testified to by Mrs. Chinn, and were sustained in part by the son, who heard from his room the words "your money or your life," though he did not appear upon the scene until just before the shot which killed his father was fired in the room by either O'Brien or Whitney.

It also appears from the record that the statements of Mrs. Chinn and her son are corroborated by O'Brien and Whitney upon all material points, though they contradict each other in many essential particulars. For instance, while both admit that as they approached the bed of A. B. Chinn and wife the words "your money or your life" were spoken, each testifies that they were uttered by the other. They both also admit that when these words were used the speaker was presenting a pistol at A. B. Chinn, but testified that only one pistol was presented, each claiming that it was presented by the other. Again both admit that when Asa Chinn appeared in the hall at the door of his parents' bedroom, they heard him call to his mother, and that the firing then began, in which one of them shot the elder Chinn, but each lays upon the other the act of shooting.

There is no claim or pretense from any source that the elder Chinn was killed by an accidental shot, or that he was offering any resistance when shot; upon the contrary, the evidence shows beyond all doubt that Asa Chinn was in a position from which it was impossible for his father to have been shot by a stray ball from his pistol, and the fact that the father's night shirt was scorched and his body powder burned, proves that the one who shot him was in the room, and close to him.

The occurrences following the murder, and which led to the subsequent detection and arrest of the criminals, are also few and unmistakably corroborative of what had gone before. Immediately after the murder the guilty



parties went to the depot yard of the Southern Railroad, and there placed themselves in an empty freight car, after concealing the pistols with which they had been armed. They were soon thereafter found and arrested by the officers who were in search of the murderers of A. B. Chinn. When they were placed under arrest O'Brien turned to Whitney and said: "Pard, he has got us." In removing the prisoners from the car the officers discovered that their clothing was wet, showing that they had been in the rain of the previous night; they also discovered that Whitney was lame, and in reply to an inquiry as to the cause of his lameness, he said he had hurt his leg upon or against a car, but when an examination of his leg disclosed the bullet wound he then said he had been shot some days previously by a negro at Williamstown. It was likewise discovered by the officers that Whitney and O'Brien had exchanged pants before their arrest, the evident purpose of which was to conceal the former's wound, for in wearing his own pants the presence of the bullet hole in the leg thereof at the point of the wound, in connection with his lameness, might have been expected to lead to the discovery of his wound.

A few days after the arrest both O'Brien and Whitney made what purported to be a full confession of their connection with the murder of A. B. Chinn, in which, as already indicated, each tried to place upon the other the leadership in, and blame for, that crime. By the confession of Whitney the concealment of the pistols with which the shooting at the Chinn home had been done by them was made known, and the pistols were found by the officers at the place designated in the confession. They were three in number. One had been brought by Whitney to Lexington; it was out of repair and practically useless. One of the other two had been taken by O'Brien and Whitney just before the killing of Chinn from the residence of O. L. Slade, and the other from the bedroom of M. C. Alford, in the residence of his sister, Mrs. McConathy. The Slade revolver was a Colt's of bluish finish, and that of Alford was a silver-mounted double-barreled derringer, with a pearl stock or handle. Each pistol was fully identified by its owner. Slade knowing his by its color and a small amount of rust upon it, and Alford recognizing his by its peculiar finish and pattern. Besides, the Slade pistol was also identified by a clerk in the store where it had been purchased, by its number which he had entered at the time of its sale to Slade in a book kept for that purpose. Both pistols were loaded when taken from their respective owners.

Though numerous formal grounds for a new trial were presented in the lower court, only two of them are relied on by counsel for appellant for a reversal. That is to say, it is contended that the lower court erred in admitting on the trial evidence of the burglaries committed by O'Brien and Whitney on entering the houses of Slade and McConathy just before the murder of Chinn, and in permitting the trial of appellant to proceed while he then counsel was in an alleged state of intoxication.

As to the first of these contentions we are of the opinion that evidence of the burglaries was competent, first, as illustrating the motive with which appellant and his accomplice entered the house of A. B. Chinn. They entered the houses of two of his neighbors, committing a theft in each, only a few minutes before entering his; their mission on that night was theft and

robbery and such, therefore, was their motive and purpose in entering the house of Chinn; second, the evidence was competent as a means of identifying the guilty parties. The identification was made through the pistols which they had stolen from the houses of Slade and Mrs. McConathy, the latter being a sister of Alford, owner of one of the pistols. The pistols were found through the confession of Whitney, who also told where they had been stolen by himself and appellant, and proof of the burglaries was competent, therefore, to corroborate Whitney's confession as well as the testimony given by him on the trial of appellant, and to corroborate Slade and Alford in their identification of the pistols, which identification in turn fastened the guilt of Chinn's murder upon the parties found in possession of the pistols. The trial court, following section 241 of the Criminal Code, very properly told the jury that they "could not convict appellant upon the testimony of Earl Whitney alone, unless such testimony was corroborated by other evidence tending to connect the appellant with the commission of the offense charged in the indictment, and the corroboration is not sufficient if it merely shows that the offense charged was committed and the circumstances thereof."

In order for the State to make out its case against appellant corroboration of Whitney's testimony was necessary, and that corroboration was found in the finding of the pistols in the place of concealment testified to by Whitney and in the identification of the pistols by Slade and Alford, who told of the burglaries by way of explaining the manner in which they were deprived of the possession of them, and in doing so furnished evidence of the motive which actuated the guilty parties in breaking into the house of A. B. Chinn.

Bishop's New Criminal Procedure, volume 1, section 1126, in discussing the admissibility of such evidence as that under consideration, says: "The intent, knowledge, or motive under which the defendant did the act charged against him, not generally admitting of other than circumstantial evidence, may often be aided in the proofs by showing another crime, actual or attempted; then it is permissible."

Again, in section 1125, same volume, we find the following statement: "Whole transaction, as explained under the doctrine of *res gestæ*, wherever a part of a transaction appears in evidence the rest is thereby made admissible. So that the entire transaction, wherein it is claimed, the wrong in issue was done, may be shown though it includes also other crimes, and even though each transaction was a continuing one, or transpiring in parts on different days."

The same doctrine is recognized in Greenleaf on Evidence, volume 1, section 53, wherein it is said: "In some cases, however, evidence has been received of facts which happened before or after the principal transaction, and which had no direct or apparent connection with it; and, therefore, their admission might seem at first view to constitute an exception to this rule. But those will be found to have been cases in which the knowledge or intent of the party was a material fact, on which the evidence, apparently collateral and foreign to the main subject, had a direct bearing, and was, therefore, admitted." \* \* \* Again, in volume 3, section 15, we find this further statement from the same learned author: "In the proof of intention it is not always necessary that the evidence should apply directly to the particular act, with the commission of which the party is charged; for the un-

lawful intent in the particular case may well be inferred from a similar intent, proved to have existed in other transactions done before or after that time." \* \* \*

We find that this court has in more than one case given its sanction to the rule announced in the foregoing authorities. In *Tye v. Commonwealth* 8 Ky. Law Rep., 59, it is said: "It was proper to allow the Commonwealth to prove the number of attempts by the defendant to commit the same offense, for the purpose of establishing the alleged identity of the accused." \* \* \*

In *Thomas v. Commonwealth*, 1 Ky. Law Rep., 122, appellant was on trial for effecting an entrance into a dwelling with the intention of stealing. Previously a store had been broken into and goods stolen, and the manner in which the entrance was effected gave strong evidence that the appellant was concerned in the prior breaking into the store. Evidence of the first breaking was admitted to show the appellant's intention to steal in entering the house. Held—"That in admitting such evidence of the first breaking, the court did not assume that the appellant was guilty of that crime; but the evidence was such as to warrant the court in allowing the facts to go to the jury—not as evidence that the appellant broke into the store, for that was abundantly proved without—but as evidence of his intention; and such evidence was properly admitted for that purpose." \* \* \*

We are unable to see that the cases of *Martin v. Commonwealth*, 93 Ky., 192, and *Bishop v. Commonwealth*, 22 Ky. Law Rep., 1161, sustain the position assumed by counsel for appellant. Upon the trial of Martin for the purpose of showing a motive on his part for taking the life of one Burk, the fact that Burk had procured an indictment against him for robbery was permitted by the trial court to be shown by the production and reading to the jury of the indictment, and the entire record, including certain affidavits for a continuance, and by detailed proof from witnesses as to the facts of the robbery, all without any direction or instruction from the court telling the jury for what purpose the evidence might be considered by them. This action of the lower court was held by this court to be erroneous and prejudicial to the appellant, because it in effect put him on trial for two offenses at one and the same time; but it was also said by the court that "motive may be shown in certain cases by a state of facts conducing to make out another and distinct offense from that for which the accused is being tried;" and further, that the showing of such motive would have been proper in Martin's case by the introduction of the indictment with the name of Burk on it as a witness, to show that it had been procured by Burk.

The case of Bishop bears a striking resemblance to the one at bar. Bishop shot and killed an officer who was trying to arrest him for the murder of another person whom he had killed but an hour before. On his trial for the murder of the officer testimony was introduced as to the previous killing. Upon appeal to this court it was urged that its introduction was erroneous, and greatly prejudicial to him. But this court, in passing upon the question, said: "It was competent to establish any fact which tended to show motive on the part of the accused, and to make plain to the jury the relations which existed between the accused and the officer at the time the homicide was committed. \* \* \* In establishing the fact of the killing it was.

impossible to avoid proving some of the details. \* \* \* Of course it was essential that the jury be told that the killing at the 'lagoon' was not evidence to establish guilt under the indictment upon which appellant was being tried, but was only evidence to show why the appellant was on the car, and to establish motive for the homicide. This the trial judge repeatedly and with exemplary care explained to the jury. \* \* \* It is perhaps unfortunate for the appellant that the first homicide was so interwoven with the second as to furnish a motive. It was for that purpose, and that purpose only, competent." \* \* \*

It appears from the record in the case that the trial judge in apt language, and with great explicitness, explained to the jury that proof of the burglaries committed by appellant and Whitney previous to the killing of Chinn furnished no evidence of their guilt under the indictment for murder upon which they were being tried, but was only evidence to show the intent or motive with which appellant entered the house of Chinn, and could be considered by them for no other purpose. In view of this action of the court, and of the authorities in the opinion cited, we conclude that no error was committed in permitting the introduction of the evidence as to the burglaries committed by appellant and Whitney previous to the killing of Chinn.

We now come to the consideration of the only remaining question presented in appellant's behalf, viz., the alleged misconduct of counsel by whom he was represented upon the trial in the court below. It appears that the attorney who conducted the defense in that court was employed by the appellant's mother, through the assistance of a priest of Louisville, Ky. It is not urged against the attorney that he is deficient in legal learning or lacking in experience. It is claimed, however, that he was so under the influence of intoxicants during the progress of the trial as to interfere in part, at least, with the discharge of his duty to his client, and that when the case was ready for argument to the jury he was not in condition to proceed with the argument, for which reason it was deferred by the court until the following day, when he appeared and addressed the jury, but left the city of Lexington after the conclusion of the argument. These alleged facts do not appear from the record of the trial, but altogether from the affidavits of appellant, his brother, and one other person, which were filed in support of the motion and grounds for a new trial. So we find that the alleged misconduct of the appellant's counsel was brought to the attention of the lower court for the first time in the motion for a new trial, and by section 281, Criminal Code, it is provided that such errors as are presented for the first time in the motion for a new trial are not subject to exception, nor can they be considered by this court. It would seem, therefore, that this court is without power to review the action of the lower court in refusing a new trial upon the ground now urged by appellant. (*Kennady v. Commonwealth*, 14 Bush, 340; *Brown v. Commonwealth*, 14 Bush, 398.)

While section 11, Bill of Rights, Constitution of Kentucky, provides that "in all criminal proceedings the accused has the right to be heard by himself and counsel," \* \* \* it is his right to select his counsel. The court may appoint counsel for him, and must do so where a felony is charged, if he fails to select or employ one of his own choosing. But in this case the ap-

pellant had counsel of his own, or of his mother's selection. The court had the right to assume in the absence of complaint from him that he was satisfied with his counsel, and it is well-nigh incredible that he and his elder brother, who was with him throughout the trial, should have suffered the alleged misconduct of his counsel to the extent set forth in their affidavits without complaint to the court, when such complaint would have resulted in the appointment by the court of other or assistant counsel to represent him, as was done after the departure of the counsel who conducted the defense upon the trial before the jury.

It does not appear from the affidavits as to the alleged misconduct of appellant's counsel that he was unfit to conduct the examination of appellant's witnesses, or the cross-examination of those introduced by the Commonwealth. Upon the contrary, the bill of evidence shows that that work was efficiently performed by the counsel. If, as stated in the affidavits, though that fact does not appear from the court proceedings, the court was adjourned for a day to enable appellant's counsel to get in proper condition to address the jury, we must take it for granted that if at any other time during the trial his condition had been such as to convince the trial judge that he was too much intoxicated to properly represent his client, he would have suspended the trial for the time being to enable him to become duly sober.

The record manifests the admirable care, ability and fairness with which the case was conducted by the trial judge, and we are unable to find in it any convincing evidence that he suffered such misconduct on the part of appellant's counsel as is complained of.

The instructions to the jury clearly and fairly presented the whole law applicable to the case, and the evidence established beyond all reasonable doubt the appellant's guilt. It is immaterial whether the shot which deprived A. B. Chinn of his life was fired by appellant or Whitney. According to the evidence they were accomplices in the perpetration of the crime, and both present when it was committed, and if so they are equally guilty.

Great stress has been placed by counsel upon appellant's youth. Whether he is fifteen years of age, as he testified upon the trial, or seventeen, as he informed the officers when arrested, it is a matter of profound regret that one so young should come to such an untimely end, but the atrocity of the crime with which he is charged, and the circumstances attending its perpetration, left no hope of his being visited with anything less than capital punishment at the hands of the jury. And as, upon the whole case, we find no error of law by which the substantial rights of the appellant have, in our opinion, been prejudiced, it is our painful, though imperative, duty to sustain the judgment of conviction, and it is hereby affirmed.

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FRAZER v. FRAZER, &c.

(Filed May 20, 1908—Not to be reported.)

Wills—Under the will of F. his son was vested with the use and enjoyment of one-fifth of the estate until his son, J., should arrive at the age of twenty-one years, and the son of testator had authority, by will, to dispose

of this interest to his wife until the arrival at the age of twenty-one years of his child.

Wm. A. Byrne for appellant.

M. C. Swinford and O'Neal & O'Neal for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Chief Justice Burnam.

The will of N. W. Frazer was probated by the Harrison County Court in 1897, and that of his son, W. D. Frazer, in January, 1900. When N. W. Frazer's will was probated D. W. Frazer was a widower with one child, Jesse W. Frazer. After the death of his father W. D. Frazer married the appellant, Jane B. Frazer, who survived him. And we are asked upon this appeal to decide what interest the appellant, Jane B. Frazer, and the appellee, Jesse W. Frazer, took in certain property devised in the fifth and sixth clauses of the will of N. W. Frazer and in the will of W. D. Frazer. The clauses in the will of N. W. Frazer involved upon this appeal reads as follows:

"5th. To my son, William Frazer, I specifically bequeath any and all thoroughbred and trotting stock that I may own, but this does not include any common stock. I also give and devise to my son, William, one-fifth part of my estate, and he is also to have the use and benefit of the remaining one-fifth part, which is to be invested as hereinafter provided until his son, Jesse, arrives at the age of twenty-one years, at which time the said one-fifth part of my estate is to be turned over to my grandson, Jesse. Should my son, William, die without leaving any child or children, his interest in my estate is to be equally divided between his sisters, the said interest to be held for them under the same conditions and limitations hereinbefore set forth. Should my son marry again and leave child or children by said marriage, the children of that marriage are to receive the one-fifth part of my estate hereinbefore bequeathed William, but Jesse is to have the one-fifth part absolutely when he reaches the age of twenty-one years.

"6th. To my grandson, Jesse Frazer, I specifically bequeath my gold watch and chain, and also my scholarship in the Midway Orphans' Home. I also give and bequeath him, when he arrives at the age of twenty-one, the one-fifth part of my estate above referred to. I direct my son, William, to invest this one-fifth part of my estate in good land or property, the proceeds of which he is to enjoy until Jesse is twenty-one years of age."

The one-fifth interest devised to W. D. Frazer until Jesse arrived at the age of twenty-one years was invested in accordance with the terms of the will. W. D. Frazer bequeathed all of his interest and rights in the property devised by N. W. Frazer to Jesse Frazer to the appellant, Jane B. Frazer.

Jesse W. Frazer, by his statutory guardian, instituted this suit in the Harrison Circuit Court against the appellant, Jane B. Frazer, setting out these clauses in the will of his grandfather, and claimed that his father, W. D. Frazer, took a life estate in the one-fifth interest devised to him by the will of his grandfather, and that upon his death he was entitled to be put in possession of the property. The circuit judge decided that upon the death of W. D. Frazer all rights which he had in the lands or estate of Jesse W. Frazer obtained under the will of N. W. Frazer ceased, and that the appel-

lant, Jane B. Frazer, took nothing by virtue of the devise made to her by the will of W. D. Frazer, and she has appealed.

In our opinion W. D. Frazer was under the will of his father, N. W. Frazer, entitled to the use of the one-fifth interest in controversy until his son, Jesse, became twenty-one years of age; and that he could use and dispose of this interest in the same way as any other property owned by him; and that his son, Jesse W. Frazer, took a vested interest in remainder, which took effect at the termination of the particular estate for years devised to his father, W. D. Frazer. It is wholly immaterial whether the particular estate which precedes a vested remainder should be an estate for life or an estate for years, both are well defined and recognized interests in real estate. (2 Blackstone's Com., 166; 2 Minor, 330.)

There is no intimation in the will of N. W. Frazer that he intended that the particular estate given to W. D. Frazer in the estate in controversy should be for life; on the contrary, with great clearness and precision, he says that he is to have the use of it only until Jesse arrives at twenty-one years of age. The appellant, Jane B. Frazer, as devisee of her husband, W. D. Frazer, is entitled to the use and enjoyment of this one-fifth interest until Jesse arrives at twenty-one years of age.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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CUMBERLAND TELEPHONE AND TELEGRAPH CO. v. WARE'S  
ADM'X.

(Filed May 20, 1903.)

Negligence—Instructions—Pleading—This action was instituted by appellee to recover damages for the death of her intestate, who was in the employ of appellant in the construction of its line of telephone. Appellant came to his death by a wire which he was putting up coming in contact with an electric light wire through the act of a party in charge of the work. The action was brought jointly against W. & Co., who made the contract with the city for the construction of an electric light plant, and against appellant, a telephone company. The city was made a defendant, and a verdict was rendered against appellant, but in favor of W. & Co., and the city. The recovery was sought against the three defendants upon the ground that the electric light wire was not properly insulated, and the telephone company being aware of the fact, was guilty of negligence in allowing its wire to come in contact with it. The petition was amended, and plaintiff pleaded in the alternative, that if the electric light wire was properly insulated then the telephone company was guilty of negligence on account of the manner in which it pulled its wire over and against the electric light wire, and thus causing the death. A verdict and judgment was rendered against appellant, but in favor of the electric light company and the city. On appeal it is insisted that the petition is not good, and that a cause of action can not be maintained because the defendants were not joint tortfeasors. Held—That the defendants were properly joined as the law is settled that where several persons jointly commit a tort, the injured party has his election to sue all or some of them separately. It is insisted that the court improperly defined the degree of care required of the electric light company and the city in stringing and maintaining its wires upon the

streets of the city. Held—That appellant can not complain of any error in instructions defining the degree of care required of the electric light company and the city, as it was not prejudicial to appellant. The court properly instructed the jury that appellee was entitled to recover, although the deceased knew of the dangerous condition of the electric light wire, if his death was caused by the negligent act of one in charge of the work and superior to deceased.

2. Panel of the jury—Appellant claims that he was prejudiced by being denied the right to a separate panel of the jury. Held—That section 2267, Kentucky Statutes, does not contemplate that where there are a plurality of plaintiffs and defendants that a greater number than eighteen names shall at first be drawn from the box, and there is but one party litigant, although there are a plurality of plaintiffs, and they can challenge no more than three jurors.

Sweeney, Ellis & Sweeney, W. S. Morrison, C. M. Finn, Watkins & Thompson, William D. Granberry and Humphrey, Burnett & Humphrey for appellant.

Wilfred Carrico and Birkhead & Clements for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Paynter.

This action was instituted by the appellee against the city of Owensboro, Westinghouse, Church, Kerr & Co. and Cumberland Telephone and Telegraph Co., to recover damages for the death of her intestate, Thomas Ware. A recovery was sought against the appellants because of the alleged concurring negligent acts of each, which caused his death. The city of Owensboro had made a contract with Westinghouse, Church, Kerr & Co. to construct an electric light plant in the city. The work had progressed, poles had been erected, wires were strung and charged with electricity. The Cumberland Telephone and Telegraph Co. was engaged in stringing a wire along Ann street, in the city of Owensboro, from its exchange building to the Messenger office, to do which it required a wire to be placed upon the cross arms of its poles along Ann street, which wires were elevated above the electric light wires which crossed that street. There were two poles south of the electric light wires. The decedent ascended the first pole, carrying up a wire to which was attached a rope. He threw it over the cross arm and dropped an end of the rope to the ground, whereupon Tom Potts, another employe, took it and ascended the next pole and did likewise; whereupon Lee, who was in charge of the force, took it up and threw it over the electric light wires; and he then took hold of the rope with the wire attached and pulled it across the electric light wires. While pulling it over the electric light wires it came in contact with them, thereby becoming charged with electricity, and as a result Ware was instantly killed. The testimony tends to show that the rope attached to the wire was too short to enable them to carry the wire from the pole up which Tom Potts had ascended to the next pole to which it was to be attached, which had been ascended by Jug Potts, another employe. The handling of the rope was done in such a way that the jury was authorized to conclude that the wire was brought in contact with the electric light wires as the result of Lee's negligence. The plaintiff sought to recover against the three defendants upon the ground that the electric light wire was not.



properly insulated; and the telephone company being aware of that fact, was guilty of negligence, in allowing its wire to come in contact with it. By an amended petition the plaintiff pleaded in the alternative that if the electric light wire was properly insulated, then the telephone company was guilty of negligence on account of the manner in which it pulled its wire over and against the electric light wire, and thus caused Ware's death. The trial resulted in a verdict for the city of Owensboro and Westinghouse, Church, Kerr & Co. and a verdict against the appellant.

It is urged that the petition is not good, and that a cause of action can not be maintained because the defendants were not joint tort feors. If the city of Owensboro and Westinghouse, Church, Kerr & Co. strung an electric light wire and left it remaining without proper insulation, and the telephone company negligently brought its wire in contact with the electric light wire, then concurring negligent acts produced Ware's death; and under the doctrine of *Pugh v. C. & O. R. R. Co.*, 19 Ky. Law Rep., 149, an action can be maintained against one or against all of the defendants. Where several persons jointly commit a tort, the injured party has his election to sue all or some of the parties jointly, or some of them separately. (*Buckles, &c. v. Lambert*, 4 Met., 330; *Hill & Bergen v. Harris*, 4 Bush, 450; *Swigert, &c. v. Graham*, 7 B. M., 661.) If the city of Owensboro and Westinghouse, Church, Kerr & Co., strung an electric light wire which was not properly insulated, it was guilty of negligence and their negligent act continued and was as effective in the production of the death of Ware at the time the telephone wire came in contact with it as it would have been had the telephone wire been strung at the same instant the electric light wire was and the contact had then produced his death. If the electric light wire was not properly insulated, the city of Owensboro and Westinghouse, Church, Kerr & Co. were wrongdoers continuously until the act which resulted in the death of Ware. Their act in maintaining the wire necessarily concurred with the act of the telephone company in producing the death of Ware.

Again, it is urged that the petition is not good in stating a cause of action in the alternative, because appellant claims that it is not averred that the pulling and drawing the telephone wire over the electric light wire was carelessly and negligently done. When the whole petition is taken together, we think these averments are sufficiently made. Under the instructions no recovery could have been had except the jury believed that such pulling was carelessly and negligently done. Before entering upon the consideration of the question as to whether the court erred in giving instructions to the jury, it may be said that if it gave an instruction more favorable to the city of Owensboro and Westinghouse, Church, Kerr & Co. then they were entitled to receive as against the plaintiff, that fact could not be a prejudicial error for which appellant can complain. Although they were thereby permitted to escape a recovery against them, appellant's liability for its tort still remained.

The appellant complains of instruction No. 6, which reads as follows: "The court instructs the jury that, as a matter of law, the city of Owensboro had the right to construct and maintain an electric system for lighting its streets, but it was bound to use the highest degree of care, reasonably practicable, to have its wires perfectly insulated so as to be free from danger

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at all points where persons, in the course of business or pleasure, might come in contact with them; and if the jury believe from the evidence that its wires at the point of contact with the Cumberland Telephone and Telegraph Co. were so insulated, and that the defendant, Cumberland Telephone and Telegraph Co., by its servants and agents, negligently and careless forcibly dragged its wires across the electric light wire, and so broke the insulation on the city's wire, and thereby caused the death of plaintiff, the jury should, if they find for the plaintiff at all, find against the Cumberland Telephone and Telegraph Co. only, and in favor of the other defendants."

It is criticised because it is claimed the petition did not charge that the servants and agents did negligently and carelessly drag its wire across the electric light wire. Again, that the court did not properly define the degree of care which the electric light company and the city should have exercised in stringing and maintaining its wires upon the streets of Owensboro. The first criticism has been hereinbefore disposed of and the second has been substantially so. Any error which the court may have committed in defining the degree of care which should have been exercised in stringing and maintaining electric light wires can not be complained of by the appellant for the reasons hereinbefore given. Besides, if they were properly insulated, under this instruction there could have been no recovery against the appellant unless the jury believe that the death resulted by the negligence of the appellant's agents and servants in drawing its line over the electric light wires.

Appellant complains of instruction No. 13, which reads as follows: "Though the jury believe from the evidence that the electric light wires were not perfectly insulated, if they further believe from the evidence that the agents and servants of the Cumberland Telephone and Telegraph Co., handling the wire by which plaintiff was killed (if he was so killed), including deceased, knew or had notice of the danger of bringing their wire in contact with the city's wires, and they might, by reasonable care, have avoided such contact, and they negligently brought into such contact and but for such negligence the plaintiff would not have been killed; if the jury find for the plaintiff they should find against said telephone and telegraph company alone, and in favor of the other defendants."

The appellant erroneously assumes that the court in this instruction told the jury to find against it, although Ware knew of the defect in the electric light wire, and with such knowledge, by his own negligence, brought the telephone wire in contact with the defective electric light wire. The court in this instruction does not tell the jury to find for the plaintiff, but in effect told it that if it found for the plaintiff it could only find against the appellant.

This instruction was given upon the idea that there could be no recovery against the city of Owensboro and Westinghouse, Church, Kerr & Co. if the agents of the appellant handling the wire by which plaintiff's intestate was killed knew or had notice of the danger of bringing the wire in contact with the electric light wire, and might, by the exercise of reasonable care, have avoided it. Of course if Ware knew that the electric light wire was not properly insulated, and he could have avoided, by the exercise of proper care, the bringing of the telephone wire in contact with the electric light

wire, and negligently did so, and but for which the accident would not have happened, the plaintiff could not have recovered. However, plaintiff would have been entitled to a recovery against appellant had Lee, who was in charge of the force, known of the condition of the electric light wire and carelessly and negligently brought the telephone wire in contact with it, thus producing Ware's death. Again, it is urged that the instruction given by the court authorized the jury to find against the appellant, although the negligent act which resulted in the death of the plaintiff was that of a fellow servant. By instruction No. 1 the jury could not have found against appellant unless it believed Ware's death was produced by the negligent act of a person in charge of the work, etc. In instruction No. 2 the jury was expressly told that the company was not liable for the negligent act of a fellow servant. By the third instruction the court submitted to the jury the question as to whether or not Rufus Lee was Ware's superior in authority, and had the right to direct him. In view of these instructions instruction No. 4, of which complaint is made, could not have been misleading, although the word occasional should not have been used in the instruction. It reads as follows: "The court further instructs the jury that the rule of law is that when one engages in the service of another he undertakes, as between himself and his employer, to run all the ordinary risks incident to such service, and that includes the occasional carelessness, negligence and unskillfulness of his fellow servants engaged in the same line of duty; and if the jury believe from the evidence that the plaintiff, while in the employment of the defendant, Cumberland Telephone and Telegraph Co., when he was killed while in the discharge of his duty as such employe, and if the jury further believe from the evidence that his death was occasioned either by his own negligence or want of skill, or that of a fellow servant, engaged in the same line of duty or service as explained in these instructions, and without which he would not have been killed, they should find for the defendants."

Besides, under this instruction the jury is expressly told that the plaintiff could not recover if the death was occasioned by "fellow servants engaged in the same line of duty or service as explained in these instructions."

Counsel for the appellant contended that the appellant's negligence was not a proximate cause of Ware's death. Except for the act of Rufus Lee, in bringing the telephone wire in contact with the electric light wire, Ware would not have been injured by the current of electricity which it carried. It was the current of electricity which produced the death. The efficient cause of the death was put in operation by the negligent act of Lee in bringing the telephone wire in contact with the electric light wire, and necessarily that act was a proximate cause of the death. Appellant filed its affidavit, stating its defense was in conflict with and unfriendly to that of its two co-defendants. Thereupon, it demanded the panel of the jury, and asked the privilege of striking three names therefrom as peremptory challenges. The question of peremptory challenges is controlled by our statute.

In section 2258, Kentucky Statutes, it is provided that "each party litigant in civil actions shall have the right of peremptory challenges to three jurors, and the right to challenge as now allowed by law."

Section 2267, Kentucky Statutes, provides that "In all civil cases of jury trial the clerk shall draw from the box the names of eighteen of the jury,

and write them, as drawn, on two slips of paper, and deliver one to each party, from which plaintiff and defendant may each strike three and return the list to the clerk, who shall call the first twelve names not erased and swear them as a jury to try the case." \* \* \*

It will be observed that the statute only contemplated that the names of eighteen of the jury shall be drawn from the box. It evidently does not contemplate that where there are a plurality of plaintiffs and of defendants that a greater number than eighteen names shall at first be drawn from the box. In *Sodousky & Co. v. McGee*, 4 J. J. M., 267, it was held that if there be a plurality of plaintiffs, they are only one party litigant and can challenge no more than three jurors. The same is true of defendants. The words "party litigant" appeared in the statute then under consideration as in the present statute. In construing them the court said: "The parties litigant mean the antagonistic sides of the controversy. If there be a plurality of plaintiffs, they are all only one party litigant. So a plurality of defendants constitute one, and but one, party to the suit."

The judgment is affirmed.

#### WHITNEY v. COMMONWEALTH.

(Filed May 20, 1903—Not to be reported.)

**Criminal law—Evidence—Confession—Appellant prosecutes this appeal from a judgment of conviction and sentence of death. He was indicted with O'Brien for the assassination of Chinn after the commission of a burglary, but was given a separate trial. One of the grounds relied upon for a new trial is that the court erred in admitting evidence of other burglaries committed on the same night. Held—That such evidence was competent to show the motive with which they entered the house of Chinn; also for the purpose of identifying the parties who committed the previous burglaries as the slayers of Chinn. The court properly instructed the jury that such evidence could be considered only for the purpose of showing the motive with which they entered the Chinn residence. It was not prejudicial error to admit the confession made by appellant, as it was substantially the same as his testimony given on his trial. Said confession, or a part thereof, was properly admitted in evidence for another reason, that it corroborated other facts received in evidence, viz., the finding and subsequent finding of the pistols, with one of which Chinn was killed; the consequent proof of the motive for entering Chinn's house, and the identity of the persons who committed the theft of the pistols with the persons who committed the homicide.**

**2. Accomplices—Instructions—The court properly authorized a conviction of appellant upon proof that the parties were accomplices, aiders and abettors, and the jury properly found appellant guilty, although it was not proven which fired the fatal shot.**

**8. Improper argument of Commonwealth's attorney—Although the attorney for the Commonwealth in his argument to the jury may have used improper language, yet it was not prejudicial as the court properly admonished the jury to disregard same.**

B. T. Southgate and Chas. Kerr for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Earl Whitney, together with Claude O'Brien, was indicted, tried and convicted in the Fayette Circuit Court for the murder of A. B. Chinn, a Lexington merchant. His trial was separate from that of his alleged accomplice, O'Brien, and his plea, like that of the latter, was not guilty, but by the verdict of the jury his punishment was fixed, as was that of O'Brien, at death. From the judgment of conviction and the refusal of the lower court to grant him a new trial he prosecutes this appeal.

It is not deemed necessary to here enter upon a recital of the facts and circumstances connected with the revolting crime of which he, as one of the perpetrators, stands convicted, as they are minutely set forth, and exhaustively discussed in the opinion of this court in the case against Claude O'Brien, ante, 2511, this day handed down, to which opinion reference is here made. It is sufficient to say that the evidence heard upon the trial of appellant shows beyond doubt that A. B. Chinn was foully assassinated in his bedroom, on the morning of October 11, 1902, while it was yet dark, by a pistol shot received at the hands of either the appellant, Earl Whitney, or his accomplice, Claude O'Brien, both of whom were present at the time, armed with pistols, having shortly theretofore entered the dwelling house of Chinn upon a mission of theft and robbery.

The only question of doubt in the case is as to which of the accused fired the shot that killed Chinn. The only persons able to name the one by whom the fatal shot was fired are Whitney and O'Brien, each of whom claims that it was done by the other. But be that as it may, both are, under the evidence, guilty, because they were accomplices, each aiding and abetting the other in the assassination, as in the lawless enterprise which led to that act.

O'Brien, though introduced by appellant's counsel in this case, refused to testify, but proof of a conversation that occurred between him and appellant, after the latter's confession to the officers, was made in this case, which did not differ materially from the testimony given by O'Brien upon his own trial. It is contended by counsel for appellant that the judgment of conviction should be reversed for the reasons, first, that it was error to admit upon the trial evidence of the burglary of the houses of Slade and Mrs. McConathy; second, to admit as evidence the confessions of appellant; third, to allow the Commonwealth's attorney to make certain alleged statements in argument which were not supported by evidence.

The question raised by the first of the foregoing grounds we have already decided in the case of Claude O'Brien v. Commonwealth, supra, which decision is against the contention of appellant's counsel, and we are still of opinion that it was competent to admit proof of the burglaries committed by appellant and O'Brien just previous to the homicide, first, as showing the motive with which they entered the house of Chinn; and, second, for the purpose of identifying the parties who committed the previous burglaries as the slayers of Chinn. In this case, as in that of O'Brien, the trial judge carefully instructed the jury that evidence of the burglaries committed by the appellant and O'Brien before entering the house of Chinn could be considered by them only for the purpose of showing the motive with which they entered the Chinn residence, and should not be considered for any other purpose.

We are likewise of the opinion that no error was committed by the lower court in admitting the confession of appellant. It is shown by the evidence that one Irvine, a Nashville detective, who seems to have known appellant in Nashville, interviewed him after his arrest, and among other things said to him: "Earl, it looks like they have a strong case against you. You are in bad. The truth won't hurt," and that as a result of these statements appellant expressed his willingness to make confession, which he did after others had been called in by Irvine to hear it.

The confession was made in the presence of four persons, one a stenographer. It was reduced to writing and signed by appellant, and this written confession was read upon the trial, it being admitted by counsel for appellant that those who heard the confession would testify that it was made as contained in the writing.

A confession of the accused out of court is competent evidence against him, although it may have been procured by deception, but is incompetent if procured by promises, threats, or advice of the prosecutor, or officer having him in charge, or one having him in duress, or having authority over him, and as said in Roberson's Kentucky Criminal Law and Procedure, section 962: "Before the confessions of one charged with the crime are admissible in evidence against him it must be shown that such confessions are freely and voluntarily made. It is the province of the court to determine whether they were so made, and as to their admissibility. As the facts and circumstances attending each confession are different, no rule can be stated as to just what will render the confession voluntary."

It appears from the record that the trial judge before permitting the introduction of proof of the confession made by appellant instituted a critical investigation of the circumstances attending the making of the confession, causing those present at the time to testify with reference thereto, with the result that it was declared admissible and was permitted to be proved. Notwithstanding the great care exercised by the lower court in inquiring into the circumstances under which the confession was made by appellant, we would be inclined to declare it inadmissible but for the fact that it was in substance repeated by appellant when introduced as a witness in his own behalf upon the trial of this case, and also in testifying as a witness upon the trial of O'Brien. "Although an original confession may have been obtained by improper means, yet subsequent confessions of the same or like facts may be admitted if the court believes from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusion, hopes or fears under which the original confession was obtained were entirely dispelled." (*Laughlin v. Commonwealth*, 18 Ky. Law Rep., 640.)

It appears that the testimony of appellant as a witness in this case, and that of O'Brien, was given several days after his written confession was made, and if the confession was superinduced by improper influences, they ought to have been, and perhaps were, dispelled by the solemn realities of the trial, and the sanctity of the oath which the appellant took upon entering the witness box. But if it were clear to our minds that the confession resulted from improper influences, its exclusion as a whole is forbidden in this case by a well-known rule of law. "Although confessions improperly ob-

tained are inadmissible, yet any facts which are brought to light in consequence of such confessions, and so much of the confession as is corroborated by these facts, may be received in evidence." (Roberson's Criminal Law and Procedure, volume 2, section 960; *Jackson v. Commonwealth*, 18 Ky. Law Rep., 795; *Jane v. Commonwealth*, 2 Met., 81; *Rector v. Commonwealth*, 80 Ky., 468.)

Applying that rule to the evidence in this case, we find the following facts were brought to light by the confession of appellant. The finding and subsequent identification of the pistols with one of which A. B. Chinn was killed; the consequent proof of the motive with which Chinn's house was entered; the identity of the persons who committed the theft of the pistols with the persons who committed the homicide. The statement in the confessions, and the statement of appellant upon the trial, as to the position of Asa Chinn during the pistol firing in the Chinn house, that is, that he was in a stooping or kneeling position, is corroborated by Chinn. Indeed practically the only statement contained in the confession that is uncorroborated is the one that O'Brien, and not appellant, fired the shot that killed A. B. Chinn. Not only is that statement uncorroborated, but in the evidence introduced by the Commonwealth upon the trial, of the conversation between appellant and O'Brien which occurred shortly before the trial, we find that each accused the other of the murder of Chinn. The jury, however, found from the evidence, as they were authorized to do, that they were accomplices, aiders and abettors, and, therefore, equally guilty, whether the shot was fired by the one or the other; and the evidence conduces to show that both were firing their pistols in the room where the homicide occurred, and that each of them had a pistol in addition to the probably worthless one that appellant carried with him to Lexington.

The jury were doubtless unwilling to accept the statement of appellant that O'Brien, his junior in age, and, according to the evidence, also his junior in crime, was the leader and instigator of the thefts and murder of which both stood convicted.

It is complained that the Commonwealth's attorney in argument to the jury said that "the defendant was forced to admit, upon cross-examination, that on the way from Louisville to Lexington he was trying his pistol to see whether it would work as a preparation for what he intended to do, and what he did do, when he came to Lexington."

After this statement was made and objection entered the court properly excluded the statement and admonished the jury not to consider the remark, whereupon the Commonwealth's attorney then said to the jury that he did not mean to make the statement that appellant was trying his pistol as a preparation for what he intended to do as the assertion of a fact, but as an inference of his own. There was evidence to show that appellant tried to fire his pistol on the road to Lexington, but failed. It is hardly possible that this statement of the attorney could in any way have been prejudicial to the appellant even if the court had permitted it to stand. It certainly could not have been so in view of the admonition of the court.

In *Handley v. Commonwealth*, 15 Ky. Law Rep., 736, this court held: "While certain statements made by the attorney for the Commonwealth on his argument to the jury were improper, because not warranted by the evi-

dence, the appellant was not prejudiced thereby, the court having admonished the jury that such statement could not be considered as evidence in the case."

A careful examination of the record in this case fails to disclose any errors whereby the substantial rights of the appellant have been prejudiced. The instructions meet our approval, and the verdict of the jury is, in our opinion, sustained by the evidence.

The judgment is, therefore, affirmed.

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COMBS, &c. v. DAVIDSON.

(Filed May 20, 1903—Not to be reported.)

Conveyances—Fraud and undue influence—Appellee, an infirm old woman of feeble understanding, made a deed of conveyance to two parties, one of whom had married her favorite granddaughter and resided at her house, for an inadequate consideration. In this action she sought to set aside and cancel said conveyance on the ground of fraud and undue influence practiced upon her in its execution. Held—That the evidence sustains the action of the chancellor in cancelling said deed.

W. C. Eversole for appellants.

Wooton & Morgan and Eversole & Wheeler for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Barker.

On the 16th day of April, 1892, the appellee, Sallie Davidson, conveyed by deed her home in Hazard, Perry county, Kentucky, to the appellants, Rankin C. and John C. Combs, upon the stipulated consideration of \$150, \$1 of which was cash, and for the remaining \$149 they executed and delivered their promissory note, payable in twelve months thereafter, without interest.

Subsequently the appellee instituted this action in the Perry Circuit Court for the purpose of obtaining a decree setting aside the conveyance to appellants, upon the ground of fraud and collusion on their part, inadequate consideration for the deed, and that appellee, by reason of her age and mental and physical infirmities, was unable to appreciate or understand the contract she had made; that appellants were lawyers and merchants, well versed in matters of business, and the legal effects of contracts and conveyances; that appellee, by reason of her age and infirmities of mind and body, was unable to resist the influence of appellants, who, by exercising undue influence and fraud, had procured her to convey to them her home upon a grossly insufficient consideration. The material allegations of the petition were denied by the answer. The evidence showed that appellee was a widow of seventy-three years of age; that she owned the house and lot in controversy, which she occupied, partly as a residence for herself, and rented part to appellants, who used it both as a store and as a residence; that some time before the conveyance Rankin C. Combs intermarried with the granddaughter of appellee, and that prior to the making of the deed all of the parties occupied the house jointly; that appellee was devoted to her granddaughter, Laura Rankin, and greatly depended upon her love for comfort



in her declining days. Appellants also appear to have possessed her confidence and esteem.

There is some contrariety in the evidence as to the condition of appellee's mind at the time of the sale. The witnesses for appellee testify that she was of weak mind and uncertain memory, and not at all in condition to engage in business so important as the sale of her home; that she was easily influenced by those in whom she had confidence, and for whom she had affection. The evidence adduced by appellants tends to show that she was of sound mind, and capable of looking after her own affairs.

We think it may be fairly concluded that, by reason of her age and frail health, appellee's mind had become greatly weakened, and that she yielded to those about her who had her confidence and esteem. As an inducement to her to sell the house and lot to appellants, they represented that if the sale was not made they would purchase another house and remove to it, thus depriving appellee of the society of her granddaughter, upon whom she was dependent; but that if the sale was made, appellee could always have a home with appellants. The evidence shows that the house and lot involved in this litigation was worth from \$250 to \$300, and that shortly after the purchase of her home it was made so unpleasant to her that she was forced to leave and take up her residence with other relatives.

Upon the trial of the case the chancellor sustained the prayer of the petition, adjudged the conveyance to have been obtained by fraud, and awarded appellee a rescission of the contract. From this judgment the appeal has been prosecuted.

In the case of *Huban v. Huban*, 3 Ky. Law Rep., 56, this court said: "A conveyance by a person of feeble condition of body and mind to another, under whose influence he was placed, no sufficient consideration appearing, is fraudulent and void." And in the case of *Boarman v. Gardner*, 7 Ky. Law Rep., 52: "Where a person of weak understanding makes an unconscionable bargain with one of strong mind, the natural inference is that it was obtained by the power of the strong over the weak, and may be set aside."

In the case of *Hunter v. Owens*, 10 Ky. Law Rep., 651, Judge Bennett delivering the opinion, the court said: "Gross inadequacy of price is always a badge of fraud, and sometimes when the disproportion between the value and the price given is very great, the chancellor may, from that fact alone, infer fraud. We will treat, in this case, of the inadequacy of price as a badge of fraud, and then inquire into the question of actual fraud. The appellee was ignorant and dull, and wholly unacquainted with the value of said land, and relied upon the appellant to sell it to her at a reasonable price, and he had reason to believe that he had her confidence and that she relied upon his judgment as to the value of said land, and not her own; it was, therefore, his duty to deal, as to price, fairly with her. They were not at arm's length, and gross inadequacy of price, always a badge of fraud, becomes an actual fraud when the parties do not deal with each other at arm's length. We are constrained to the conclusion that the chancellor was justified in his inference of actual fraud in this case."

The principle thus announced is not inimical to the opinion in the case of *Rabb v. Rabb*, 23 Ky. Law Rep., 971, or of *Neal v. Neal*, 16 Ky. Law Rep.,

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195. In these cases there was no evidence of fraud; the respective parties were equal in intelligence, health and education, and the court refused to relieve the complainants from the consequence of acts deliberately and intelligently entered into.

In the case at bar we have an illiterate, childish, infirm old woman, living in the house with two active, alert, strong-willed men, carrying on the business both of practicing law and merchandizing; one of them had married the favorite granddaughter of this old woman. They obtained from her a conveyance of her home for about one-half of its real value, using, as a means to induce her to make the sale, the threat that unless it was made she would be deprived of the society of her granddaughter, to whom she was devotedly attached, and upon whom she was dependent for love and affection, and by the representation that if the sale was made to them, she could remain in the house with her granddaughter, and find a home and shelter with appellants. It required only the lapse of a few weeks to shatter the old woman's hope of finding a comfortable home with her granddaughter, for, by what she considered ill treatment, she was driven out to find a home elsewhere. Under all the circumstances of this case we are constrained to the conclusion that the chancellor did not err in vacating this unequal contract.

Wherefore, the judgment is affirmed.

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**OWENSBORO WATERWORKS CO. v. CITY OF OWENSBORO, &c.**

(Filed May 20, 1903—Not to be reported.)

Franchise taxes—Municipal government—Injunction—This action was brought to enjoin the city of Owensboro from selling the waterworks plant under a levy for franchise taxes for the years 1893 and 1894. The waterworks company brought an action against the city for water rents which it asked to offset against its claim for taxes. These actions were consolidated and the claim for water rent was allowed, and offset against the claim for taxes and a judgment in favor of the city for taxes was rendered, and the collector was about to sell the plant to satisfy this judgment. It is insisted that the city was not authorized to levy a franchise tax for 1893, as the charter of the city did not take effect until June 15, 1893, and the levy was made under an ordinance passed in April, while the city was under the old charter. Held—That the said objection is not tenable as the tax was authorized by the general revenue law which took effect in 1892, but the city had no right to impose the penalty of 10 per cent. for nonpayment of taxes, as by section 3400, Kentucky Statutes, interest should be allowed on unpaid taxes from the first of October of each year at 8 per cent. The injunction in so far as it sought to restrain the collector from selling the plant should not have been dissolved. Under section 172 of the Constitution the Board of Equalization properly fixed the valuation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. Section 4274, Kentucky Statutes, providing for fixing the assessment at 70 per cent. of its cash value, was superseded by the Constitution.

Sweeney, Ellis & Sweeney for appellant.

Geo. W. Jolly for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hobson.

On April 11, 1893, appellant, the Owensboro Water Co., filed its petition in equity, enjoining the city of Owensboro from selling its plant under a levy made by the tax collector for a franchise tax for the years 1893 and 1894.

The city filed answer contesting the allegations of the petition. During the progress of the action the water company brought another suit against the city to recover judgment against it for certain hydrant rents due it by the city under a contract between them. As a set-off and counterclaim the city pleaded the franchise taxes due it by the water company. The two actions were consolidated. After this the city having dismissed without prejudice so much of its counterclaims as related to the taxes for the year 1897, filed a separate suit against the water company to recover these taxes and the water company filed an answer controverting its liability for the tax, making in substance the same issues as were already raised in the other two suits. The three suits were then consolidated, and on final hearing the court offset the taxes against the water rent and gave a judgment over in favor of the city.

It is insisted that the city had no authority to levy a franchise tax for the year 1893, as the new charter of the city took effect on June 15, 1893, and the levy was made by an ordinance passed by the city council in April of that year, while the city was under the old charter. The general act regulating revenue and taxation had taken effect, however, in the fall of 1893, and thereby it was provided that corporations like appellant should "annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised." The act also provided for the assessment of the franchise by the board of valuation and the certifying of the value by the auditor to the county clerk. (Kentucky Statutes, section 4077, 4084.) The city was authorized by its existing charter to make a levy, and this power in connection with the act referred to authorized the collection of the franchise tax for the year 1893. The precise question was before this court in the bank tax cases (102 Ky., 174); and, although it is not referred to in the opinion, it was necessarily involved in the decision of those cases, as the validity of the franchise taxes against the banks for the year 1893 was there sustained.

The court gave judgment against the water company for the amount of the taxes also a penalty of 10 per cent. on the amount of the tax and interest on the amount of the tax at 10 per cent. In this he followed section 4091, Kentucky Statutes: "All taxes assessed against any corporation, company or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, company or association by the auditor; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of 10 per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of 10 per cent. per annum. Any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined \$50 for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction."

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By section 4083 it is the duty of the auditor, immediately after the value of the franchise is fixed by the board, to notify the corporation of the fact, and it is then allowed thirty days from the time of receiving the notice to go before the board and ask a change in the valuation. After the expiration of thirty days, by section 4084, it is the duty of the auditor to certify to the county clerks the amount liable for county, city, town or district tax. The notice by the auditor to the corporation referred to in section 4091 can not be the notice named in section 4083, for after that notice is given the corporation is allowed thirty days to go before the board for a rehearing. The notice referred to in section 4091 seems to be a notice by the auditor to the corporation of the amount of its tax, which is payable to the State treasury with a view to its payment; for the corporation is made delinquent if it fails to pay after receiving thirty days' notice, and the Franklin Circuit Court is given jurisdiction. The auditor has nothing to do with the collection of county or city taxes and the Franklin Circuit Court is the fiscal court of the State. The same legislature which passed this act also passed the act for the government of the cities of the third class, and by section 3400, which is part of the act for the government of these cities, "all taxes shall bear interest at the rate of 8 per centum per annum from the first of October of each year." The rule is that the acts of the same legislature are to be read together, and under this rule section 4091 must be held not to apply to cities of the third class. We, therefore, conclude that interest should be allowed on the taxes from the first of October of each year at 8 per cent., and that no penalty beyond this should be charged.

For one year the city valued the tangible property of the corporation at \$15,000 more than it was assessed at by the State Board. As the water company has paid taxes on this \$15,000 in its tangible property, the amount should be deducted from the franchise tax for that year, as otherwise it would pay to this extent twice on the same property. The city tax collector had no authority to levy on and sell the property of the water company. This was held in *Louisville Water Co. v. Hamilton*, 81 Ky., 517. But the water company having come into court for relief, and the city being authorized to proceed by action to collect its tax, the court properly settled the accounts between the parties while they were before them, but so much of the injunction as restrained the tax collector from selling the plant of the water company should not have been discharged. (*Elizabethtown & Paducah R. R. Co. v. Trustees of Elizabethtown*, 75 Ky., 234.)

By section 4274, Kentucky Statutes, the board of equalization fixes the assessment of real property at 70 per cent. of its cash value, but this is a provision of the act of May 4, 1888, and has been superseded by section 172 of the Constitution, by which all property not exempted from taxation must be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale, and it is the duty of the board and all other officials now to comply with the provision of the Constitution. The act of 1888, in so far as it is in conflict with the provision of the Constitution, is no longer in force. Appellant can not, therefore, complain of the assessment of its property by the board of valuation at its fair cash value.

Judgment reversed and cause remanded for a judgment as herein indicated.

## LEWIS v. MILLER, JUDGE.

(Filed May 20, 1903.)

Writ of prohibition—Exemption from process—Appellant was sued for a debt owing by her father and sought to be made liable to the extent of assets received from him. She makes this application for a writ prohibiting the chancellor from proceeding with said suit, claiming that she was exempt from the service of process by reason of being a nonresident, who came into this State as a witness in litigation in which she was interested. Held—That as she came into the State without having been brought here by plaintiff, she is not exempt from the service of process. As her father, by absenting himself from the State, could not avoid process on his liabilities in case he had returned to the State, appellant, to the extent that she received assets from him, could occupy no better position than her father.

W. Pratt Dale for plaintiff.

Harris Marshall for defendant.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Burnam.

The plaintiff, Katherine D. Lewis, had applied to this court for a writ of prohibition against the Hon. Shackelford Miller, judge of the first division of the chancery branch of the Jefferson Circuit Court, to prevent him from proceeding with the trial of an action instituted against her in the Jefferson Circuit Court by the Citizens National Bank of Louisville. She alleges in substance that in January, 1875, the Citizens National Bank recovered a judgment against her father, Blanton Duncan, deceased, for \$1,750, with interest, upon which execution issued, and was returned no property found; that on the 16th day of March, 1903, the bank instituted a suit against her on the debt, alleging that she had received more than the amount of their judgment from the estate of her father as heir at law; and that summons was served upon her on this suit while she was temporarily in Kentucky for the purpose of testifying as a witness in an appeal which she had taken from the judgment of the Jefferson County Court probating the will of her father; that she entered her special appearance in the action filed against her and moved the court to quash the summons which was served upon her on the ground that she could not be legally sued under the circumstances; that Judge Miller overruled her motion to quash the summons, and will, unless prohibited by this court, proceed to hear and determine the action.

In support of this motion we have been referred to numerous decisions of courts of last resort in other States, holding, in substance, a suitor, or witness, to be exempt from the service of process while without the jurisdiction of his residence for the purpose of attending court in an action to which he is a party, or in which he is to be sworn as a witness. But this exact question seems not to have been adjudicated by the court of this State. But in *Catlett v. Morton*, 14 Ky., 122, a member of the legislature, while attending its deliberations, was sued for debt in the Franklin Circuit Court, and he plead his privilege as a member under the constitutional provision, which provides: "No person or persons shall, under any pretense, directly or indirectly, or by any ways or means whatever, arrest, assail, menace, or other-

wise disturb the person of a member during his privilege except on legal process for treason, felony or breach of the peace."

But it was held by this court, in an opinion by Judge Mills, that the only effect of this provision was to protect members from arrest, and that they were subject to the execution of any other process as other citizens. The rule laid down in this case was subsequently followed in *Jonson v. Offutt*, 64 Ky., 19. Privilege from arrest seems to have been the limit allowed suitors and witnesses at common law whilst going to, attending and returning from court on business connected with their suits. (A. & E. Ency. of Law, volume 16, page 40, and cases cited there; *Greenleaf on Evidence*, 15th edition, section 316, 317 and 318.) An interesting history of the origin and reason of this rule at common law is given by Judge Reeve in *King v. Coit*, 4 Day, 129. He says: "When a member of parliament was arrested the ancient practice was to obtain a writ of privilege, not from the suit, but for the arrest, and a supersedeas issued to the court to stay the proceedings as long as the privilege of parliament lasted. A more summary mode was afterwards had of obtaining a discharge by motion, but it was not from suit, but from arrest, and was so expressly laid down in the case of *Ritt Comyn*, 44 Fortes, 342, *Cast Hardwick*, 28."

The only statutory provisions which we have in force which bear upon the question is section 81 of the Civil Code, which provides: "In an action brought pursuant to section 78, a defendant who is summoned out of the county in which it is brought, and who had not resided therein when the action was begun, can not be summoned in that or any other action of the plaintiff while visiting such county for the sole purpose of defending the first-named action."

And section 542 of the Code provides: "A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county while going, returning or attending in obedience to a summons."

It is evident that plaintiff can not support her contention under either of these provisions of the Code, as it is not contended that the Citizens National Bank had anything to do with bringing her to this State or that she came in obedience to any summons served upon her. After creating the debt sued for, plaintiff's ancestor voluntarily went beyond the jurisdiction of the courts of this State without making provisions for the payment of his obligations. And it would be a great stretch of interstate comity to hold that Duncan would have been exempt from suit at the hands of his creditor if he had voluntarily returned to this State for the purpose of testifying as a witness or attending to litigation in which he was interested. Plaintiff to the extent that she has received assets from his estate as his heir at law, occupies no better attitude. And it seems to us, both under the common law, the decisions of this court, and the statute law, in so far as they have any bearing upon the question, that plaintiff is not privileged from suit at the hands of the citizens of this State while voluntarily attending a trial in which she is interested as a witness.

The motion for a writ of prohibition is, therefore, overruled.

HOLTHEIDE v. SMITH, JR., &c.<sup>1</sup>

(Filed May 21, 1903—Not to be reported.)

Cancelling conveyance—Evidence—Appellant brought this suit against the husband and son of his sister, alleging that several years prior to her death he conveyed to his sister real property for the recited consideration of \$1,500, when in fact no money was paid, but the property was conveyed to her to hold for him so as to protect it from any claim of his wife, who was separated from him. The court properly excluded the deposition of appellant, as it was against his sister, who was deceased, and it properly refused to set aside the conveyance on parol testimony that purported to impeach the consideration, as there is no allegation of fraud or mistake. The law is well settled that parol evidence will not be received to impeach the consideration of a deed which has been solemnly made by a party without an allegation of fraud or mistake.

Morris B. Gifford and Wilson & Gifford for appellant.

John Roberts and William Furlong for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Nunn.

The appellant, F. J. Holtheide, stated in his petition that prior to the month of August, 1890, that he and his wife, Blanche, had become estranged and separated, and that they agreed that if he would join her in a deed conveying her property in Chicago that she would join him in a conveyance of his property in Louisville, the purpose being to relieve the property of each of any interest of the other; that the agreement was perfected by the execution of the deeds; that he, in connection with his wife, on the 28th day of August, 1890, conveyed lots Nos. 1204 and 1206, on Kentucky street, in Louisville, Ky., to his sister, Lula M. Holtheide, for the recited consideration of \$1,500, when in fact no consideration whatever was paid; that his sister took the title and agreed to hold the property for him, with the promise to reconvey it to him on demand, or to make a conveyance thereof to any person whom he might designate; that his sister subsequently married R. T. Smith, and died on February 27, 1899, leaving one child, the appellee, Frederick R. Smith; that he had not made any request of her in her lifetime for a conveyance to himself or anyone. He instituted this action on the 28th day of October, 1901, against the husband of Lula and her child, asking that his deed of August 27, 1890, be cancelled and adjudged void, and that his title be quieted, and that he recover of appellee, R. T. Smith, as administrator of Lula M. Holtheide, the rent received for said property. The answer presented a traverse of the petition.

The appellant took his own deposition and that of his mother, sister and George Shea. His own deposition was objected to, and the court properly sustained the objection because he was testifying against an infant and with reference to transactions had with a person who was then dead. The substance of the evidence of the other three witnesses was that they had heard Lula M. Holtheide, the vendee in the deed, say frequently that she was holding that property for her brother Frank to keep his wife, Blanche, from getting it. No witness stated that she said at any time that she did not pay the consideration named in the deed. Even if there were no legal obstacle in the way, the evidence in this case is hardly sufficient to authorize the setting aside of a deed made eleven years before the action was instituted against the heirs of the vendee.

It is insisted on behalf of appellant that it is competent to show the true consideration of the deed by parol evidence, but it is well settled in Ken-

tucky that parol testimony is not admissible, in the absence of an allegation of fraud or mistake, to show that a deed absolute on its face, as in this case, was really conveyed in trust for the grantor. In *Crutch v. Muir's Ex'or*, 90 Ky., 142, which was a suit by the grantor against the heirs of the grantee to enforce the alleged verbal contract of redemption, the court in that case said: "There is a marked distinction between a legal title to real estate acquired under circumstances that make a trust upon the holder in favor of a person other than the immediate grantor, and that conveyed by an absolute deed from the vendor to the purchaser. An action for equitable relief may be brought and maintained in the first-mentioned case without either charging a person upon a contract for the sale of real estate or contradicting or varying the terms of a deed under which the legal title is held, though the result may be to change a conveyance, absolute on its face, into a mortgage or deed of trust, or to vest the holder of the title altogether. Consequently an agreement upon which claim for relief is in such case founded may, though not in writing, exist and be enforced without violation of the statutes referred to, and be established by parol, notwithstanding the general rule of evidence mentioned."

In the case of *Munford v. Green's Adm'r*, 103 Ky., 140, the court said: "It is not alleged that there was any fraud or mistake in the execution of the deed, or any vice therein. There is no claim that any language was used in the deed which was not intended by the parties to be used in expressing the contract between the parties. The sole question in this case is whether parol testimony, in the absence of any allegation of fraud or mistake, is admissible to contradict the legal import of a deed. We are of the opinion that this can not be done. It is a well-settled rule in this State that parol evidence is not admissible to contradict written evidence, except in cases of fraud or mistake, or where there is vice in the contract. The question in the case of *Thomas v. McCormick*, 9 Dana, 109, involved the identical question to be determined in this case. In that case the court adjudged that parol testimony was inadmissible to show that a deed, in terms an absolute conveyance, was not intended as such, but was designed as a mortgage. In speaking of the rule, the court said: 'Though it may operate harshly in a particular case, is, nevertheless, so salutary and conservative that an inflexible adherence to it is necessary for effectuating the policy of the statute of frauds and perjuries, and of giving proper security to property, and full effect to solemn contracts in writing.' \* \* \* It was held in *Faris, &c. v. Dunn*, 7 Bush, 276, that a resulting trust may be established by parol testimony. In that case a father bought a tract of land with the money of his daughter, and took the conveyance of the legal title to himself. The court held that a trust resulted. It is plain that the parol testimony did not contradict any writing which the daughter had signed. In the case of *Cary v. Callan's Ex'or*, 6 B. M., 44, the proceeding was to establish a resulting trust upon the ground that Callan had expended in the acquisition of some property an amount of money derived from the estate of the common father of himself and sisters. The sisters were not parties to the deed, and the court recognized that the resulting trust, if it existed, could be established by parol testimony. This testimony did not involve the contradiction of an instrument of writing. Those who sought to establish the trust had not executed the instrument of writing." To the same effect are the cases 4 J. J. M., 591, and 14 Ky. Law Rep., 655.

In the case before us the party seeking to establish the trust in his favor signed the conveyance, and there is no allegation in his petition or any proof to show that there was either fraud or mistake in the execution of it.

Wherefore, the judgment is affirmed.

*Ex. J. H.*  
1/2/04



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## ERRATUM—

After the form containing Shannon v. Padgett, page 1281, had been printed the opinion was changed by substituting the word "satisfaction" for "judgment" in the third line.

EVIDENCE—See Agents, 2, 3; Bills and Notes, 5, 16; Boundary, 7; Common Carrier, 3, 4, 9, 18; Continuance, 11; Contracts, 30; Conveyances, 11; Criminal Law, 5, 6, 7, 15, 21, 28, 33, 33, 34, 39, 40, 46, 46, 47, 48, 49, 50, 57, 58, 60, 61, 62, 64, 65, 67, 71, 72, 73, 74; Damages, 38; Decedents' Estates, 3; Elections, 8, 9, 10, 13, 15, 16, 17, 18, 19, 20; Forcible Entry, 2; Fraud, 8, 9, 10; Fraud, Statute of, 2, 3; Husband and Wife, 2; Insurance, 9, 26, 27, 28, 24, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 56, 57, 58; Landlord and Tenant, 7, 8; Limitation, Statutes of, 2; Malicious Prosecution, 7, 8, 9, 10, 11; Master and Servant, 12, 13; Municipal Taxation, 2, 3; Negligence, 1, 2, 6; Passway, 3; Railroads, 5, 4, 13, 14, 18, 19, 90; Title, 10, 11, 14; Warranty, 2, 3, 4; Wills, 16, 17, 18, 24—

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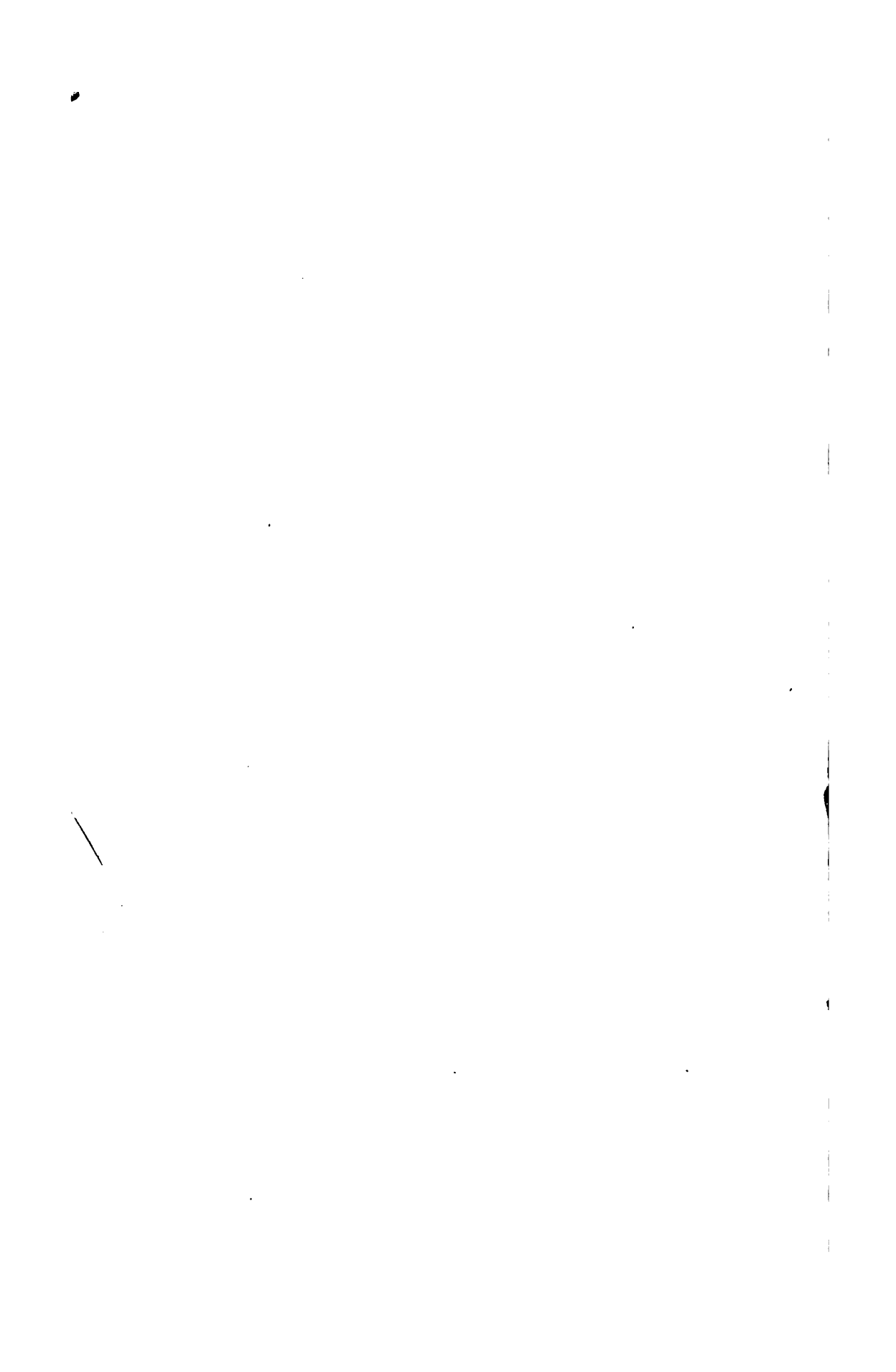
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